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BRITISH COLUMBIA HOTEL EMPLOYEES' UNION, LOCAL 260 (*Intervenor*) ..... APPELLANT;

AND

BRITISH COLUMBIA HOTELS ASSOCIATION (*Prosecutor*) ..... RESPONDENT.

AND

HOTEL AND RESTAURANT EMPLOYEES' UNION, LOCAL 28 (*Intervenor*) ..... RESPONDENT;

AND

LABOUR RELATIONS BOARD (BRITISH COLUMBIA)

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Trade Unions—Collective Bargaining—Whether a group, a fractional part of a larger unit already certified, the majority of whom favour continuance of existing bargaining authority, may be certified—Industrial Conciliation and Arbitration Act, R.S.B.C. 1948, c. 155, ss. 10, 12, 13, 47, 58.

*PRESENT: Kerwin C.J. and Rand, Estey, Locke and Cartwright JJ.

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The respondent Local was certified by the respondent Labour Relations Board and entered into a collective agreement with the respondent Association in respect of 31 hotels for a period ending April 30, 1953. The appellant made application to the Board on April 26, 1953 to be similarly certified for three units composed of the employees of three of the hotels included in the above-mentioned 31 hotels. The respondent Association supported by the respondent Local thereupon made application for a writ of prohibition directed to the said Board prohibiting certification. An order *nisi*, granted by Wood J., was discharged by Manson J. The order of the latter was reversed by the Court of Appeal for British Columbia. On appeal from that judgment.

Held: that the appeal should be allowed and the order of Manson J. restored.

Per Kerwin C.J., Estey and Cartwright JJ.: The Act contemplates that, in the main, a collective agreement negotiated under its provisions will remain in force for the period therein specified. It was apparent to the Legislature however that circumstances might develop which would make that impossible or undesirable and provision was made for its termination under s. 47, its cancellation under s. 12 (7), and the replacement and revocation of a bargaining authority under ss. 10 and 13. While therefore cancellation was provided for only under s. 12 (7), it would seem that the provisions of ss. 10 and 13 contemplate the making of an application such as that here in question prior to, and quite independent of, cancellation under s. 12 (7).

Per Rand J.: The provisions of the Act enable the Board, within the conditions laid down, to certify a group as a unit appropriate for bargaining purposes even though the group may be a fractional part of a larger unit already certified the majority of employees in which are in favour of continuing the existing bargaining authority.

Per Locke J.: It was the duty of the Board upon receiving the application to consider whether the proposed unit was one appropriate for collective bargaining, a decision involving the exercise of a discretion as to which the determination of the Board was conclusive by reason of the term of s. 58 (1). Had the proceedings halted by the writ been proceeded with and the unit found appropriate it would have been the obligation of the Board to certify the appellant.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) allowing an appeal, Sidney Smith J.A. dissenting, from the judgment of Manson J. (2)

A. B. Macdonald and *Maurice Wright* for the appellant.

A. C. DesBrisay, Q.C. for the respondent Hotels Ass.

J. L. Farris, Q.C. for the respondent Local 28.

J. J. Urie for the Labour Relations Board (B.C.).

(1) (1954) 11 W.W.R. (N.S.) 685; 3 D.L.R. 85.

(2) (1954) 11 W.W.R. (N.S.) 76.

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The judgment of Kerwin C.J and of Estey and Cartwright JJ was delivered by:

ESTEY J.:—The respondent, Hotel and Restaurant Employees' Union Local 28 (hereinafter referred to as Local 28), was certified the bargaining authority for the employees by the Labour Relations Board (British Columbia) (hereinafter referred to as the Board) and had a collective agreement with the respondent, British Columbia Hotels Association (hereinafter referred to as the Association), in respect to 31 hotels for a period of two years ending April 30, 1953.

The appellant, British Columbia Hotel Employees' Union, Local 260 (hereinafter referred to as Local 260), on April 28, 1953, made three applications to the Board to be certified the bargaining authority for three units to be composed of the employees of the Georgia, Niagara and Marble Arch Hotels respectively, all three of which were included in the above-mentioned 31 hotels. These applications were considered by the Board on May 15, 1953, when it directed that votes be taken in the three hotels to ascertain the wishes of the employees.

These votes were not taken and the three applications were allowed to remain in abeyance because Local 28 had commenced *certiorari* proceedings in respect to the Alcazar Hotel, which raised questions as to the construction of provisions in the statute relevant to the consideration of the three applications.

On December 10, 1953, Mr. Justice Clyne rendered judgment in the Alcazar *certiorari* proceedings, affirming the Board's disposition of that application, and on January 6, 1954, the Board notified Local 260 that a vote would be taken at the Georgia Hotel and, it may be assumed, at the Niagara and Marble Arch Hotels.

On January 7, 1954, the Association applied to Mr. Justice Wood, who granted an order *nisi* for the issue of a writ of prohibition directed to the Board prohibiting the certification of Local 260 as the bargaining authority for the three hotels and the taking of votes therein. Local 28 intervened and has supported the Association throughout.

The order *nisi* was discharged by Mr. Justice Manson (1) February 2, 1954. On March 26, 1954, the order of the latter was reversed by the Court of Appeal for British Columbia, Mr. Justice Sidney Smith dissenting. (2)

Subsequently, the Court of Appeal granted leave to Local 260 to appeal to this Court and in the proceedings thereupon taken Labour Relations Board (British Columbia) was made a respondent. This Board had been established under *Industrial Conciliation and Arbitration Act* (R.S.B.C. 1948, c. 155). This Act was repealed by c. 17 of the Statutes of 1954, assented to April 14, 1954, but which, according to s. 87, was to come into force only upon proclamation of the Lieutenant Governor. Such a proclamation was made on June 15, 1954, whereby the Act came into force on June 16, 1954. Under the 1954 Act the Board is known as Labour Relations Board. Upon notice a motion was made by it at the opening of the argument before us for an order extending the time for appealing and giving it leave to appeal from the judgment of the Court of Appeal of March 26, 1954. This motion was granted.

The Respondents' contention is that, the Board having certified Local 28 to be the bargaining authority for the employees of the 31 hotels, that certification remains effective until cancelled under the provisions of s. 12(7) of the *Industrial Conciliation and Abitration Act* and, therefore, it has no jurisdiction to hear an application such as that here made by Local 260 in respect of the employees in three of the 31 hotels.

This issue must be resolved upon the language of the statute, the primary purpose of which, as its title indicates, is to give the employees the right to organize and provide for "Mediation, Conciliation, and Arbitration of Industrial Disputes." It contemplates that, in the main, a collective agreement negotiated under its provisions will remain in force for the period therein specified. However, that circumstances may develop which would make that impossible or undesirable was apparent to the Legislature and, therefore, provision was made for its termination under s. 47, its cancellation under s. 12(7) and the replacement and revocation of a bargaining authority under ss. 10 and 13.

(1) (1954) 11 W.W.R. (N.S.) 76. (2) (1954) 11 W.W.R. (N.S.) 685.

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Section 10(1) (*c*) provides that "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 three cases numbered (*a*), (*b*) and (*c*), of which (*a*) and (*c*) are relevant to this discussion:

> (*a*) Where no collective agreement is in force and no bargaining authority has been certified for the unit:
>
> * * *
>
> (*c*) Where a collective agreement is in force, and where ten months of the term of a collective agreement have expired.

The application of Local 260 was made under s. 10(1)(*c*). Not only throughout this section is there no mention of s. 12(7), but it would appear that if the cancellation contemplated by the latter was a condition precedent to the application of s. 10(1)(*c*) the ten-month period would appear inappropriate and unnecesary. That these sections, as their language would suggest, contemplate independent applications is emphasized by the fact that under s. 12(7) the Board may grant the application at any time after certification, if it is satisfied "that the labour organization has ceased to be a labour organization, or that the employer has ceased to be the employer of the employees in the unit . . . ." While, therefore, cancellation is provided for only under s. 12(7), it would seem that the provisions of ss. 10 and 13 contemplate the making of an application such as that of Local 260 here in question prior to and quite independent of cancellation under s. 12(7).

Local 260 made its application under s. 10(1)(*c*) after the expiration of the ten-month period of the then current collective agreement. It is said, in support of the respondents' contention, that even if the application of Local 260 may be made under s. 10(1)(*c*), the Board can, upon such an application, only determine whether "the majority of the employees in the unit are members in good standing of the labour organization." This contention accepts the prior certification as precluding the Board from considering, upon such an application, whether "the unit is appropriate for collective bargaining." Under this legislation s. 10 sets forth the various circumstances under which a labour organization may apply for certification and s. 12 specifies what must be found by the Board in order that certification

may be directed. With great respect, the language of these sections does not support the respondents' contention. On the contrary, it would seem that s. 12 requires, upon every application, that the Board must decide both whether "the unit is appropriate for collective bargaining" and whether "the majority of the employees in the unit are members in good standing of the" applicant labour organization.

Moreover, the word "unit," as first used in s. 10(1), is preceded by the indefinite article "a." It is "a unit" that a labour organization has itself selected and in respect to the employees in which it asks certification as the bargaining authority that the Board must, upon each application, consider. There are no words in s. 10(1) that in any way limit or restrict the unit or, indeed, which would exclude an application in respect of a part of an existing unit. It is of some significance that thereafter throughout the subsection the phrase is "the unit," which refers back to "a unit" in the earlier part of the subsection.

Neither does the language in s. 13 support the respondents' contention, as expressed in the factum of Local 28, that "the unit referred to in s. 13 can only be the unit which has been approved by the Board as a unit appropriate for collective bargaining." It will be observed that not only in s-s. (1) of s. 10, but also in s-s. (2) thereof and in s-ss. (1) and (2) of s. 12 and in s. 13 the phrase first used is "a unit" and thereafter it is "the unit." It is apparent that in each case the latter phrase refers back to "a unit" as first used in the above-mentioned sections and subsections. Moreover, I do not think "a unit," as used in s. 13, means a unit that has in some earlier application been determined to be "a unit appropriate for collective bargaining." As already pointed out, ss. 10 and 12 provide under what circumstances application may be made and what must be determined in order that certification may be directed. Then follows s. 13 which deals with the replacement and revocation of the former bargaining unit and the taking over by the new bargaining unit. Section 13(*b*) deals specifically with the possibility of a bargaining authority previously certified for "the unit." If that phrase referred to the unit as previously decided to be appropriate for collective bargaining the concluding words "in respect of such employees" would be without meaning, or mere surplus. In my view they are

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essential, as "the unit" refers back to the phrase "a unit" which the Board, upon an application such as here made by Local 260, has certified under s. 12(2) as a bargaining authority.

The definition of the word "unit" in s. 2(3) does not assist in the determination of this issue. It may well be that in another section or subsection of this statute the word "unit" refers to the existing or current bargaining unit, as, indeed, it may well be in s. 12(7). That, however, does not detract from its meaning as I have construed it in ss. 10(1) and (2), 12(1) and (2) and 13.

It is suggested that the foregoing construction may undermine the stability and peace the statute is intended to attain. With great respect, it would seem that this suggestion overlooks that the attainment of that end rests upon the acceptance of and satisfaction with wages, working conditions and their bargaining authority on the part of the employees. If the statute is to be permanently effective, the collective agreements made must, in the main, be adhered to and carried out according to their terms and, in particular, for the period specified. Where, however, exceptional circumstances develop which make that impossible, the Legislature has enacted provisions that are intended to enable the Board to deal with them as they develop and thereby restore those factors that make for peace and stability.

I agree with the learned Chief Justice that "the Act contemplates changing conditions." This appears evident not only in the sections already mentioned, but, indeed, throughout the Act, and particularly in s. 58(2) where the Board may "reconsider any decision or order made by it under this Act." It is, however, submitted that under s. 12(2) the phrase "shall certify the applicants as the bargaining authority," being a statutory direction to the Board, is not a "decision or order" of the Board within the meaning of s. 58(2). The statute directs the Board to determine whether the two factors mentioned in s. 12(1) and (2) are present and, in reality, the only order made by the Board is that certification contemplated in s. 12(2). It is that certification that is subject to cancellation under s. 12(7) and it is that certification which is revoked in s. 13(*b*). Moreover, I do not think the Legislature con-

templated that if, after certification, the unit is inappropriate for collective bargaining, or the employees in the unit are not members in good standing of the labour organization, except for limitations as to the making of certain applications provided in the Act, this certification should continue. With great respect it would seem to me that to give the limited construction here suggested would, in certain circumstances, defeat the object of the Act.

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Counsel agreed with the observation of Mr. Justice Davey in *United Steel Workers of America* v. *Labour Relations Board* (1), at 106, that the word "or" in what is now s. 12(2) inadvertently remained in the course of its amendment (S. of B.C. 1948, c. 31, s. 28) and that the meaning thereof is clear without that word. We also agree with that view and have construed the section as if the word "or" had been deleted.

The appeal should be allowed and the order of Mr. Justice Manson restored. The appellant should have its costs in this Court and in the Court of Appeal against the Association and Local 28. There should be no order as to costs for or against either Board, including the motion of the new Board for leave to appeal.

RAND J.:—I agree that the provisions of the *Industrial Conciliation and Arbitration Act* of British Columbia enable the Labour Relations Board, the intervenor, within the conditions laid down, to certify a group as a unit appropriate for bargaining purposes even though the group may be a fractional part of a larger unit which is already certified and the majority of employees in which are in favour of continuing the existing bargaining authority. The analyses of those provisions by Manson J. on the motion, (2) Smith J.A. in the Court of Appeal (3) and by my brothers Estey and Locke, JJ., are in substantial agreement, and I will not add anything to what they have said.

I would, therefore, allow the appeal and restore the trial judgment with costs in this Court and in the Court of Appeal.

(1) (1953-54) 10 W.W.R. (N.S.) 97; [1953] 4 D.L.R. 563.

(2) (1954) 11 W.W.R. (N.S.) 76.

(3) (1954) 11 W.W.R. (N.S.) 685.

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LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia whereby the judgment of Manson J., setting aside a writ of prohibition issued on the ex-parte application of the British Columbia Hotels Association directed to the Labour Relations Board of British Columbia and the members of that body, was set aside. Sidney Smith J.A. dissented and would have dismissed the appeal.

The British Columbia Hotel Employees' Union, Local 260, and the Hotel and Restaurant Employees' Union, Local 28, are labour organizations, within the meaning of that term as used in the *Industrial Conciliation and Arbitration Act* of British Columbia (R.S.B.C. 1948, c. 155). The British Columbia Hotels Association is a society organized under the provisions of the *Societies Act* of the Province and is an employers' organization, within the meaning of the said Act. The Labour Relations Board (British Columbia) is established under the provisions of the Act for the purpose of exercising the functions thereby assigned to it. Hereinafter, I will refer to these parties respectively as Local 260, Local 28, the Association and the Board.

The occurrences which give rise to the present litigation are set out in detail and in chronological order in the reasons for judgment delivered by Manson J. and it is unnecessary to repeat them.

The sections of the Act which affect the matter appear to me to be as follows:

Section 2(3) provides:

> For the purpose of this Act, a "unit" means a group of employees, and "appropriate for collective bargaining" with reference to a unit means appropriate for such purposes, whether the unit is an employer unit, craft unit, professional unit, plant unit, or a sub-division of a plant unit, or any other unit, and whether or not the employees therein are employed by one or more employers.

Section 10 reads in part:

> (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:
>
> * * *
>
> (*c*) Where a collective agreement is in force, and where ten months of the term of a collective agreement have expired.

(2) A labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining, and the employees in which are employed by two or more employers, may make application under this section to be certified as bargaining agent for the unit.

Section 11 makes provision for the appointment of craft unions whose members comprise only part of the employees as bargaining agents for their members in defined circumstances.

Section 12 reads in part:

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.

(2) When, pursuant to an application for certification by a labour organization, the Board has determined that a unit of employees is appropriate for collective bargaining if the Board is satisfied that the majority of the employees in the unit are members in good standing of the labour organization; or the Board shall certify the applicants as the bargaining authority of the employees in the unit; but if the Board is not so satisfied, it shall refuse the application.

* * *

(7) If, at any time after a labour organization has been certified as bargaining agent for a unit of employees, the Board is satisfied after such investigation as it deems proper that the labour organization has ceased to be a labour organization, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification. If ten months have elapsed after the certification of a labour organization and the Board is satisfied after such investigation as it deems proper that the labour organization has ceased to represent the employees in the unit, it may cancel the certification.

Section 13 reads:

13. Where a bargaining authority is certified for a unit:—

(*a*) That bargaining authority shall immediately replace any other bargaining authority for the unit, and shall have exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement until the certification is revoked:

(*b*) If another bargaining authority had previously been certified for the unit, the certification of the last-mentioned bargaining authority shall be deemed to be revoked in respect of such employees; and

(*c*) If, at the time of certification, a collective agreement binding on the unit is in force, that agreement shall remain in force, but any rights and obligations that were thereby conferred or imposed upon the bargaining authority whose certification has been revoked shall cease so far as that bargaining authority is concerned, but shall be conferred or imposed on the new bargaining authority.

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Locke J.

Section 58 defines certain of the powers of the Board and, so far as it is necessary to consider it, reads:

58. (1) If a question arises under this Act as to whether:—

* * *

(*g*) A group of employees is a unit appropriate for collective bargaining:

* * *

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.

(2) The Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any such decision or order.

By the terms of a collective agreement dated June 26, 1951, made by Local 28 on behalf of the employees with the Association, it was provided, *inter alia,* that all employees covered by it should, within thirty days from its date, make application and complete membership in the union and any employees employed during the term of the agreement should apply for membership and complete the same within thirty days after the date of their employment, and that such union membership should be maintained during the agreement as a condition of employment. The term was expressed to be from May 1, 1951, to April 30, 1953, and thereafter from year to year, subject to the right of either party to terminate it by giving sixty days' written notice.

A schedule forming part of the agreement showed the owners of the Alcazar, Niagara, Georgia and Marble Arch Hotels as being among those on whose behalf the Association executed the agreement.

Prior to the expiration of the term of this agreement, an application had been made to the Board by the Alcazar Hotel Employees' Mutual Benefit Association to be certified as the bargaining authority for the employees of that hotel. On April 1, 1953, this organization had been certified by the Board and proceedings were taken by Local 28 by way of *certiorari* to quash the order of the Board. The application for the writ was ultimately dismissed by Clyne J. on December 10, 1953 (see *In re Hotel and Restaurant Employees' International Union, Local 28 et al* (1).

This litigation was in progress when on April 28, 1953, Local 260 applied to the Board for certification as bargaining agent for the employees of the Niagara, Georgia and

(1) (1954) 11 W.W.R. (N.S.) 11; 1 D.L.R. 772.

Marble Arch Hotels. Since the action of the Board in granting a separate certification for the employees of the Alcazar Hotel had been made the subject of litigation, the Board notified the employees of the three hotels last mentioned that, when the Alcazar Hotel litigation was terminated, the Board would proceed to take a vote of the employees concerned if its action was upheld by the Court.

In the meantime, however, the Association and Local 28 had commenced to negotiate a new agreement to replace the one which had expired on April 30, 1953, and this resulted in a new agreement dated July 1, 1953, and made operative as of that date. In making this agreement the Association acted, *inter alia,* for the owners of the Niagara, Georgia and Marble Arch Hotels.

The point to be determined is whether the Act vests in the Board power to approve as a unit of employees appropriate for collective bargaining a group of employees who at such time are included in another unit, except in the events provided for in subsection (7) of s. 12. In the present matter, Local 28 had not ceased to be a labour organization and the employers had not ceased to employ the employees in the unit which had been determined to be appropriate for collective bargaining on the application of Local 28 on February 28, 1952, when the application of Local 260 was made.

The learned Chief Justice of British Columbia, with whom Bird J.A. concurred, (1) has expressed the opinion that while the Board may determine that a proposed new unit, which includes members of an existing unit, is appropriate for collective bargaining and certify a bargaining authority for it, this can only be done if the Board is first satisfied that the majority of the members in the existing unit are no longer members in good standing of the labour organization certified as its bargaining authority. It is further said in the reasons for judgment delivered that "once the majority creates the bargaining authority for the unit the majority of the unit must agree before the unit can be represented by another bargaining authority, either in whole or in part."

(1) (1954) 11 W.W.R. (N.S.) 11.

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Locke J.

I am unable, with great respect, to agree with either of these conclusions.

A unit appropriate for collective bargaining, according to the language of the definition, may be "a subdivision of a plant unit or any other unit and whether or not the employees therein are employed by one or more employers." It was the duty of the Board upon receiving the application of Local 260 to determine whether the proposed unit was one appropriate for collective bargaining, a decision involving the exercise of a discretion and as to which the determination of the Board was conclusive by reason of the term of s. 58(1). In the present case that decision has not been made, the proceedings having been halted by the writ of prohibition, but had the matter proceeded and the proposed unit found appropriate for that purpose it would have been the obligation of the Board—and not a matter of discretion—to certify the local as the bargaining agent. In deciding whether the proposed unit was one appropriate for that purpose, the fact that some or all of the employees to be included in it then formed part of an existing unit would, of course, be a factor to be considered by the Board.

The Board had earlier decided that the unit in respect of which the certificate dated February 27, 1952, was given, was one that was appropriate for collective bargaining. Express authority to vary that decision by excluding these employees from that unit is to be found in s. 58(2), and to constitute them a separate unit in s. 12. In my opinion, the steps proposed to be taken by the Board upon the application of Local 260 were within its statutory powers.

I would allow this appeal and restore the order of Manson J. The appellant should have its costs in this Court and in the Court of Appeal against the Association and Local 28. I would make no order as to costs for or against the Board.

Appeal allowed and order of Manson J. restored.

Solicitor for appellant: *A. B. Macdonald.*

Solicitors for B.C. Hotels Association: *Bourne, Des-Brisay and Bourne.*

Solicitors for Hotel and Restaurant Employees' Union, Local 28: *Farris, Stultz, Bull and Farris.*