1947
*Feb. 12, 13
*May 13

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN (RESPONDENT) — APPELLANT;

AND

DOMINION FIRE BRICK AND CLAY PRODUCTS, LIMITED (APPLICANT) — RESPONDENT;

AND

CLAY PRODUCTS WORKERS' UNION (RESPONDENT) ..... — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal—Parties—Status to appeal—Right of Labour Relations Board, Sask., to appeal from judgment holding it had no jurisdiction in matter brought before it—Right of Board, as a party under its official name, to appear in legal proceedings.

The Labour Relations Board of Saskatchewan (established under Statutes of Saskatchewan, 1944 (2nd Session), c. 69) appealed to this Court from the judgment of the Court of Appeal for Saskatchewan, [1946] 3 W.W.R. 459, holding, on a question raised before it on preliminary objection by the present respondent company, that the Board had no status to appeal from the judgment of Anderson J., [1946] 3 W.W.R. 200, setting aside a ruling of the Board that it had jurisdiction to hear a certain matter brought before it. Before this Court a further objection was taken by said company that the Board was not a body known to the law and consequently could not appear in any legal proceedings.

Held: (1) Effect should not be given to the latter objection. (*Per* the Chief Justice and Kerwin J.: The effect of ss. 4 and 9 of said Act is that the Board is a legal entity and can appear in legal proceedings and be heard as to its rights. *Per* Rand and Kellock JJ.: Assuming that the Board is not an entity distinct from its members, it was not for said company at this stage, having chosen to designate them by their collective name and after having obtained a decision in its favour, including an order for payment of costs, to get rid of them now by such an objection; *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426, at 445, referred to).

(2) The Board had the right to appeal to the Court of Appeal. (*Per* the Chief Justice and Kerwin J.: An examination of the cases indicates that for many years it has been taken as settled that a body such as the Board has a right to appeal where its jurisdiction is in question. *Per* Rand and Kellock JJ., referring to *The King's Bench Act,* R.S.S.

*Present: Rinfret C.J. and Kerwin, Rand, Kellock and Estey JJ.

1940, c. 61, s. 2 (14) ("party"); *The Court of Appeal Act,* R.S.S. 1940, c. 60, s. 6; and to the proceedings taken in the present matter; also to *Mackay* v. *International Association of Machinists* ([1946] 2 W.W.R. 257, at 260, 264): The Board was both a proper and a necessary party to the proceedings here in question and, being a party, had the right of appeal to the Court of Appeal and required no further or other status; the argument that a tribunal charged with the responsibility of deciding as between other persons should have no interest in supporting its decision in a Court of Appeal, is irrelevant here in view of said statutory provisions. *Per* Estey J.: It is indicated by authorities (cases reviewed) that over a long period of time it has been recognized that where the jurisdiction of a body such as the Board, constituted to discharge judicial functions, is questioned in a superior court, it may defend its jurisdiction and, in the event of an adverse judgment, take an appeal therefrom).

APPEAL by the Labour Relations Board of Saskatchewan from the judgment of the Court of Appeal for Saskatchewan (1) dismissing its appeal from the judgment of Anderson J. (2).

On an application before the said Board for an order determining that the employees employed by Dominion Fire Brick and Clay Products, Limited (hereinafter sometimes called the Company) at its plant near Claybank, Saskatchewan, except the office staff, plant foreman and chief engineer, constituted an appropriate unit of employees for the purpose of bargaining collectively, determining that the Clay Products Workers' Union represented a majority of the employees in that unit, and requiring the Company to bargain collectively with the said Union, the Company raised a preliminary objection that it was not an employer within the meaning of *The Trade Union Act, 1944* (Statutes of Saskatchewan, 1944, Second Session, c. 69) and therefore the Board lacked jurisdiction to make the order applied for. On the question raised by this preliminary objection, the Board decided against the Company, and ruled that the Board had jurisdiction. On application by the Company by way of *certiorari,* Anderson J. (by his judgment above referred to) quashed or set aside the order of the Board, holding that, in view of the nature of the Company's work or undertaking, the Board had no jurisdiction (the jurisdiction lying with the Wartime Labour Relations Board

(1) [1946] 3 W.W.R. 459; [1946] 4 D.L.R. 574.
(2) [1946] 3 W.W.R. 200; [1946] 4 D.L.R. 130.

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under Federal Order in Council P.C. 1003, of February 17, 1944). The Board appealed to the Court of Appeal for Saskatchewan. When the appeal was called for hearing, counsel for the Company advanced the preliminary objection that the Board had no status to bring the appeal. The hearing was adjourned and, after argument later on the preliminary objection, effect was given thereto and the appeal dismissed. From that judgment the present appeal was brought to this Court (by special leave granted to the Board by the Court of Appeal for Saskatchewan). Before this Court the additional point was raised, that the Board was not a body known to the law and consequently could not appear in any legal proceedings.

F. A. Brewin and *M. C. Shumiatcher* for the appellant.

J. C. Osborne and *G. F. Henderson* for the respondent Dominion Fire Brick and Clay Products, Limited.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—This is an appeal by the Labour Relations Board of Saskatchewan from an order of the Court of Appeal of that province and, in order to understand what is involved, it is necessary to go back to an application made to that Board by Clay Products Workers' Union. The application was for an order (1) that the employees employed by Dominion Fire Brick and Clay Products, Limited, at its plant near Claybank, Saskatchewan, except the office staff, plant foreman and chief engineer, constituted an appropriate unit of employees for the purpose of bargaining collectively, (2) that the Union represented a majority of the employees in that unit and (3) requiring the Company to bargain collectively with the applicant.

On that application the Company raised a preliminary objection that it was not an employer within the meaning of the Saskatchewan *Trade Union Act, 1944,* but the Board overruled this objection. The Company thereupon applied to Anderson J., in the Court of King's Bench, Crown Side, who ordered that the order of the Labour Relations Board be quashed without the actual issue of a writ of *certiorari*

and that security for costs be dispensed with. The respondents on that application were the Board and the Union and they were ordered to pay the Company's costs.

Before us, a new objection was taken for the first time by the Company respondent that the Labour Relations Board was not a body known to the law, and consequently could not appear in any legal proceeding. That objection may first be disposed of. Section 4 of *The Trade Union Act, 1944,* as amended, constitutes the Board, provides that a majority shall constitute a quorum, and that a decision of a majority present and constituting a quorum shall be the decision of the Board. By section 9:

> 9. A certified copy of any order or decision of the board shall within one week be filed in the office of a registrar of the Court of King's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order.

The effect of these provisions is that the Board is a legal entity, and, as put by Riddell J., speaking on behalf of the majority of the Ontario Court of Appeal in a case of mandamus: *Re Provincial Board of Health for Ontario and City of Toronto* (1): it has "rights as well as duties, and in that view it has a right to be heard in Court."

The ground of the decision of the Court of Appeal was that the Board was not a party aggrieved, but MacDonald J.A., who delivered the judgment of the Court, is clearly in error in stating that no costs were awarded against the Board by Anderson J. However, the matter may be put on a broader basis. Even if the cases mentioned by MacDonald, J.A., could be distinguished in the manner indicated by him, the fact that the point made by the Court of Appeal was not even taken in those cases or in cases such as *Stonor* v. *Fowle* (2) and *Combe* v. *De la Bere* (3) indicates that for many years it has been taken as settled that a body such as the Board has a right to appeal where its jurisdiction is in question.

The appeal should be allowed and, in accordance with an intimation from the Bench at the close of the argument, the matter should go back to the Court of Appeal for its

(1) (1920) 46 O.L.R. 587, at 596.
(2) (1887) 13 App. Cas. 20.
(3) (1881) 22 Ch. D. 316.

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determination as to the admissibility of certain affidavits filed on behalf of the Board and on the substantive matter raised by the original application for *certiorari*. The appellant is entitled to its costs in this Court in any event to be taxed only after the substantive matter in dispute shall have been finally disposed of. All other costs will be disposed of by the Court of Appeal.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.—This is an appeal by the "Labour Relations Board," established by Chapter 69 of the Statutes of Saskatchewan, 1944, 2nd Session, from the judgment of the Court of Appeal of Saskatchewan dismissing an appeal by the Board from the judgment of Anderson J. in the Court of King's Bench, quashing, in *certiorari* proceedings, an order of the Board purporting to have been made on April 15, 1946, under powers granted to it by the statute. The Court of Appeal gave effect to a preliminary objection by counsel for the respondent company that the Board had no sufficient interest or status to appeal the judgment of Anderson J. On the appeal to this Court, the additional point was raised that the Board was not a body known to the law and consequently could not appear in any legal proceedings. It will be convenient to consider this last objection first.

The Board is constituted by section 4 of the statute and is to consist of seven members, appointed by the Lieutenant Governor in Council. The majority of the members constitutes a quorum and a decision of the majority of such quorum is the decision of the Board. By section 9 a certified copy of any order or decision of the Board is to be filed in the office of a registrar of the Court of King's Bench and thereupon it becomes enforceable as a judgment or order of the court.

The respondent instituted the *certiorari* proceedings by notice of motion pursuant to Rule 4 of the Crown Practice Rules of Saskatchewan and the notice was directed to the Board by its official title and also to the respondent union and the Attorney General of Saskatchewan. By

Rule 11 such a notice is required to be served upon "the person or one of the persons who made the judgment, conviction or order" and in pursuance of this provision the notice of motion was served upon the Board. The method of service was not disclosed to us.

Assuming that the respondent company is right in objecting that the Board is not an entity distinct from its members, I think that it is not for the respondent company at this stage, having chosen to designate them by their collective name and after having obtained a decision in its favour, including an order for the payment of costs, to get rid of them now by such an objection. I think the language of Lord Lindley in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1) may be used with propriety here. After saying that the respondent was not a corporation, His Lordship said: "The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used."

With regard to the ground of decision of the Court of Appeal, it is necessary to refer to certain other statutory provisions. By *The King's Bench Act,* R.S.S. 1940, Chap. 61, section 2 (14), "party" includes "every person served with notice of * * * any proceedings, although not named in the record". It may be pointed out here that in the notice of motion here in question the Board, as well as the union, are named respondents and, as already mentioned, the Board was served. Accordingly, the Board was a "party" in the Court of King's Bench. By section 6 of *The Court of Appeal Act,* R.S.S. 1940, Chap 60, it is provided that the Court of Appeal shall have jurisdiction and power, subject to the rules of court, to hear and determine all appeals or motions in the nature of appeals respecting any judgment, order or decision of any judge of the Court of King's Bench.

In *Mackay* v. *International Association of Machinists* (2), the defendant association had applied to the Labour Relations Board for an order requiring an employer to refrain from certain alleged unfair labour practices and

(1) [1901] A.C. 426, at 445. (2) [1946] 2 W.W.R. 257.

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the Board made an order granting the application. In that case, which was an appeal in *certiorari* proceedings, Martin C.J.S. said at 260:

> Counsel for the association cited many authorities showing that it is not the practice in Canadian Courts to make an inferior Court or tribunal a party in *certiorari* proceedings; all that these authorities indicate is that the inferior tribunal is not formally named as a defendant but that circumstance cannot alter the fact that the tribunal may be a party as it undoubtedly is in this province by virtue of the service of the notice upon it.

Gordon J.A., at 264, said:

> Both under the English practice and under our own Crown Practice Rules (Rule 11) the notice of motion for a writ of *certiorari* must be served upon "the person or one of the persons who made the judgment, conviction or order". Service on one member of the Labour Relations Board was effected in this case and the Board is therefore a party and a necessary party to the proceedings.

In my opinion, the Board was both a proper and a necessary party to the proceedings here in question and, being a party, had the right of appeal to the Court of Appeal and required no further or other status. It is urged that a tribunal charged with the responsibility of deciding as between other persons should have no interest in supporting its decision in a Court of Appeal. However that may be in other circumstances, the argument is irrelevant here in view of the statutory provisions referred to. A number of illustrations could be given where statutory bodies not dissimilar in function to the appellant Board have appeared by counsel to support their decisions. It is sufficient to refer to *The King* v. *Electricity Commissioners* (1).

I would accordingly allow the appeal and refer the matter back to the Court of Appeal to be disposed of on the merits.

ESTEY J.—The Labour Relations Board of Saskatchewan as constituted under *The Trade Union Act, 1944* (1944 Statutes of Saskatchewan, ch. 69) made an order dated April 15, 1946, declaring its jurisdiction to determine the proper bargaining unit for the employees at the Dominion Fire Brick and Clay Products, Ltd. Its jurisdiction to do so was questioned before Mr. Justice Anderson who

(1) [1924] 1 K.B. 171.

under date of July 16, 1946, directed that the order of the Board be quashed without the issue of a writ of *certiorari*.

The Labour Relations Board appealed from the order of Mr. Justice Anderson to the Court of Appeal, and, upon preliminary objection being taken, the Court held that the Labour Relations Board had no status to appeal because the order of Mr. Justice Anderson did not in any way affect the interests of the Board.

In *In re Jane McEwen* (1), the Board of Review for Manitoba was one of the appellants to this Court from an order of the Court of Appeal in that province directing the issue of a writ of *certiorari* and that a proposal of the Board dated October 29, 1937, be quashed. An order for payment of costs was made against the Board in the Court of Appeal, as Mr. Justice Anderson did in the case at bar, but the main issue in that case, as here, was the jurisdiction of the Board to make the order, and no question was raised as to the status of the Board of Review as an appellant.

In *The King* v. *London County Council* (2), the London County Council had made an order permitting premises to be open for cinematographic entertainments on Sundays and certain holidays. The Divisional Court held that the Council had exceeded its jurisdiction, made absolute a rule *nisi* for a writ of *certiorari* and directed that the order should be quashed. The London County Council appealed and the Court of Appeal affirmed the decision of the Divisional Court.

In *Hetherington* v. *Security Export Co.* (3) the Provincial Secretary-Treasurer of New Brunswick had signed a distress warrant under sec. 6 of the *Liquor Exporters' Taxation Act* of that province. The jurisdiction of the Secretary-Treasurer was questioned in an application for a writ of *certiorari*. The Court of first instance directed the writ of *certiorari* to issue. The Appellate Division discharged that order. In this Court the decision of the Appellate Division was reversed but was restored by the Privy Council. Throughout these proceedings the Provincial

(1) [1941] S.C.R. 542.
(2) [1931] 2 K.B. 215.
(3) [1924] A.C. 988.

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Secretary-Treasurer was both respondent and appellant and no question was raised as to his status to defend his jurisdiction in either capacity.

The record in the *Hetherington* case (*supra*), as in *The King* v. *London County Council* (*supra*), is not clear as to the disposition of costs upon the original application. It is not, however, suggested in any of the cases that an order directing either the payment of costs or the discharge of any of its duties is essential to give to the judicial body the status to take an appeal.

See also *Combe* v. *De la Bere* (1); *Stoner* v. *Fowle* (2); *Rex* v. *Electricity Commissioners* (3).

The learned judges in the Court of Appeal referred to *Board of Education* v. *Rice* (4), where both *certiorari* and *mandamus* were granted, and to *Local Government Board* v. *Arlidge* (5), where in the Court of Appeal (6), Lord Justice Vaughan Williams concluded his reasons for quashing an order for the issue of a writ of *certiorari* with a direction that the matter be "sent back to the Local Government Board to be determined in the manner provided by law". In neither of these cases is the status of the respective Boards to appeal discussed and, when considered with the authorities already cited, they do not appear to support the requirement or qualification suggested in the judgment here appealed from.

The application for a writ of *certiorari* is not an appeal upon the merits. It raises questions as to the legality of the proceedings. Very often, as in this case, it is the jurisdiction of the tribunal to make the order in question. The foregoing authorities indicate that over a long period of time it has been recognized that where the jurisdiction of the body, constituted to discharge judicial functions, is questioned in a superior court, it may defend its jurisdiction and, in the event of an adverse judgment, take an appeal therefrom.

(1) (1881) 22 Ch. D. 316.
(2) (1887) 13 App. Cas. 20.
(3) [1924] 1 K.B. 171.
(4) [1911] A.C. 179.
(5) [1915] A.C. 120.
(6) *The King* v. *The Local Government Board; Ex parte, Arlidge,* [1914] 1 K.B. 160, at 184.

The Court of Appeal had already held that the Labour Relations Board exercised judicial functions: *Bruton* v. *Regina City Policemen's Association* (1), and that the Board was a party in *certiorari* proceedings: *Mackay and Mackay* v. *International Association of Machinists Lodge No. 1057* (2).

In my opinion, the appeal should be allowed and the matter referred back to the Court of Appeal as suggested by my brother Kerwin.

Appeal allowed and order of the Court of Appeal set aside (further terms of judgment pronounced in accordance with the last paragraph in the judgment of Kerwin J.).

Solicitor for the appellant: *Morris C. Shumiatcher.*

Solicitors for the respondent Dominion Fire Brick and Clay Products, Limited: *Grayson and McTaggart.*