I.A.M. v. Hearn

Between
International Association of Machinists and Aerospace Workers,
Appellant
and
Bernice Hearn, Respondent
and Between
International Association of Machinists and Aerospace Workers,
Appellant
and
Patricia Perks, Respondent
and Between
International Association of Machinists and Aerospace Workers,
Appellant
and
Barbara Grandy, Respondent

Newfoundland Judgments: [1986] N.J. No. 261
Action 1984 Nos. 1351, 1352 and 1353 (D.C.)

Supreme Court of Newfoundland - Trial Division
Barry J.

Heard: April 29, 1986
Judgment: Dec. 10, 1986

Deborah Paquette, for the appellant.
Augustis Lilly, for the respondent.

BARRY J.: This appeal arises out of the dismissal on the 25th day of May, 1984 by His Honour Judge M.R. Reid of a claim brought by the appellant against the respondents under the Small Claims Act in the Provincial Court of Newfoundland at St. John's.

The facts relevant to the appeal may be summarized as follows:

The appellant is a trade union, whose membership includes persons employed by Eastern Provincial Airways (herein referred to as the employer) an air carrier with business premises, amongst other places, at Gander, Newfoundland. The appellants are residents of Gander, and at all times material to this action were employees of the employer and members of the appellant union. The employer operates in a field of federal jurisdiction and its labour relations with the appellant are governed by the Canadian Labour Code, Revised Statutes of Canada, 1970, Chapter L-1, under which the appellant was certified as a bargaining agent for a unit of its employees including the respondents. The appellant had had in effect a collective agreement between itself and the employer, but had been unsuccessful in negotiating a new agreement upon its expiry. In consequence, the appellant had declared a strike against the employer. In the course of the strike, which endured from January 7, l983 to March 16, 1983, certain of its employees in its bargaining unit, including

the respondents, failed to comply with a request made to them by the appellant to desist from work at the employer's premises during the strike period, but continued their employment duties. In so doing, the respondents crossed the picket lines established by the appellant at the employer s premises. The respondents were duly charged by the appellant with commission of acts of misconduct contrary to the rules of its constitution, and upon following procedures outlined therein the respondents were found guilty of the offences charged and it imposed upon each of them a fine of $1,000.00. Although there was provision in the constitution allowing the respondents to appeal the decision of the appellant, they did not avail of it and the time limit provided for such appeal has now passed. The respondents have not paid the fines imposed upon them. By originating summons with statements of claim attached, issued out of the Provincial Court of Newfoundland on December 31st, 1983 the appellant sought to recover from the respondents the amount of the respective fines levied on them as debts. When the action came on for hearing in the Provincial Court of Newfoundland on the 25th day of May, A.D., 1984 His Honour Judge M.R. Reid, upon the application of the respondents struck out the claim of the appellant upon the ground that he lacked the jurisdiction to try the case.

The appellant has now appealed his decision to this court upon the grounds that the trial judge erred:

(1) in finding that the Provincial Court was without jurisdiction to entertain the appellant's claim.
(2) in finding that the appellant's monetary claims against the respondent did not constitute debts within the meaning of the Small Claims Act, R.S.N., 1979, c. 34.

Article L of the appellant's constitution sets out the various types of behaviour and activities which constitute misconduct on the part of a member and provides for disciplinary action where such behaviour has been established. The relevant portion of s. 3 of Article L deals with such misconduct as follows:

> "Sec. 3. The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any warrant after written and specific charges and a full hearing as hereinafter provided:
> Refusal or failure to perform any duty or obligation imposed by this Constitution; ...
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution ..."

The procedure prescribed for the hearing of the charge requires that an alleged wrongdoer be notified of the charge, the time and place of the hearing and be given an opportunity to appear and defend before a trial committee. The committee may recommend its verdict and also a suitable punishment to the membership at large and this recommendation shall then be voted upon by a ballot of members of the union at a duly constituted meeting. The membership may amend, reject, or substitute another penalty. Sections 14, 15, 16 provides for further appeals from the decision of the membership.

The appellant alleges that the pecuniary penalties imposed upon the respondents were established under a legal process, i.e. in accord with the constitution, and in consequence must be regarded as debts within the meaning of the Small Claims Act.

The trial judge declared that the question whether the union could sue a member for a penalty consisting of a fine was governed by a provision barring such action in s. 4(b) of the Trade Unions Act R.S.C., 1970, T-11, 1970. He declared that the law respecting the enforcement of such penalties was set out in the case of Russell v. Amalgamated Society of Carpenters and Joiners, (1912) AC 421 (H.L.) which dealt with a similar case under the Trades Unions Act (England) 1871, 34 & 35 Vict., Chapter 31, as amended which also contained penalty restrictions not unlike those in s. 4 of our Trade Unions Act. The court in that case held

that the union, which had as primary objects in its constitution the calling of a strike and the enforcement of strike action by disciplinary action, was aimed at the restraint of trade and hence was illegal at common law. The trial judge in this action found that the union was in a similar position and that being unlawful at common law it looked for legitimacy to the Trade Unions Act (Canada). He held that s. 4 of that Act clearly prohibited the recovery in court of a penalty imposed by a trade union upon a member for misconduct under its rules.

The appellant alleges that the union constitution is comprised of rules which are, in effect, terms of an agreement binding upon each of its members and that the fine imposed upon the defendant was levied under the provisions of that agreement, in consequence of which, it contended, the fine must be regarded as a debt owing to it by the defendant. The trial judge declared that debts arise in two ways, i.e. by agreement or by statute and that a penalty does not fit in either category. The admittance of a person to membership in the union, he stated, does not imply that the member agrees to the penalty which may be imposed under it, nor does it mean that failure to appeal means acquiescence in the penalty imposed so as to make it recoverable by action in court.

The appellant has supported its appeal with the following arguments:

1. That the action was not commenced to enforce the mandatory provisions of the union's constitution, and that its internal regulations suffice to take appropriate disciplinary action against the respondents.
2. That all members of the union were bound by its constitution.
3. That the legality of its proceedings against the respondent for breach of its rules stands unimpugned. The appellant could have appealed through its appeal procedure, but did not.
4. That the fine assessed against the respondents had not been paid, and that such liquidated assessments are debts under the constitution. By entertaining this action the court would not be directly enforcing the union constitution within the meaning of s. 4 of the Trade Unions Act.
5. The plaintiff-appellant, not having been registered under the Trade Union Act is not subject to s. 4 of that Statute.
6. The appellant is certified as a bargaining agent in respect of a unit of employees of the employer under s. 124 of the Labour Code of Canada, 1976, CL 1, part 5. Sections 127 to 130 and s. 110 of that Act provide that employees are free to join a trade union of their choice and to participate in a lawful strike. Consequently, the trial judge erred in finding that trade unions are governed only by the Trade Unions Act and the common law.
7. The trial judge erred in finding that the $1,000.00 fine was not a civil debt or damages within the Small Claims Act.

The claim of the appellant as set out in its statement of claim reads as follows:

"(1) What are you claiming?

(a) Specified amount

(2) How did your claim arise? Please give specific details.

(Write on back of page if more space required.) Claim is the amount of civil debt due to the International Association of Machinists and Aerospace Workers of which the Defendant is a member by virtue of the provisions of the Constitution of that Association related to

disciplinary fines which may be imposed upon its members.

(3) Where did claim arise? Gander, Newfoundland.
(4) When did your claim arise? April 20th, 1983.
(5) How much are you claiming? $1000.00.

The Small Claims Act defines a small claim in s. 1(d) as:

1(d) "small claim means a claim under this Act."

Section 3(1) of the Small Claims Act defines the jurisdiction of the courts in the following terms:

"3.(1) Subject to the restrictions and conditions in this Act, a judge has jurisdiction to try and adjudicate upon any claim for debt (whether payable in money or otherwise) or for damages (including damages for breach of contract) where the amount claimed does not exceed one thousand dollars, including claims within that amount for the recovery of taxes or charges under The City of St. John's Act The City of Corner Brook Act, The Local Government Act, 1972 or The Local School Tax Act, or under any regulation, order or by-law made thereunder."

The Trades Union Act, 34 & 35 Vict., chapter 31, 1871 as amended in 1878 was enacted to provide basically for the following:

1. The protection of members of trade unions by requiring that union constitutions include certain provisions governing their operations and that copies be given to each member of the union concerned.
2. The registration of trade unions.
3. The conferring upon unions a status of being a legal entity for the purpose of conducting its business affairs, particularly with respect to the acquisition and holding of property and of suing and being sued in relation to its business contracts.
4. The protection of unions by declaring them not to be unlawful merely because they may be in restraint of trade or that their agreements are void merely because they are in restraint of trade.
5. By protecting union members and unions from intervention of courts in conflicts and disputed matters arising out of its ordinary transaction of business. I quote s. 4 as follows:

"4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed:
2. Any agreement for the payment by any person of any subscription or penalty to a trade union:
3. Any agreement for the application of funds of a trade union, --

(a) To provide benefits to members; or,
(b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

(c) To discharge any fine imposed upon any person by sentence of a court of justice, or,

4. Any agreement made between one trade union and another; or,
5. Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Clearly, s. 4, above, was intended to keep the courts out of the internal union affairs in respect of the subjects mentioned. At the time of enactment such a provision was considered desirable and necessary to allow unions to function effectively. Note particularly s. 4 ss. 2 and its declaration that the Act does not enable courts to entertain actions to enforce payment of any subscription or penalty to a trade union.

The Canadian counterpart, The Trade Unions Act,(R.S.C., 1970, c. T-11), although not as comprehensive as its English prototype, was enacted to accomplish the same general objects and contains a number of similar provisions, including s. 4, which reads as follows:

"Sec. 4. Legal proceedings not authorized by this Act. --(1) Nothing in this Act enables any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement

(a) between members of a trade union, as such, concerning the conditions on which any members for the time being of the trade union shall, or shall not, sell their goods, transact business, employ or be employed;
(b) for the payment of any person of any subscription or penalty to a trade union;
(c) for the application of the funds of a trade union,

(i) to provide benefits to members,
(ii) to furnish contributions to any employer or workman, not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union, or
(iii) to discharge any fine imposed upon any person by sentence of a court of justice;

(2) Agreements not unlawful.--Nothing in this section shall be deemed to constitute as unlawful any of the agreements mentioned above."

The Canada Labour Code (Part V.) now provides that Trade Unions may be certified and given, inter alia, enforceable bargaining rights, and the right to strike.

In this case the respondents have questioned the right of the appellant to take legal action to enforce its rules. Firstly, they allege that the appellant, being a voluntary association, has no status to sue in its own name because it has not been registered under the Trade Unions Act. Secondly, if it had been so registered it would be prohibited by s. 4 of that Act from taking action in court to enforce the penalties imposed upon the respondents.

The case of Rigby v. Connol (1880) 14 Ch.D. 482, held that the court had no right to intervene in the internal affairs of a trade union on behalf of a member who had been expelled for failure to pay a fine. In that instance an action had been taken against a trade union on the ground that the rules of its constitution providing for expulsion, though declared not to be unlawful under the Trades Unions Act, were

nevertheless, not lawful at common law and therefore not enforceable. Jessel, M.R. dealt with this point at pp. 490-1 in his judgment as follows:

> "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the Plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscription and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less.
> The only question remaining, therefore, is whether the negative words in this Act, "nothing in this Act shall enable,' really prevent me giving him any relief whatever, because those words do not say that the Court may not otherwise enforce; all the section says is, "Nothing in this Act shall enable.'
> The question, therefore, which I have to consider is, what would have happened without the Act? And it appears to me that without the Act it is clearly an unlawful association; it is an association by which men are not only restrained in trade, but they are bound to do certain acts under a penalty."

The scope of this decision as a precedent, however, has been whittled down by subsequent cases, both in England and in Canada, to the point where an unregistered trade union is no longer considered to be an unlawful association. Since Rigby v. Connol (supra) development of the law through court decisions arising from problems occurring out of the operation of the two trade union acts referred to above has resulted in the establishment of certain principles.

1. The right to sue a union in its own name as a legal entity for an injunction restraining it from pursuing a course of action prohibited under its rules. Taff Vale Railway Company v. The Amalgamated Society of Railway Servants, (1901), A.C. 426 (H.L.). In response to a strike at the premises of the respondent railway operator, the latter took action against the union representing the employees in its registered name requesting an injunction to restrain picketing. The union moved to have its claim stricken out, alleging it was neither a corporation nor an individual and that it had no sueable status. Farwell, J., upon hearing the application, granted the injunction and declared that the Trades Unions Act conferred upon a union a status. I quote the following excerpt from his judgment as set out at pp. 429-30 in the case on appeal to the House of Lords, cited above, wherein his judgment was affirmed:

> "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature. ... nor can it be said for this purpose that the association is illegal, for the Legislature by ss. 2 and 3 of the Act of 1871 has rendered legal the usual purposes of a trade union, and has further enabled the trade union to carry into effect those purposes by the provisions to which I have already referred. This is not a case of suing in contract to which the provisions of s. 4 of the Act would apply; it is an action in tort, and the real question is whether on the true construction of the Trade Union Acts, the Legislature has legalised an association which can own property and can act by agents by intervening in labour disputes between employers and employed, but which cannot be sued in tort in

respect of such acts."

See also the Yorkshire Miner's Association v. Howden, (1905), A.C. 256 (H.L.)

2. A member of a union may not bring action against it in respect of its breach of the rules of its constitution. Russell v. Amalgamated Society of Carpenters and Joiners, (1912) A.C. 421 (H.L.). A summary of the case is contained in its headnote, at pp. 421-2:

> "The rules of a society registered under the Trade Union Acts, 1871 and 1876, combined provisions for the militant purposes of a trade union, which were admittedly in restraint of trade, with provisions for the provident purposes of a friendly society, and the subscriptions of the members were applicable to all the purposes of the society. One of the rules provided for the expulsion of members for non-compliance with the decisions of the managing or branch committees directing the militant operations of the society or for violating the recognized trade rules of the district: --
> Held, that an action against the society and its trustees for payment of moneys alleged to be due to a member under the rules in respect of superannuation benefit was not maintainable under the Act of 1871, and was not maintainable apart from the Act; by Earl Loreburn L.C. and Lord Atkinson, because the society, being a voluntary association, could not have been sued in such an action in its own name; by Lord Macnaghten, Lord Shaw of Dunfermline, Lord Mersey, and Lord Robson, because the society was an illegal association at common law, inasmuch as its main purposes were in unreasonable restraint of trade and the rules relating to those purposes were not severable from the rules relating to its provident purposes."

Lord Atkinson treated the trade union plaintiff as a voluntary association and declared that as such it could not sue or be sued in its own name. I quote the following excerpt from his judgment at p. 431:

> "This is an action based upon an agreement "to provide benefits to members' and is instituted directly to enforce that agreement or to recover damages for the breach of it. The statute gives no support to such an action. Whether it can be instituted in its present form or not must depend upon the common law. It is not a representative action such as is frequently instituted in a Court of Equity. It is a comon law action, and I am clearly of the opinion that the defendant society cannot be sued in such an action in its registered name; nor can the trustees be sued in it in their character or trustees. Partners may no doubt be sued in the name of their firm, but that is under legislation in the form of the Rules and Orders of 1883."

Lord Robson, noting that some of the rules of the union were legitimate and some in restraint of trade, stated at page 439:

> "The first question that arises is whether the agreement between the defendants and the plaintiff's husband, as embodied in the rules of the defendant society, is in contravention of the common law doctrine as to unlawful restraint of trade. If so, then the agreement is void, unless what is legal in it can be treated as wholly independent of its illegal objects. For the purpose of dealing with this question it is enough to refer to rule 48. That rule constrains a member by fine, or suspension and threat of expulsion, to comply with the decision of the executive committee as to strikes and to obey the recognized trade union rules of the district, whatever they may be, as to the conditions of his work. It also prohibits him from "taking a sub-contract or piecework, or working for either of these classes of employers (sub-contractor or pieceworker being defined as a person taking the labour of a job only and

not supplying the material), or fixing, using, or finishing work which has been made under unfair conditions, either in the United Kingdom or abroad, or contrary to the recognized trade rules of the district in which it has been prepared.' There can be no doubt that prior to the Trade Union Act, 1871, provisions of this sort were held to be in restraint of trade. The cases of Hilton v. Eckersley (1) and Hornby v. Close (2), without mentioning others to the same effect, are conclusive in support of that proposition."

3. A court will intervene to require a union to abide by the terms of its own constitution where its failure to do so has caused or will cause an injustice to one of its members. The following excerpt from the judgment of Lord Macnaghton in the Howden case (supra) at p. 265 is relevant:

"Then I come to the question, What was the 'object' of the present litigation? Was it to enforce an agreement for the application of the funds of the union to provide benefits to members? I should say certainly not. The object of the litigation was to obtain an authoritative decision that the action of the union which was challenged by the plaintiff was not authorized by the rules of the union. The decision might take the form of a declaration or the form of an injunction, or both combined. But the decision, whatever form it might take, would be the end of the litigation. No administration or application of the funds of the union was sought or desired. The object of the litigation was simply to prevent misapplication of the funds of the union, not to administer those funds, or to apply them for the purpose of providing benefits to members.

4. A registered trade union, though not incorporated, is capable of entering into contracts and for that purpose is a legal entity distinct from its members. However the rules of a trade union whether registered or unregistered are not subject to be legally enforced in consequence of the prohibitions contained in s. 4 of the Trades Unions Act; Lord MacDermott in his judgment in the case of Bonsor v. Musician's Union (1956) A.C. 104 (H.L.) stated at pp. 135-6:

"Sections 2 and 3 throw no direct light on the question, but they were enacted to deal with a situation which has to be kept in mind in construing the Act. The objects of many trade unions included purposes which had been held to be in restraint of trade, with the result that the agreements between their members were unlawful and the members themselves within reach of the criminal law. Section 2 removed the danger of prosecution, and section 3 provided that the purposes of a trade union 'shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.' It was not, however, the policy of the legislature to make the whole range of trade union agreements enforceable at law. Section 4, accordingly, provides that nothing in the Act shall enable any court to entertain legal proceedings instituted with the object of directly enforcing or recovering damages for breach of certain enumerated classes of agreement, the first of which reads as follows: '(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed.' Now, it is clear that section 4, like sections 2 and 3, is not confined in its application to unions which are registered under the subsequent provisions of the Act. It applies to trade unions within the definition to which I have already referred, and therefore to unions which are not registered and not juridical persons as well as to unions which are registered; and this, it may be added, holds good for all the classes of agreement which section 4 specifies, for there is nothing in the text to restrict any of these classes to a particular type of union. On this account section 4 can hardly be expected to furnish a positive answer to the question under discussion; nevertheless I think its description of class (1), though by no means conclusive, affords some indication of the intention of the legislature. That class of

agreement is described in a manner which indicates that it was the policy of Parliament to keep the contracts of union members respecting the main purposes of their combination outside the jurisdiction of the courts. The description accords with what has long been the generally accepted view of the bond by which the members of a trade union are held in association, namely, the contract between members which is formed on admission by an acceptance of the union rules. but it does not refer to agreements between a union and its members. This omission seems natural if the only bond in contemplation was that just mentioned. But I do not think it is what one would expect if the intention was to make a juridical person of any union choosing to register, as in that case the registered union would, while the unregistered union would not, be free to circumvent this part of section 4 by the simple expedient of doing what the union here is said to have done and framing its rules so that the members were bound contractually to it; and that would be contrary to the policy of section 4, if I am right in the view already expressed that that section was meant to apply to trade unions generally and irrespective of registration."

5. Each member of a trade union is bound by the terms of its constitution and rules. In Orchard v. Tunney, (1957), S.C.R. 436 (Man.) the plaintiff, a union member, was suspended by the union for breach of its rules and in consequence was discharged by his employer because of a union shop provision in its collective agreement. He sued for damages and reinstatement. The initial suspension was unauthorized as was the subsequent confirmation by the trial tribunal purportedly acting under the rules. The plaintiff's claim was allowed and his reinstatement was ordered. Rand, J. in dealing with the status of trade unions said at page 441:

"In the absence of incorporation or other form of legal recognition of a group of persons as having legal capacity in varying degrees to act as a separate entity and in the corporate or other name to acquire rights, incur liabilities, to sue and be sued, the group is classified as a voluntary association. There are many varieties of this class ranging from business partnerships, labour unions, professional, fraternal and religious societies to social clubs, in the latter of which personal relations are the main objects, and in the descending or ascending scale the difference in the interests would seem to be proper to be reflected in the legal significance, if any, attributable to them.
Most of their purposes in some form or another touch property; and as their economic character grows that contact is correspondingly enlarged. In a degree depending upon the nature of their objects, they have been left largely to their own government on the ground, probably, that it is better to let family affairs settle themselves; but as they have evolved and membership has taken on greater economic importance resort to the Courts has become more frequent and the warrant for juridical interposition to prevent injustice has called for a more critical analysis of the jural elements involved."

And further at page 445 he said:

"There is no legislation in Manitoba similar to that of the Trades Union Acts, 1871-1876; and it was not argued that The Labour Relations Act, supra, had any wider effect than as already stated. Apart, then, from statute, that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relationship by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations: that the body

as such is that to which the responsibilities for action taken as a group are to be related."

6. A trade union is a creature of statute and is bound by the same duties and liabilities as the general law would impose upon a private individual doing the same thing. This statement of law emanates from the case of the International Brotherhood of Teamsters v. Therien, 1960, 22 D.L.R. (2d), page 1 (S.C.R.) where a union made threats to an independent contractor that their common employer would terminate its business relationship with him. The contractor thereupon sued the union in tort for damages for conspiring to procure his dismissal in circumstances where a collective agreement with a closed shop provision was in effect. The issue of whether the union was a legal entity was addressed by the court. Locke, J. said at page 11:

> "Were it not for the provisions of the Trade-unions Act and the Labour Relations Act if the union was simply an unincorporated association of workmen, it would not, in my opinion, be an entity which might be sued by name, and what was said by Duff J. and by Anglin J. (with whom Brodeur J. agreed) in Local Union v. Williams above referred to would apply. Such an unincorporated body not being an entity known to the law would be incapable of entering into a contract (Canada Morning News Co. v. Thompson, (1930), 3 D.L.R. 833, S.C.R. 338). That, however, is not the present case.
> I agree with the opinions expressed by the learned Judges of the Court of Appeal in the cases to which I have above referred. The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. What was said by Farwell J. in the passage from the judgment in the Taff Vale case which is above quoted appears to me to be directly applicable. It is necessary for the exercise of the powers given that such unions should have officers or other agents to act in their names and on their behalf. The Legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualitites of a corporation in respect of liability for tort since a corporation can only act by its agents.
> The passage from the judgment of Blackburn J. in delivering the opinion of the Judges which was adopted by the House of Lords in Mersey Docks Trustees v. Gibbs, (1866), L.R. 1 H.L. 93 at p. 110, referred to by Farwell J. states the rule of construction that is to be applied. In the absence of anything to show a contrary intention -- and there is nothing here -- the Legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. Qui sentit commodum sentire debet et onus.
> In my opinion, the appellant is a legal entity which may be made liable in name for damages either for breach of a provision of the Labour Relations Act or under the common law."

Locke, J. also held that Therien was asserting a common law cause of action and not a statutory one, even though he relied upon the provisions of the Labour Relations Act.

In the case O'Laughlin v. Halifax Longshoremen's Association, (1972) 28 D.L.R. (3d) 315 (N.S.C.A.), the plaintiff-appellant had taken action in tort against the defendant-respondent association which had been neither registered nor certified, for damages resulting from his suspension from membership in the association for conduct action detrimental to the union arising out of allegations of dishonesty against the president. Cooper, JJ.A. in his judgment for the court said at page 332-4:

> "After considering fully the authorities to which I have referred and others which I have examined, I am of the opinion that the Assocation is a legal entity capable of being sued in

its own name in the action brought against it by the appellant O'Laughlin. I think that Parliament by the enactment of the Industrial Relations and Disputes Investigation Act, has manifested an intention that a trade union, although not an incorporated body, is a juridical person: see Polymer, supra, at p. 616 -- at least for certain purposes among which, in my view, is an action by one of its members for suspension from membership affecting his employment.

The genesis of the development of the law relating to the status of trade unions as legal entities or juridical persons is the Taff Vale and Bonsor v. Musicians' Union cases. From those cases it is my opinion that the law in Canada has developed to the point where these bodies, sometimes very large and in any event of great importance in modern society, are now recognized as something more than mere collections of individuals and that Legislatures intended this to be so, having regard to the provisions of Labour Relations Acts now in force in this country. I think this modern position was fully recognized in the Therien case which I regard as of compelling authority.

In coming to the conclusion that the Association is a legal entity for the purposes of these proceedings, I have not lost sight of the fact that it was not certified as a bargaining agent. I do not regard this fact as one which should impel me to decide otherwise than I have done. The association is subject to the Industrial Relations and Disputes Investigation Act, save only that those provisions which apply only to a trade union which has sought and has been granted certification are not at present applicable to it. The association was in a position to apply for certification: see the Vancouver Manchinery case, supra; McKinnon et al. v. Dominion Coal Co. Ltd., supra, and Locke, J.'s coment on the Patterson and Teamsters, etc. v. Therien (1960), 22 D.L.R. (2d) 1 at p. 11, (1960) S.C.R. 265; affirming 16 D.L.R. (2d) 646, 27 W.W.R. 49; affirming 13 D.L.R. (2d) 347, 26 W.W.R. 97.

I reject also the contention that because of s. 45(1) of the Act which reads:

> '45(1) A prosecution for an offence under this Act may be brought against an employers' organization or a trade union in the name of the organization or union and for the purpose of such a prosecution a trade union or an employers' organization shall be deemed to be a person, and any act or thing done or omitted by an oficer or agent of an employers' organization or trade union within the scope of his authority to act on behalf of the organization or union shall be deemed to be an act or thing done or omitted by the employers' organization or trade union.'

The association cannot be a legal entity capable of being sued in its own name in civil proceedings. I agree with Monnin, J., in Dusessory's Supermarkets St. James Ltd. v. Retail Clerks Union, Local 832, et al. (1961), 30 D.L.R. (2d) 51 at pp. 70-1, 34 W.W.R. 577, that a body which is a legal entity for one purpose may also be a legal entity for another.

I confess to some difficulty with what Evans, J.A. said in the Astgen case as quoted above. But it seems to me that the issue there was one peculiarly of union concern only. The view of Labour Relations Acts is primarily the regulation of collective agreements between unions and employers. When the effect of action taken by a union in disciplining a member by suspension is to deprive him of employment as a union member, it is my view that the action is more than a purely internal union matter and becomes in effect one of regulation of conditions of employment. We are here concerned with the pseudo-corporate status bestowed on labour unions by statute which Evans, J.A., said was not in issue in the Astgen case, supra.

Finally, I have also considered the effect of non-registration of the Association under the Trade Unions Act. I think that the provisions of the Industrial Relations and Disputes Investigation Act are sufficient in themselves to support the conclusion to which I have

come."

The appellant in the cases under appeal had been certified under the Canada Labour Code (Part V) and this action arose out of a legal strike wherein the respondents were penalized for not abiding by its rules respecting strike action and picketing.

Outstanding examples of instances where the courts will intervene to correct abuses in the internal affairs of unions are the Howden (supra) and Bonsor (supra) cases in England and the case of Orchard v. Tunney (supra) in Canada. The intrusion of the court into the internal affairs of trade unions had been justified by the courts on the ground that it is not an enforcement of the rules of its constitution but merely an intervention to place members in a position where they can call upon their union to enforce the rights accorded to them under its rules.

It was quite proper for the union in this case to make provision in its constitution for penalties to be imposed upon members found guilty of breaches of its provisions. However, the issue here is not whether the penalty rule was unlawful but whether the appellant can call upon the courts to enforce it.

As Grunfeld pointed out in his text, "Modern Trade Union Law", (Street & Maxwell, 1966), at page 70, if the rule books were held to be enforceable, it would have wide implications upon society. I quote an excerpt from his text at page 70:

> "Theoretically, therefore, it would be open to a union to sue members in the courts for subscriptions or fines and to ask the courts to enforce a union strike against disobedient members by an award of damages or an injunction. There would, it is true, be technical difficulties in the path of a union bringing such suits: in particular, the injunction, being a purely discretionary remedy, might be refused entirely in this type of case. Besides, British trade unions would not, in practice, wish to assert such legal rights. Basically, they are still voluntary associations, the ties of solidarity in which are not capable of being maintained by county or High Court actions. Nonetheless, the mere theoretical possibility of such actions being brought, of being thus intimately involved in support of industrial union action, may well be sufficient to induce the courts not to hold union rule books to be in reasonable restraint of trade at common law, however illogical the finding of unreasonableness may now appear."

The effect of s. 4 is that if the union is registered, the provisions of the Act cannot be used to enforce, inter alia, the payment of a subscription or a penalty prescribed in its constitution even though lawful at common law. In England trade unions with unlawful objects, such as provisions to take strike action in certain instances to obtain their goals, are in unlawful restraint of trade at common law and their existence is legalized only by s. 3 of the Trades Unions Act of 1871. Grunfeld speaking of the enforcement of disciplinary measures through fines stated at page 77:

> "(2) Internal union discipline: the fining rule. An action by union officials to enforce payment of a fine imposed in strict accordance with the rules is a non-starter by reason of section 4. On the other hand, that section ought not in principle to bar an action brought by a union member to prevent a fine being imposed on him in breach of the rule book or of the doctrine of natural justice. An action for an injunction of this kind directly enforces the union's fining rule as little as the action in Y.M.A. v. Howden directly enforced the benefit rule there. Two Scottish decisions to the contrary are, in my respectful submission, unsound, since they conflict with the clear implications of the House of Lords' interpretation of section 4 in Howden's case."

And also at page 85:

> "(c) As to the fining rule
> The courts will not entertain proceedings by a union or its officials against a member for specific performance of the fining rule, i.e., for payment of a fine duly imposed on the member in accordance with the fining rule. The remedies of damages and the injunction are, again, irrelevant, the question of the possibility of a declaration being examined below. Here, too, the question arises whether a member may recover money already paid to meet a fine which had been imposed on him wrongfully in violation of the rule book. In principle -- for there is no decision on the point -- the action for restitution in quasi-contract should lie. If an injunction may be granted to prevent the imposition of a fine in breach of the fining rule and so maintain the status quo under the rule book, it follows, in my opinion, that repayment may be ordered of a wrongly imposed fine to the same end of restoring the status quo ante."

The following is a statement of the law found in "Halsbury's Laws of England," (3rd) vol. 38 at pp. 373-378 respecting the jurisdiction of courts to enforce payment of penalties imposed upon union members and other agreements specified in s. 4 of the Trade Unions Act:

> "647. Where no action lies. Though agreements made by trade unions illegal at common law only on the ground that they are in unreasonable restrain of trade are made lawful, the court is not enabled to entertain any proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, made by such a trade union whether registered or unregistered, and whether the action is brought by a member or by some person claiming in his place: -- Any agreement between members of a union as such concerning the conditions on which any members for the time being shall or shall not sell their goods, transact business, employ or be employed;
> (2) Any agreement for the payment by any person of any subscription or penalty to a union; ..."
> "649. Powers of court in respect of unenforceable agreements. The agreements so specified remain nevertheless lawful. There appears to be nothing to prevent a court from declaring the meaning of any agreement or rule, even though it cannot grant consequential relief, and the court will entertain proceedings to determine whether in given circumstances the rules authorise the payment of strike pay, or superannuation benefits, the institution of legal proceedings in the interests of members, the giving of legal aid, expulsion, or the promotion of a newspaper, or proceedings to establish the right of persons interested to inspect the books by an accountant, or to ascertain the proportions in which the funds should be distributed on a dissolution."
> "650. Meaning of direct enforcement. The court cannot make an order entitling a member to participate in the funds of a union, or for the administration of such funds. An action for an injunction to restrain a trade union from acting ultra vires or illegally, or to restrain members from applying the funds of the union in a manner inconsistent with the rules is, however, maintainable, as is an action for damages against a union for wrongful expulsion of a member or for an injunction restraining the union from expelling threatening to expel a member, except where the member is itself a trade union. In none of these cases is an agreement to provide benefits directly enforced, for such proceedings need not have either the object or the effect of involving the administration of the funds or their application to provide benefits."

Although there are many differences between the statute and common law in England and their counterparts in Canada in the manner in which this subject is dealt with, yet the development of the laws respecting the rights and liabilities of trade unions in both countries has evolved in much the same way. Accordingly, it is not by chance that the above statement of Halsbury also expresses generally the Canadian position.

The constitution of a union as an organization is the sine qua non of its existence and since the Canada Labour Code recognizes a trade union, whether or not it is certified or registered as a legal entity for the purposes therein set out, it follows that the agreement of its members comprised in its constitution is a lawful contract. The union's status is not that of a corporation, although it has many of the attributes of such an artificial person. Its status as a legal entity under the Code is that of a voluntary association endowed by it with the special powers necessary to permit it to accomplish its legitimate objects through its rules, and while acting in that capacity it is subject to the same limitations and liabilities as private individuals in our society. Likewise, when registered under the Trade Unions Act, it can act in its own name in its dealings with others and in regulating its internal affairs to the extent permitted under that statute. Its constitution, however, is that of a voluntary association with the added privilege of representing itself and its members in its own name, and in that capacity it possesses the powers of such an association to enforce its rules.

The appellant, although not registered, is nonetheless a trade union by definition and, in fact, it having been certified as a bargaining agent under the Canada Labour Code. By virtue of its certification it is given, inter alia, bargaining rights and the right to strike. By implication, it is also given the incidental powers necessary to carry out the functions for which it was certified. Clearly, the right to be organized as a trade union under a constitution and the right to enforce its rules, are foremost amongst these incidental powers. Traditionally, as I have stated, trade unions have governed their own internal affairs and were able through rules in their constitutions to enforce their disciplinary provisions. While courts will intervene in the internal affairs of unions from time to time to insure that the rights granted to a member under the constitution of his or her union are given effect by the union, such intervention may not be made for the purpose of directly enforcing the rules of the union. It would seem to follow that if the rules were indirectly enforced by the court this would not run counter to the prohibition against enforcement set out in s. 4 of the Trade Union Act in the case of a registered union. Be that as it may, if in this case the trial judge had ordered that judgment be entered for the appellant, in my view, this would be a direct enforcement of its rules respecting the imposition of penalties upon its members.

There is no doubt an overlap between the two Acts, but together they provide the powers necessary for a trade union to fulfill its role as protector of the rights of its members amongst themselves and as bargaining agent for the employees in its unit. Prior to the enactment of the Trade Unions Act, trade unions with objects considered unlawful at common law as being in restraint of trade did not possess the power to enforce their rules in court. The respective legislators of the Trades Unions Act, 1871 in England and its counterpart in Canada, undoubtedly realized the importance to a trade union of the power of enforcement of its rules; but rather than give that power to them, they each enacted provisions that nothing in their respective Acts was to be construed as rendering the rules of a trade union unlawful. This did not mean that the effect of registration of a union is to deprive it of a vested or previously held right to enforce its rules in a court of law. If that were true, it would place the unregistered union in a more favourable position to enforce its rules than a registered union. As Lord MacDermott stated in the Bonsor case (supra) it was not the intention of the legislature to allow a union to circumvent that part of s. 4 of the Act by simply not registering and by framing its rules so that the members were contractually bound by them. Accordingly, I am satisfied that the appellant did not have the power to enforce its rules in a court of law, either at common law as an unregistered union or by virtue of its status as a certified bargaining agent under the Canada Labour Code.

If, contrary to my finding herein, the appellants were held to be entitled to bring this action merely because it was unregistered and hence not subject to s. 4, it may well be that the suit should have been taken

in a representative capacity as required of voluntary associations, as I have some doubt whether its quasi corporate status would permit it to sue its members in its own name in these circumstances.

Other than in the case of a statutory penalty the question of the enforceability of a penalty in court generally arises in actions for breach of contract wherein some monetary detriment or forfeiture is imposed upon the defaulting party. The general rule is that penalties are unenforceable, although there are some exceptions which are not relevant to this appeal. In considering whether such detriment or forfeiture may be a penalty or liquidated damages, Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd., (1915) A.C. 79 enunciated the following statement of law as a guide to a determination of the question, at page 713 of his judgment:

> "1. Though the parties to a contract who use the words "penalty' or "liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda, (1905) A.C. 6).
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (Public Works Commissioner v. Hills, (1906) A.C. 368, and Webster v. Bosanquet, (1912) A.C. 394)."

Ogus in his text "The Law of Damages" published by Butterworths, 1973 at page 41 referred to the above quoted statement of Lord Dunedin and declared:

> "This requires little comment. The notion that a party may be punished for failing to perform his contractual obligations is repugnant to a system of law which subscribes to a general compensatory principle of damages. Exemplary damages are not recoverable for breach of contract. Consistently English law regards the punitive element in no more favourable a light when it is the subject of a contractual agreement. 'Caveat promisor' is not a reliable precept in this context."

Apart from the question as to whether any court of law can enforce a penalty imposed by a trade union, the other issue in this appeal is whether a penalty could be classified as a debt under The Small Claims Act. It is evident that these penalties are not liquidated damages and the appellant has not so alleged. The word debt, in the legal sense, when used in the context of defining jurisdiction of summary courts to deal with matters of indebtedness, is defined in "Halsbury's Laws Of England", (3rd) Vol. 25 at page 183 as follows:

> "Various statutes render sums of money recoverable as civil debts. A magistrates' court has power to make an order on complaint for the payment of any money recoverable summarily as a civil debt; and any sum payment of which may be ordered by a magistrates' court is so recoverable except a sum recoverable on complaint for an affiliation order or an order enforceable as an affiliation order or a sum that may be adjudged to be paid by a summary conviction or by an order enforceable as if it were a summary conviction."

See the definition of 'debt' in "Strouds Judicial Dictionary" (4th) Vol 2, page 696:

> "A 'debt' is a sum payable in respect of a liquidated money demand, recoverable by action (Rawley v. Rawley, 1 Q.B.D. 460; see Seldon v. Wilde (1910) 2 K.B. 9, cited JUDGMENT); the word can but seldom be construed to include damages for breach of covenant (Wilson v. Knubley, 7 East. 128, cited SPECIALTY: see Varlo v. Faden, 1 D.G.F. & J. 211, cited DEBTS; Westcott v. Hodges, 5 B. & Ald. 12). See LIQUIDATED DEMAND."

And civil debt, vol. 2, page 470:

> ""A 'civil debt' (Summary Jurisdiction Act 1879 (c. 49), s. 6) was 'a sum of money claimed to be due' before the commencement of the proceedings to recover it, and does not include a fine or penalty not due to anybody until the magistrate has adjudged its amount (R. v. Paget, 8 Q.B.D. 151; see also Mellow v. Denham, 5 Q.B.D. 467; R. v. Steward (1899) 1 Q.B. 964, cited SHIP). See CLAIMED, Cp. JUDGMENT DEBT."

I am of the view that the concept of actionable debt considered by the framers of the Small Claims Act is that expressed in the above definitions. It is also in accord with the meaning ascribed to the word 'debt' by the learned trial judge.

If penalties were classed as debts, under a more general definition of the word, I would then have to consider whether the trial judge could enforce payment of those of the kind imposed upon the respondents. Upon applying the principles respecting the enforceability of penalties in contracts above enunciated, I am bound to conclude that these particular penalties, derived as they are from the contract comprised in the appellant's constitution, cannot be enforced in a court of law.

If, however, the penalties derive not from the constitution of a voluntary association, but from the rules of a legal entity with quasi corporate status then different considerations will apply. I have found that the appellant is indeed a legal entity in its own right by virtue of its status as a certified bargaining agent. Although it has been held that this status allows such a trade union to sue and be sued in tort, and permits the court to intervene in an action taken by a member against it in its proper name, there has been no precedent that I am aware of which has declared that the rules of a trade union have the force of law. If this were the case, an unregistered trade union would have a legal status approaching that of a corporation, even to the extent of a limitation of liability of its members with its rules being the equivalent of 'articles of association'. The provisions of the Canada Labour Code do not confer upon certified unions the right to enforce penalties imposed by it upon its members in court and I cannot find any language in the statute which may be interpreted as implicitly granting such a right.

The appellant alleges that it is entitled to recovery of these penalties as debts. To meet the definition of a civil debt, which arises out of a contract, the claim must be either for a specific amount stipulated in the contract, or an amount ascertainable from the terms of the contract by the parties by arbitration or in a court of law. The penalties imposed in this case do not meet any of those criteria. The sections in the appellant's rules which establish penalties for breach of its mandatory provisions leave their calculation entirely in the hands of other members of the union. In my view, apart from any consideration of the question whether a penalty imposed by a trade union could qualify as a debt, it would be contrary to public policy to require the courts to enforce payment of a monetary penalty whose limits are not fixed. In such a case as this, it was open to the appellant through the procedure in its constitution to set the fine at any amount it chose and in cases where the fines imposed may be inordinately excessive, the court would be required to enforce unjust penalties without having the right or power to review or adjust of them.

While there are circumstances in which parties to an agreement may pre-determine a penalty to be paid by a defaulting party, and the penalty will be enforced by action in court as a debt or as liquidated damages, a

penalty which is to be determined after the breach by the party claiming to be wronged, cannot be so classified. It cannot be said that the fine imposed in this case was an amount agreed upon by the parties to the appellant's constitution since it was not specified therein, or otherwise made known to the respondents prior to the alleged breach. For these reasons alone, it is clear that the fines cannot be regarded as debts within the meaning of The Small Claims Act. Accordingly, I uphold the finding of the trial judge that the penalty imposed by the appellant was not enforceable at law. In summary I find:

1. That the trial judge had no jurisdiction to enforce payment of the monetary penalties imposed upon the respondents by the appellant, since there was no authority to do so either at common law or by statute.
2. That a penalty of the nature which the appellant sought to enforce is not a debt within the meaning of The Small Claims Act.

This appeal is dismissed with costs for the respondents.