

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

NORTH SHORE TAXI (1966) LTD.

(the "Employer")

-and-

TEAMSTERS LOCAL UNION NO. 213

(the "Union")

PANEL: Brent Mullin, Vice-Chair

COUNSEL: Israel Chafetz, for the Employer  
David B. Stevenson, for the Union

CASE NO.: 13760

DATE OF HEARING: January 20, 1993

DATE OF DECISION: January 29, 1993



## **DECISION OF THE BOARD**

### **I. NATURE OF THE APPLICATION**

This is the first application under Section 68 of the *Labour Relations Code* received by the Board. In general terms, Section 68 proscribes the use of replacement workers by an employer during a lockout or strike.

The application immediately raised two issues of importance:

1. the Board's procedural approach to Part 5 applications, and
2. the applicability of the presumption against retrospectivity to Section 68 of the Code.

### **II. THE BOARD'S PROCEDURAL APPROACH TO PART 5 APPLICATIONS**

The Union applied under Section 68 of the Code on January 18, 1993. It requested an expedited hearing of the matter on January 20, 1993 commencing at 9:30 a.m. at the Board. It was not contested that the Union properly served the Employer with the application.

As a preliminary matter at the hearing, counsel for the Employer requested an adjournment. He advised the Board that, in response to the Union's application, the Employer had initially obtained other counsel. However, that other counsel was not available for the hearing. As a result, the current counsel was then retained by the Employer. That was at 4 p.m. the day prior to the hearing. Counsel said he had been retained over the telephone and did not know the history of the case. He met his client for the first time at 8 a.m. the morning of the hearing. In those circumstances, he requested an adjournment.

The Employer submitted that this was not an expedited matter, such as specifically found in Section 5(2). It was submitted that since the strike had been ongoing for 11 weeks, a few

more days would not unduly prejudice the Union.

The Union opposed the application for an adjournment. It submitted that it was reasonable to presume that the Employer was aware of the pending change in the law because both press reports and the mediation process between the parties ought to have made it aware.

In their submissions, the parties advised the Board of their availability. It was apparent that the next mutually available date for the parties and their counsel was 12 days away.

In the circumstances, I rejected the Employer's adjournment request, but gave counsel for the Employer until 4 p.m. that day to prepare his case. In making that ruling, the fact that this was a Part 5 application weighed heavily. The Board's Rules provide for the expedited hearing of a Part 5 complaint at the date and time the applicant wishes, though at least 24 hours after service of the complaint (Rule 27). I also said that I did recognize, however, that this was the first Section 68 application under the new Code.

I reminded the parties of the practice of the former Labour Relations Board and the Industrial Relations Council regarding expedited applications and adjournment requests. I said that practice had been neatly summarized in *Bhandal Drywall Ltd.*, BCLRB No. 42/86 (reconsideration of BCLRB No. 315/85), and I was going to follow that practice here. In that decision, the former Board stated:

A feature of most of the Board's expedited procedures is the unilateral fixing of dates for meetings and hearings by the Board without taking into account the calendars of the parties or their counsel. In order to achieve the desired policy of expedition, it is necessary to take this approach for two reasons. First, the resources of the Board are not unlimited and the availability of adjudicative panels of the Board is limited by the availability of the Chairman and the Vice-Chairmen. Great difficulty is often encountered in having the necessary adjudicators available to meet the time frames contained in the various expedited procedures. Second, and particularly having in mind the limited resources of the Board, the Board's experience in setting down expedited dates on a consensual basis has not been positive. This is particularly so where the expedited date is some two or three weeks in the future as parties not faced with a certain date for the hearing take longer

to obtain counsel and counsel once retained enter into negotiations for dates that are advantageous to either their calendars or their client's. Aside from being time consuming and generally unproductive, this process also tends to engender suspicion, if not acrimony, between the parties. Rather than face these consequences and in order to meet the policy objective of expedition, the Board has opted to fix dates unilaterally and, as a general rule, to change those dates only where the consent of all parties is obtained. The latter rule is not a hard and fast one, as it must in the interests of natural justice, be tempered by considerations beyond the control of the parties such as the unavailability of a crucial witness or the sudden illness of counsel. Faced with such exigencies the Board in deciding on the appropriateness of an adjournment must balance the competing interests and even where an adjournment is considered appropriate, it may impose certain terms or conditions on the granting of the adjournment to minimize the prejudice suffered by the opposing party. (p. 9)

In general, that policy and practice will continue to be followed by the current Board.

In the circumstances in this case, the Employer's reaction to the Union's application was not adequate. The Union had complied with the Rules in the filing of its application and the setting of the time and place for the hearing. As well, the application itself must not have been a surprise to the Employer. Given all of the factors, including the awkward spot in which counsel for the Employer found himself, I was prepared to adjourn the matter only until 4 p.m. that same day, at which time the matter was to proceed unless the parties themselves reached agreement otherwise.

### III. SECTION 68 AND RETROSPECTIVITY

#### 1. Background

The hearing recommenced at 4 p.m. on January 20, 1993. At that time the parties were required to exchange opening positions. Through that exchange, it became apparent that a

significant number of matters were not in dispute. Included in that was the fact that the Employer had hired replacement workers since the onset of the strike, but prior to the proclamation of the Code on January 18, 1993.

It was agreed that fact produced a transitional issue with respect to the possible retrospective application of Section 68 in the circumstances. The parties agreed that issue would be argued then, with the remainder of the Union's application adjourned to February 1, 1993.

The background to the matter is as follows:

- (i) The Union was certified on March 31, 1987 by the former Labour Relations Board of British Columbia as the bargaining agent for a unit of employees of the Employer described as "employees except the cab drivers."
- (ii) The individuals employed in the bargaining unit include dispatchers, telephone workers, office workers, and maintenance employees. At the time of the commencement of the strike, there were approximately 17 employees in the bargaining unit. They worked at the Employer's premises at 250 and 264 Pemberton Avenue, North Vancouver.
- (iii) The last collective agreement between the Union and the Employer had a term from October 1, 1989 to September 30, 1992.
- (iv) The Union and the Employer commenced negotiations on or about August 18, 1992 for a renewal of the collective agreement. The parties bargained collectively, including using the services of a mediation officer.
- (v) On November 9, 1992 the Union commenced a lawful strike against the Employer.
- (vi) Since the commencement of the strike, but prior to proclamation of the Code, the Employer has utilized the services of persons who were not hired or engaged as of the date on which collective bargaining began and who are performing some of the

work of the striking employees.

2. Issue

The issue is whether the application of Section 68 of the Code to the circumstances of this case raises the presumption against retrospective application of legislation.

3. Positions of the Parties

The Union says that the statute need not be applied retrospectively in order for the application to succeed. Although the replacement workers were hired prior to the proclamation of the Code, every day they provide services in the nature of the former work of the striking employees is a new event. Thus, the Union need only rely on the events of January 18, 1993 and on; i.e. a purely prospective application of the statute.

In the alternative, and this was the main thrust of the Union's argument, the Union says that Section 68 operates only from the date of proclamation of the Code, but in doing so it can properly rely upon acts prior to the proclamation of the legislation. A key element in considering that retrospective application is the purposes of the Code. The Union says that the retrospective application of Section 68 supports, and is supported by, the purposes of the legislation as set forth in Section 2 of the Code. In particular, the Union relies upon point 4 in Driedger's summary of the law with respect to retrospectivity (Driedger, "*Statutes: Retroactive Retrospective Reflections*", Can. Bar Rev. (1978), Vol. LVI, 264 at p. 276, hereinafter "*Driedger*"). *Driedger* states:

4. The presumption [against retrospective application] does not apply if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event.

The Union says that a retrospective application of the section is justified under this exception to the presumption against retrospectivity, on the basis that Section 68 is a provision which operates in the public interest.

The Union also relies upon the *Recommendations for Labour Law Reform*, submitted by the Sub-committee of Special Advisors to the Honourable Moe Sihota, Minister of Labour (September 1992, hereinafter the "Report"). In the Report, both John Baigent and Vince Ready supported a prohibition against replacement workers on a social policy and public good basis. The other Sub-committee member, Tom Roper, disagreed.

The Employer says that the Union is seeking a retrospective application of Section 68 and that the presumption against retrospectivity applies. It says that it is not just the Employer's rights which would be affected here; there are individuals who will lose their jobs. If the section is given retrospective effect, they will be fired.

The Employer relies, in particular, upon the Council's analysis of retrospectivity in *Horizon Electric Ltd.*, IRC No. C87/89. Following the reasoning in that decision, it says that there is a retrospective application of Section 68 being sought, which would interfere with the vested rights of the Employer and the employees, and the language in the legislation is ambiguous with respect to retrospective application. In particular, that ambiguity should be contrasted with clear evidence of the Legislature's intention, such as found in Section 17 of the *Labour Code Amendment Act, 1984*. As well, all the "triggering events" here (namely, the notice to bargain, collective bargaining, a strike, and the hiring of replacement workers) were prior to proclamation, as well as third reading of the Bill. The Employer says that it would not be fair to apply Section 68 retrospectively in these circumstances.

In further support of its position, the Employer relies on *Focus Building Services Ltd.*, IRC No. C88/87; *Brosseau v. Alberta Securities Commission* (1989), 35 Admin. L.R. 1 (S.C.C.); *Re Canadian Association of Industrial Mechanical and Allied Workers and Director, Employment Standards Branch, et al.* (1992), 91 D.L.R. (4th) 219 (B.C.S.C.); and *Zoltan Strigan*, BCLRB No. 138/85.

In reply, the Union says that it is not suggesting that anyone be fired. The prohibition in the statute is against the performance of "services." The statute does not require that any individual be fired and the Union is not requesting that. The Union also says that the determination of the Council in the *Horizon Electric Ltd.* decision was made because it was found to be consistent with the purposes and objects of the legislation. The Union says the same is true

here with respect to the retrospective application of Section 68 and the purposes of the legislation in Section 2 of the Code.

Lastly, the Union relies in particular upon an authority referred to within the Supreme Court of Canada's decision in *Brosseau v. Alberta Securities Commission, supra*. That case is *Re Solicitor's Clerk*, [1957] 3 All E.R. 617 (D.C.). There, a statute was amended so as to disqualify a person from being a solicitor's clerk if the person had been convicted of larceny or some other such crime. A clerk who had been convicted of one of those offenses before the passage of the new law was ordered disqualified on the basis of the new law. He argued that the law had been improperly given a retrospective effect. The Court dismissed the argument, holding that there was no retrospective effect since the real aim of the law was prospective and aimed at protecting the public.

#### 4. Analysis

It is necessary at the start to define the concept of retrospectivity. Driedger is the leading non-judicial authority on this subject. He has been generally cited with approval by the Supreme Court of Canada (see *Brosseau v. Alberta Securities Commission, supra*, pp. 18-19). Driedger defines retrospectivity most helpfully when he distinguishes it from retroactivity:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. (*Driedger*, pp. 268-269)

I find that, at least at first blush, the Union is seeking a retrospective application of Section 68 of the Code. The fact situations relied upon in applying Section 68 (namely notice to bargain, collective bargaining, a strike, and the hiring, after either the notice to bargain or actual bargaining, of persons to perform some of the work of the striking employees) all occurred

before proclamation of the Code. The issue of retrospectivity is therefore properly raised.

The question is whether Section 68 is to be given effect if it depends upon occurrences before it was proclaimed. In addressing this issue, we are looking for "the intent behind the particular piece of legislation" (*Nova, An Alberta Corporation v. Amoco Canada, Petroleum Co.*, [1981] 2 S.C.R. 437, as cited in *Brosseau v. The Alberta Securities Commission, supra*, p. 18). In that regard, "[t]he general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act" (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, as cited in *Brosseau v. Alberta Securities Commission, supra*, p. 18). Ambiguity in the language of the statute will give rise to the presumption against retrospective effect (*Re Althumney*, [1898] 2 Q.B. 547, p. 552).

The rigour of the law's approach in that regard can be felt in the comments of the Supreme Court of Canada in *Angus v. Hart, et al.; Sun Alliance Insurance Co., Third Party* (1988), 52 D.L.R. (4th) 193. That was a case in which the law changed to allow spouses to sue each other in tort. The change in the law occurred after an automobile accident in which a wife was seriously injured as a result of her husband's alleged negligence. The Court refused to allow the legislation to be applied retrospectively. It held:

...The rule against retrospective application should certainly have effect in a context such as the present one, where a party is deprived of a defence to an action by the operation of the new statute: see *Foy v. Foy* (1978), 88 D.L.R. (3d) 761 at p. 762, 20 O.R. (2d) 747 at pp. 747-8, 9 C.P.C. 141 (C.A.), *per* Jessup J.A. *in obiter*. This is the whole point of the presumption. The law is leery of retrospective legislation to begin with; the legislature will not lightly be presumed to have intended a provision to have retrospective effect when the provision substantially affects the vested rights of a party. (p. 201)

However, as the Supreme Court of Canada notes, "[w]hile the presumption against retrospective effect is clear, there seems to be a great deal of confusion among the authorities and case law as to what constitutes such an effect" (*Brosseau v. The Alberta Securities Commission, supra*, p. 17). Some of that confusion has, fortunately, been reduced by Driedger in his text,

when he explains:

...there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption. (Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), p. 198, hereinafter "*Driedger, Construction of Statutes*")

With respect, particularly regarding the third kind of statute identified, this is a clearer and more accurate statement of the law than arises from the formulation earlier in Driedger's article (see *Driedger*, p. 271). That is important for this case and will be explained below.

In light of the above, I turn firstly to the Code itself. In doing so, I do not find support for a retrospective application of Section 68 either "expressly or by necessary implication" (*Gustavson Drilling (1964) Ltd., supra*). Most notably, the legislation as a whole stands in marked contrast to Section 17 of the *Labour Code Amendment Act, 1984* which stated:

#### 17. Conflicts

Where any right or obligation acquired, accrued, accruing or incurred under a provision repealed by this Act or under a provision of a collective agreement is inconsistent with or in conflict with any requirement contained in or made under the amendments made by this Act, the requirement contained in or made under those amendments prevails.

The language in that section followed, but in effect reversed, the general provision in Section 35(c) of the *Interpretation Act*, R.S.B.C. 1979, c. 206, which states:

35. Where an enactment is repealed in whole or in part, the repeal does not

...

- (c) affect a right or obligation acquired, accrued, accruing, or incurred under the enactment so repealed;....

(see *Bombay Palace Inc.*, BCLRB No. 263/84, (1984), 6 CLRBR (NS) 391, at 395.)

The transitional provisions in the current *Labour Relations Code* stand in sharp contrast to Section 17 of the *Labour Code Amendment Act, 1984*. The operative transitional sections in the Code are Sections 160 through 163. With the exception of a specific provision regarding membership cards (Section 162), the transitional provisions in the Code do not specifically address occurrences prior to the Code, conflict with the previous state of the substantive law, or retrospectivity. The statute as a whole thus does not support a retrospective interpretation and application of Section 68 either "expressly or by necessary implication."

I find the specific provisions in Section 68 itself to be similarly ambiguous. The relevant test is from *Driedger*. He says:

It is perhaps dangerous to generalize, but the position appears to be that whenever the operation of a statute depends upon the doing of something or the happening of some event, the statute will not operate in respect of something done or in respect of some event that took place before the statute was passed; but if the operation of the statute depends merely upon the existence of a certain state of affairs, the *being* rather than the *becoming*, the statute will operate with respect to a status that arose before the passing of the statute, if it exists at the time the statute is passed.... (See *Driedger* at n. 17 on p. 267)

However, *Driedger* notes "the frailty of language" in trying to determine "whether the words in a statute setting forth a fact-situation are intended to describe an event or a characteristic." (*Driedger*, p. 268). It is thus very difficult, and risky, to try to infer legislative intent in that circumstance. He gives this example:

...suppose a statute applied to a "person who was employed on January 1, 1970". It is impossible to tell from those words alone

whether the person described is one who took employment that day (event) or one who on that day was an employee (characteristic). (*ibid.*)

I find the specific language in Section 68 to be like that in Driedger's example above. It is ambiguous. It could be construed as either an event or a characteristic. Consider Section 68(1)(a), which states:

(a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins....

Does the language describe an event (namely, the hiring after a certain date) or does it describe a characteristic or status (namely, that of being a replacement worker -- though one hired after a certain date)? The question cannot be confidently answered either way. I thus find the language in the section ambiguous with respect to retrospective application.

Part of the reason why the language is ambiguous (regarding whether it denotes a characteristic or an event) may be because of the unique nature of the collective bargaining regime under the legislation. It is very time driven -- almost in a lock-step fashion. There is notice to bargain, followed by negotiations. After attempting to reach a collective agreement, the parties then have the right to engage in "economic warfare" via strike or lockout or both. All of these occurrences are "events" in the sense that they can only occur at certain times and in accordance with certain requirements being met. Yet, once the event has occurred, the characteristic or status arises.

In the new Code, the restriction on the use of the services of a replacement workers is related to various factors (such as the hiring in Section 68(1)(a)). These factors are defined by the Code in terms of time, place, certain occurrences and requirements; i.e. exactly as one would expect in a statute that governs all aspects of collective bargaining. Only when these factors have been satisfied is the employee a replacement worker.

It may be that in this unique context, the replacement worker provisions in Section 68 refer to both events and status. It is interesting that Driedger finds his example for the "frailty of

language" in the employment context. In my view, the difficulty inherent in his example is heightened in the time and event driven and defined context of both collective bargaining and disputes under the legislation and Section 68 as a part of that. The relevant language in Section 68 does not either "expressly or by necessary implication" refer to simply a characteristic or status, as opposed to an event or on-going series of events. Had the Legislature wished to apply Section 68 to ongoing strikes and use of services, it could easily have done so. It did not do so and it is not my place to read such an intent into the legislation.

I also do not accept the Union's argument that hiring in the terms of Section 68(1)(a) prior to January 18, 1993, on that day and thereafter becomes a new event. The "services" are provided anew each day, but that is not the issue with respect to retrospectivity. The fact situation at issue is the hiring or engaging of the replacement workers after the earlier of either notice to bargain or actual bargaining. In this case, that occurred after the earlier of the notice to bargain or actual bargaining, but before proclamation of the Code. That raises the retrospectivity issue. In general, I do not accept that each day the replacement workers provide "services" in the nature of the former work of the striking employees, that they are notionally "hired" or "engaged" anew as a fresh event that day. To be "hired or "engaged" to provide services normally implies a continuing relationship for either a certain term or a term of indefinite duration. Unless the facts of the hiring actually are that the replacement workers are hired day-to-day, or in some other actual manner new or afresh on or after January 18, 1993, I cannot accept the Union's argument. The Union in this case did not dispute that the hiring occurred prior to proclamation. Its argument was purely a legal one; namely, that I view the replacement workers' continued employment as if they were freshly hired or engaged on January 18, 1993 and every day thereafter. I do not accept that argument.

It is argued that Section 68 is purely prospective and that it only restricts the services of a person hired or engaged when they provide services on or after January 18, 1993. But to view the language in that way ignores the fact that such "services" have been expressly tied in by the legislation to the times and occurrences (the hiring) referred to in Section 68(1)(a).

It is the use of these prior occurrences, and the prejudicial consequences that attach to them, which raise the question of whether the Legislature intended the section to apply to strikes and hiring that occurred prior to the proclamation of the Code. I have not found that intention

"expressly or by necessary implication" in the Code generally or Section 68 specifically. As a result, the presumption against retrospectivity arises.

However, the Union says, and it was the main thrust of its submission, that the presumption against retrospectivity does not apply here because Section 68 is an enactment in the public interest. The Union relies on point 4 in Driedger's summary (*Driedger*, p. 276, see above and discussion below). In response, the Employer says that to give retrospective application to Section 68 here would strip the Employer, and the individuals employed by it as replacement workers, of "vested rights." In effect, the Employer relies on point 3 in Driedger's summary, which states:

3. The presumption [against retrospective application] does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability, or duty. (*Driedger*, p. 276)

It was conceded in argument that the change from the *Industrial Relations Act* to the provisions regarding replacement workers in the *Labour Relations Code* was not merely procedural but involved substantive rights of the Employer, which existed up until the time of proclamation. I am satisfied that the former rights of an employer to hire and use replacement workers during a strike or lockout fall within the kind of "matters of substance" which can give rise to the presumption against retrospectivity (*Bhindi and London*, BCLRB No. 10/85, p. 3). Alternatively, they are in the nature of accrued rights, as referred to in Section 35(c) of the *Interpretation Act*.

I find that the Employer satisfies point 3 in Driedger's summary in that the consequences of the legislative amendment are prejudicial to the Employer. In Driedger's terms, they create "a new . . . disability" for the Employer. Whereas the Employer formerly could hire replacement workers without legal consequence (with the exception of professional strike breakers), as of January 18, 1993 it cannot do so. That, however, does not necessarily answer the Union's position relying on Driedger's point 4.

To repeat, the Union's position is that the presumption against retrospectivity does not apply to Section 68 of the Code because it is an enactment in the public interest. In that regard,

the Union relies primarily on the relationship of Section 68 to the purposes of the legislation as set forth in Section 2 of the Code.

Although this was not argued, I think it should also be stated that it has been recognized at the highest judicial levels that comprehensive labour relations legislation such as the Code is legislation in the "public interest" (*Bakery and Confectionary Workers' International Union of America, Local No. 468, et al. -and- White Lunch Limited -and- the Labour Relations Board of British Columbia*, [1966] S.C.R. 282, at p. 292). I concur with that. I find, however, that it does not provide an answer to the retrospectivity issue here. There are two reasons.

The first reason is that the public interest or public protection exception to the presumption against retrospectivity does not apply to Section 68 of the Code. Section 68 falls within the second kind of statutes in Driedger's analysis, not the third. In Driedger's analysis (*Driedger, Construction of Statutes*, p. 198), the public interest or protection exception arises where the prior event at issue has already attracted a penalty. In that circumstance, the presumption against retrospectivity will not apply with respect to a further penalty if that further penalty is in the public interest or protection. The case the Union relies upon in reply, *Re Solicitor's Clerk*, is an example of that kind of situation: so is the Supreme Court of Canada's decision in *Brosseau v. Alberta Securities Commission*. In contrast, if Section 68 of the Code was given retrospective effect in the circumstances here, it would for the first time, "attach prejudicial consequences to a prior event" (*ibid.*), i.e. to previously lawful conduct. The "prior event" is the hiring or engaging of replacement workers prior to the proclamation date of the Code. The "prejudicial consequences" are the making unlawful what was once lawful.

It is one thing to attach a new prejudicial consequence, in the public interest, in respect to an act which was wrongful in the first instance. Thus, an individual convicted of a criminal offence may, by the subsequent enactment of legislation, be prohibited in the public interest or protection from being a solicitor's clerk or from trading in securities. The presumption against the retrospective application of legislation is not attracted in that circumstance. *Re Solicitor's Clerk* has been applied to a narrow category of public protection cases.

In fact, Driedger clarified his third category of statutes to restrict the application of the public protection exception to further penalty situations. In his article, he describes these kinds

of statutes as follows:

Thirdly there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; these do not attract the presumption. (*Driedger*, p. 271)

In his text, he states:

Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended *as further punishment* for the event; these do not attract the presumption. (*Driedger, Construction of Statutes*, p. 198, emphasis added)

According to Driedger, the third category applies where there has been wrongful conduct in the prior event when it occurred. Without that redefining of the category, the public protection or public interest nature of legislation could virtually always oust the concern with respect to retrospectivity. That would not be consistent with the principles established in this area by the Supreme Court of Canada, upon which I have relied here.

In the second category of statutes, the previous fact situation does not necessarily have in it wrongfulness at the time. In that category, the public interest is not at issue. The presumption against retrospectivity arises, but it can be rebutted. It can be rebutted not by the public interest (which one would think would be the intent of virtually every significant legislative enactment), but by a clear expression of legislative intent.

In this case, we are dealing with the second category of statutes. There is previously lawful conduct which is now attracting a prejudicial consequence. The Legislature can do that, but in law it must do so "expressly or by necessary implication."

That has brought me squarely to the second, and more basic, reason why the presumption against retrospectivity is not rebutted here. The Legislature has not "expressly or by necessary implication" indicated an intent that the presumption against retrospectivity should not apply to Section 68 of the Code. The express intent in Section 162 of the Code stands in sharp contrast to

the otherwise, in this regard, ambiguous provisions in the transitional sections and Section 68 itself. The Legislature exhibited clear intent with respect to prior matters in Section 162 regarding union membership cards signed prior to the proclamation of the Code. The Lieutenant Governor in Council also has the power to make regulations which could be effective regarding retrospectivity (Section 163). However, both the Legislature and the Lieutenant Governor in Council have not addressed the retrospective application of Section 68.

Even more marked is the absence in the Code of the kind of clear retrospective intent expressed in Section 17 of the *Labour Code Amendment Act, 1984*. The legislation here could easily and clearly have met the "expressly or by necessary implication" test, just as it did in 1984. It has not done so.

As a consequence, I find that the language of the statute does not support giving retrospective application to Section 68 of the Code and that the presumption against retrospectivity does apply in the circumstances of this case.

5. Conclusion

Because the legislation does not either "expressly or by necessary implication" make Section 68 of the Code retrospective in its application, Section 68 does not apply to replacement workers who were hired by the Employer prior to the proclamation of the Code. Conversely, the hiring of replacement workers by the Employer on or after January 18, 1993 will be subject to Section 68.

LABOUR RELATIONS BOARD

BRENT MULLIN  
VICE-CHAIR