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Submissions

of the C. J. L. Foundation

and

the Christian Labour
Association of Canada

to the

Royal Commission Inquiry
into Civil Rights
in the Province of Ontario

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The concern before this Royal Commission of Inquiry of the C.J.L. Foundation and the Christian Labour Association of Canada (whose principles and objectives are set out in Appendix A) is the position of the individual in the field of labour relations and the protection of his civil rights and basic freedoms.

The following submissions will be made:

1. That any form of *compulsory* unionism, as permitted by law and expressed in agreements between an employer and a trade union requiring that membership in or financial support of the trade union shall be a condition of employment, abridges the fundamental and constitutional rights of free speech and association, and the right to employment, i.e. the right and duty to seek and obtain employment without the imposition of arbitrary requirements.

2. That the incorporation of compulsory unionism into a collective agreement may and does in many cases constitute a form of discrimination because of political or religious conviction, and where this is the effect it should be declared unlawful.

3. That a procedure should be provided for the individual employee to pursue his own grievance and refer it to arbitration independently of the trade union, where compulsory union support is demanded by a collective agreement, or where the trade union is unable or unwilling to give adequate representation to that employee.

4. That there be a right of appeal from decisions of the Ontario Labour Relations Board on questions of law, so that important legal principles and the legal rights of parties before the Board are not determined by an administrative tribunal without recourse to the Courts.

These submissions will be dealt with in detail.

1. It is our submission that it is the duty of the Government to protect the God-given right of all citizens to employment. This right is fundamental and demands full freedom of opportunity for all to engage in occupations which they are able and willing to fulfill. The

failure of the Government to prevent compulsory unionism is a denial of this right and deprives men of their livelihood. As was said by Shylock in *The Merchant of Venice,* "You take my house, when you do take the prop that doth sustain my house; you take my life, when you take the means whereby I live."

The right that we refer to is of course the right to employment in a free society and not as it is understood in a totalitarian state. In the Marxist sense, the right to employment is interpreted as embracing a guarantee of employment by an all-powerful state which controls the means of production and the access to employment. In our free society, the phrase signifies the God-given right of every citizen freely to seek and retain the gainful employment which he desires, unfettered by the imposition of unreasonable or discriminatory conditions. Expression was given to this concept by Mr. Justice Douglas in *Borsky* v. *Board of Regents* 347 U.S. 442 (1954) at p. 472 as follows:

> **The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb.**

The right to employment is also recognized in the *Universal Declaration of Human Rights* approved by the General Assembly of the United Nations in 1948. Article 23 (1) provides that:

> **Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.**

In this context we are also concerned with the freedom of association — the right to join or refrain from joining a trade union. This right is recognized in the *Canadian Bill of Rights* as having existed in Canada and is declared to continue to exist without discrimination. An inherent corollary of the right to associate or the right to join is the right not to associate and not to join. Freedom rests on choice, and where there is no right to dissent or to dissociate, there is no freedom.

Article 20 (2) of the *Universal Declaration of Human Rights,* to which Canada subscribes and with which *The Ontario Human Rights Code* declares itself to be in accord, states

> **No one may be compelled to belong to an association.**

This principle is also embodied in Section 52 of *The Labour Relations Act* of Ontario, which states:

> **No person shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization. R.S.O. 1960, c. 202, s. 52.**

The United States Courts have recognized the same principle in interpreting the *Bill of Rights.* In *Board of Education* v. *Barnette* 319 U.S. 624 (1943), the case concerning the refusal of Jehovah's Witnesses to salute the flag, it was explicitly acknowledged that freedom of speech carries with it the freedom to remain silent. In *Santa Fe* v. *Brown* 101 P 459 (1909) the Supreme Court of Kansas said:

> **It would seem that the liberty to remain silent is correlative to the freedom to speak. If one must speak, he cannot be said to freely speak.**

Similarly, another American Court has held that "the freedom to associate of necessity means as well freedom not to associate."

Many arguments have been put forward in favour of compulsory unionism but none has justified the serious abrogation of civil and fundamental rights which it involves. It cannot be justified as a form of taxation for the support of a properly-constituted bargaining agent, because taxation is a sovereign power which may be exercised only by government, not by a political party or any other kind of private association. The right of the individual to be represented by the trade union of his choice is taken away by the majority vote of his fellow employees. Having been compelled to surrender this right, he certainly should not be compelled to surrender his other constitutional rights. The principle of majority rule should not be used as an excuse for the denial of fundamental rights, which are inviolate.

2. It is further submitted that *compulsory* union membership or support in some cases is a form of political and religious discrimination.

We are committed to the view that a trade union fulfills its proper task only when it seeks to put into practice Scriptural social principles. The religious principles of many people forbid or prevent them from lending support of any kind to an organization which is not committed to the Christian concept of labour relations, but which on the contrary is committed to a secular or to an anti-Christian view of life. Many trade unions adhere to the Marxist concept of unceasing war between what they conceive to be the managing and labouring classes. Some openly advance a materialistic theory of relations between employer and employee, and almost all are committed to a purely rationalistic or humanistic view of commercial enterprise and the relationships of those who participate therein. To compel these individuals to join or financially support such a trade union is effectively to impose on them a God-less ideology and thereby subject them to a specious form of discrimination.

Section 4 (2) of *The Ontario Human Rights Code* (Statutes of Ontario, 1961-62, Chap. 93) provides that:

> **No trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, nationality, ancestry or place of origin. R.S.O. 1960, c. 132, ss. 2, 3.**

In *Regina* v. *Ontario Labour Relations Board, ex parte Trenton Construction Workers Association, Local 52* [1964] 2 O.R. 376 McRuer C. J., referring to s. 4 (2), said, at p. 389:

> **On a strict interpretation it could be taken to mean that a union that forbids membership to persons who adopt a certain creed is not to be certified or it may mean that subscription to a particular creed as a condition of membership is a bar to certification. As I have indicated, I am inclined to the view that either would be discriminatory within the meaning of the statute.**

In our submission, a worker is compelled to subscribe to the "creeds" or ideologies of humanism and socialism when he is coerced into joining or supporting a trade union that is so committed, and he consequently is discriminated against within the spirit and intent of this legislation, and of ss. 36 (b) and 52 of *The Labour Relations Act*.

In addition, many trade unions support directly and indirectly the New Democratic Party, which is committed to socialism. For example, the United Steelworkers of America was a moving force behind and a founding-member of that Party. To require an employee whose political convictions are opposed to those advanced by that Party to support the Steelworkers is political discrimination. There is admittedly a right of employees to join a trade union which subscribes to certain political principles, but there is equally a right not to join and not to so subscribe. The recent case of the Bergsma's, the two people in Hamilton who were refused Canadian citizenship because of their avowed atheism, illustrates this point. The argument in favour of admitting them to citizenship has been that freedom of religion is part of the Canadian Constitution, and that this freedom includes the right to be an atheist. The argument therefore is that in refusing citizenship to these people, the Citizenship Court is practising discrimination. Surely the principle of religious and political freedom applies equally to workers who affirm, as does the *Bill of Rights*, "that the Canadian Nation is founded upon principles that acknowledge the supremacy of God," and to workers who choose not to support secular trade unions and which may subscribe to political principles inconsistent with their own.

The governmental protection promised to the Bergsma's should surely also be extended to citizens of strong Christian conviction.

3. The inability of a particular employee to support the trade union chosen by a majority of his fellow workers often results in his being deprived of the protection and representation to which he is entitled in the procedures for grievance and arbitration. This may arise in two ways:

(i) Where there are provisions in a collective agreement requiring union membership or support and such agreements fail to provide the individual with a remedy or a procedure for the redress of his grievance arising out of these provisions.

(ii) Where there is a failure or inability on the part of a trade union to give adequate representation to an employee or a group of employees because of conflicts among rights and interests of its own, of the employee and of third parties.

There often is a dispute as to the interpretation of a particular union-security clause. The union and the employer usually have little interest in obtaining an interpretation of the clause from an arbitration board. The individual affected is in a difficult position because no procedure is normally provided in the collective agreement for him to obtain an interpretation, or more importantly, to argue a violation of his civil rights.

The latter situation arose recently in a dispute which did go to arbitration. It concerned the case of two janitors employed by the Board of Education for the Township of Etobicoke. The collective agreement between the Board and the National Union of Public Employees provided for the check-off of union dues. The two janitors were requested by the employer to sign the dues-authorization deduction cards. On each occasion, they refused to sign stating that to do so would be contrary to their religious principles. The union argued that the Board was in violation of the collective agreement in failing to make the necessary deduction or alternatively take disciplinary action, and the matter was referred to arbitration.

It was held by the arbitration board that the employees should be requested to sign the authorization cards, and if they refused to do so they would be subject to dismissal. In the course of his award, Judge Little, Chairman, stated as follows:

> **It is true that many employees will state what in their view are valid reasons for neither joining a Union 'or being compelled to pay dues' . . . . BE THAT AS IT MAY, WE ARE NOT CONCERNED HERE WITH THE REASONS FOR OR AGAINST THE COMPULSORY PAYMENT OF UNION DUES BY NON-MEMBERS. THEY CAN FORM NEITHER THE BASIS OF OUR DECISION, NOR EVEN BE CONSIDERED IN DECLINING THE ISSUE BEFORE US. We must decide one thing and one only. Are these two employees compelled by this Agreement to authorize dues deduction and if they fail do they become liable to discharge? (emphasis added)**

This quotation illustrates the problem with which we are concerned. In stating that the objections of the individuals could not even be considered in deciding the issue, the board presupposed that the contest was one solely between the employer and the union, and that the position of the individual employee played no part at all in deciding a question which involved such vital issues as the right and freedom of the employee himself to continue in his employment, and to be protected from compulsory support of an organization opposed to his manifestly firmly-held convictions.

The reasoning of Judge Little, quoted above, appears to leave the individuals affected without remedy. The accepted position is that there are only two parties to a collective agreement and, therefore, only two parties in an arbitration arising out of that agreement. The argument is that the union has assumed the position of agent for all employees and alone can prosecute their grievances.

This argument and its practical effects fail to take into consideration the facts. The first purpose of a modern trade union is said to be the promotion of the welfare of its members, primarily by securing improvements in their working conditions, wages, fringe benefits, etc. However, once the union has acquired a position of its own, there is a tendency for it to be at least equally concerned with its own preservation and the advancement of its own interests, as opposed to those of the workers it is supposed to represent. Thus, it acquires a second objective — its own perpetuation. This objective is often pursued at the expense of its members.

The desire for self-perpetuation is manifested by the insertion in collective agreements of clauses designed to achieve that goal, provisions for union security, union shop, closed shop, compulsory check-off and other similar privileges. These provisions are quite distinct in nature from the other class of provisions contained in a collective agreement, which regulate the relationship between employer and employees. A collective agreement is in substance two agreements in one, and the remedies for the enforcement of one set of provisions are not necessarily adequate for or relevant to the enforcement of the other. This distinction is now generally recognized. One leading authority writes:

> **One contract — between the employer and the union — is made up partly of promises running to the benefit of the union as an organization, like the check-off or closed shop clauses, which the union alone can enforce, and partly of provisions relating to wages, hours and job security which the employer promises to incorporate in a second bilateral contract — the contract of hire between the employer and the individual employees.**
>
> **(ARCHIBALD COX, The Legal Nature of Collective Bargaining Agreements, 57 Mich. Law Rev. 1, at p. 20)**

In seeking to compel compliance with these provisions, the union is concerned only with its own interests. When the union seeks to enforce them, the interests and the rights of the employees become obscured and, as experience has shown, are completely disregarded. It then becomes necessary for the individual employee to seek protection elsewhere. It is in these circumstances that we believe the individual is entitled to a status in the grievance and arbitration process separate and distinct from that of the union.

We submit that individuals aggrieved by the various forms of union-security clauses should, so long as these clauses are permitted, be granted by legislation the following rights:

(a) where the dispute is referred to arbitration by either the company or the union, the individual concerned should have the status of a party interested, and the right to be present at and participate in the proceedings as a party;

(b) where the company and the union refuse or are unwilling to refer the dispute to arbitration themselves, the individual should have the right to proceed to have the issue arbitrated on his own initiative and, again, as a party interested.

The second problem arises where the union fails to give fair and equal representation to an employee or group of employees. Apart from the obvious case of animosity toward a particular employee, there may arise a situation where the union is forced to favour the position of one group of employees against another, as for example on a seniority issue, or the employee may be prejudiced by a "sweetheart" relationship between the trade union and the company. In such circumstances the employee has an interest obviously separate from that of the trade union, and genuine grievances may go unremedied unless the right to individual and separate representation is recognized.

This has been realized, again by Archibald Cox, in the following terms:

> **. . . it seems useful to observe the characteristics of a collective bargaining agreement which might affect the terms in which it is written and, consequently, the process of interpretation. One unique characteristic is the number of people affected. The habit of speaking of negotiation "between the parties" or of "a triangular relationship between employer, employees, and labour union" obscures the number of employees and the complexity of their interests. The group, moreover, has interests of its own which may conflict with the claims of individuals because several classes of individuals may have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to wishes of a numerical majority of the members.**
>
> **(COX, Reflections upon Labor Arbitration, 72 Harv. Law Rev. 1482 (1959), at p. 1490)**

There have been a number of decisions and expressions of opinion in American Courts supporting separate representation. In a New York case, *Iroquois Beverage Corp.* v. *International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America,* 14 Misc. 2d 290, Williams, J. said:

> **The employee may demand arbitration if the union is neglectful of his interests. Under this view the employee would clearly have the right, in a case where an arbitration proceeding was instituted by the union, to intervene in the proceeding and to move to vacate the award if the award were an adverse one.**

In *Soto* v. *Lenscraft Optical Corp.* 7 A.D. 2d. 1, 180 N.Y.S. 2d, 388, the Court discussed the generally unsettled law on the rights of individual employees, stating that while

> **. . . the union has control over grievance procedures, there must be implied, a duty of fair representation . . . . Certainly a case was made by petitioners for permitting them to be represented by their own counsel in the arbitration hearings. Enough was shown to negative the possibility of fair representation of the interests of petitioners by Local 122. The denial of the right to independent representation, under the special circumstances of this case, vitiated the award rendered in the absence of the petitioners at the hearings . . . .**

In this case, the opposite view prevailed in the higher court, and the decision was reversed by the New York Court of Appeals (198 N.Y.S. [2d]), on the ground that the petitioners had no status to interfere as they were not parties to the collective agreement, and therefore to the arbitration proceeding.

Professor A. W. R. Carrothers of the University of British Columbia is of the view that as the law presently stands the procedural rights of the individual worker depend entirely on the contract which the union has negotiated:

> **. . . there is no clear law on the question whether an individual employee alone may be considered a party to grievance and arbitration proceedings . . . . Whether the individual is privileged to follow a grievance to arbitration without his union's support again would appear to turn on whether the language of the arbitration clause in the collective agreement contemplates such proceedings, or alternatively, whether the contract of employment may be found to compass the initiation and execution of arbitration by the individual independently of the bargaining agent.**
>
> **(CARROTHERS, Labour Arbitration in Canada (1961), p. 73)**

What is needed is government recognition that the employee may in reality be a third party in proceedings between the union and the company. It is already recognized that a third party cannot be bound by an arbitration award in a proceeding to which he was not made a party. In *Machinists, Fitters and Helpers, Local No.* 3 v. *Victoria Machinery Depot Co. Ltd.* (1959) 19 D.L.R. (2d) 194 (Macfarlane J.) (1960) 31 W.W.R. 564 (B.C.C.A.), it was held that an arbitration award regarding work entitlement of employees represented by Union A was not binding on Union B which had a collective agreement with the same employer, when Union B was not a party to the arbitration. An award in favour of the members of Union A necessarily lessened the amount of work to which the members of Union B were entitled.

Smith J. A. said, at p. 570:

> **My second ground for holding the award void is that it expressly professes to dispose of the rights of non-parties.**

If the rights of a union cannot be determined in a proceeding to which it is not a party, surely the individual should enjoy the same protection when his rights are not being safeguarded or his interests protected. It is therefore submitted that no decision affecting his rights should be made in the grievance and arbitration process, without his consent, unless he is:

(a) a party to such proceedings as may brought by the company or the union;

(b) given a right to be present at the hearing; and

(c) accorded an independent status allowing him to commence proceedings to arbitration on his own initiative where the union neglects or refuses to act after being requested to do so.

Attached as Appendix B to these submissions is a suggested amendment to the Ontario Labour Relations Act.

4. The final submission is that parties before the Ontario Labour Relations Board be given a right of appeal to the Supreme Court of Ontario from decisions of the Board which involve questions of law.

It is recognized that the theory in attempting to limit appeal from and review of decisions of an administrative tribunal is that the tribunal is best able to decide questions which come before it in its comparatively narrow jurisdiction on the basis of a specialized knowledge. It is submitted however that this idea does not justify granting a Board, which does not necessarily have the qualifications to reach decisions on important questions of law, a power seriously to affect legal rights without their opinions being subject to review by a Judge.

Reference need only be made to the decision in *R.* v. *Ontario Labour Relations Board, ex parte Trenton Construction Workers Association, Local* 52 (1964) 2 O.R. 376 to realize the importance of the questions of law that can come before the Board. If the applicant in that case had not been able to point to errors of jurisdiction, evident in the reasons for judgment, or if no reasons for judgment had been written, it might not have been able to bring certiorari, and would have effectively been deprived of any remedy and accordingly denied the right to certification in this province. It should be pointed out that the Franks Committee on Administrative Tribunals and Inquiries in England, which reported in 1957, recommended that there be an appeal structure for tribunals for appeals on questions of fact or law and on the merits, except where the tribunal is exceptionally well-qualified, and that all decisions of administrative tribunals should be subject to review by way of appeal to the Divisional Court on points of law.

It is submitted that the Ontario Labour Relations Board, which deals with legal and civil rights, should be subject to review when doing so.

All of which is respectfully submitted.

C.J.L. Foundation

Christian Labour Association of Canada

APPENDIX A

The Committee for Justice and Liberty was formed in 1961 with the primary purpose of protecting and advancing the freedoms of workers and their right to employment. On April 18th, 1963, letters patent were granted to seven members of the Committee incorporating the C.J.L. Foundation to advance the objectives of the Committee. The objects of the Foundation are set forth in the letters patent as follows:

1. to carry on a programme of education, based on the Word of God, for the promotion of justice and liberty in the field of labour relations;

2. to promote the recognition of the God-given right of all persons to employment and the provision of employment;

3. to secure those rights by appropriate legislation;

4. to advise governments, organizations and persons of situations where justice and liberty in the field of labour relations are infringed;

5. to promote, assist in and advance such research as will further the cause of justice and liberty in the field of labour relations; and

6. to assist, advise and educate all persons who experience difficulty in exercising their right of employment.

The Christian Labour Association of Canada is a national labour organization, constituted of trade, industrial, and general workers locals. Locals of the Association, separate unions in their own right, exist and carry on the activities of certified bargaining agents in the Provinces of Ontario, Alberta and British Columbia. As stated in its Constitution, the Christian Labour Association of Canada bases its program and activities on the Christian principles of social justice and love as taught in the Bible.

The Committee for Justice and Liberty and the Christian Labour Association of Canada are founded upon the basic proposition that free men should have the opportunity to order their lives according to their own convictions. In the area of labour relations this requires that workers have the opportunity to establish free organizations through which they can give concrete expression to their convictions. It is of great importance to the individual worker whether a labour union accepts a Marxist, or a socialist, or a so-called "neutral" point of view, or whether it adheres to Christian principles. It should be pointed out that an important segment of the Canadian labour movement is committed to the philosophical and political principles and objectives of Socialism. We do not dispute the rights of other organizations to favour particular political principles and programs, but we do dispute their right to demand support from all workers in a given bargaining unit in which they have acquired the necessary majority support. Freedom of choice in regard to union membership or financial support should be protected in the interest of both the individual and society.

The Committee for Justice and Liberty and the Christian Labour Association of Canada do not believe that the true interests of the nation are served when consistent attempts are made to erase these differences in the name of a superficial uniformity. In a free society men should not be forced to accept a uniform pattern of life and organization, but a real opportunity should be provided so that men can freely form those organizations and institutions which give expression to their legitimate aspirations. This is not to suggest that our society should be divided up into unrelated fragments. In diversity a generous amount of cooperation would be possible, provided that an attitude of respect and goodwill be present.

APPENDIX B

It is therefore proposed that the Ontario Labour Relations Act be amended to provide as follows:

1. Where the employment of a person is denied or terminated by reason of provisions in a collective agreement providing for membership in or financial or other support of the trade union which represents the bargaining unit of which that person is or intends to be a member, that person shall have the right, notwithstanding any provision in the collective agreement or any other arrangement between the union and the employer to the contrary:

(a) if the issue is taken to arbitration by the union or employer, to participate in the arbitration proceedings as a party, and to have all the rights and be subject to the same duties in the arbitration process as the other parties to the collective agreement.

(b) if the union or employer refuse or neglect to take the matter to arbitration, to initiate proceedings for arbitration under the procedure contained in the collective agreement and subject to the provisions of the collective agreement in that behalf, as if the rights to initiate arbitration granted by the collective agreement had been thereby granted to that person.

2. Where an employee or group of employees feel aggrieved by the failure of the union which is the collective bargaining agent for the unit of which the employee or group of employees is or are members, to give him or them fair, equal or adequate representation, he or they may apply in writing to the Board which shall appoint an arbitrator to whom the employee or group of employees may apply, on notice to the union and the employer, for leave to prosecute a grievance to arbitration under the terms of the collective agreement and if the arbitrator so appointed finds that the employee or group of employees have failed to receive fair, equal and adequate representation from the union, he shall make such order for the commencement and prosecution of arbitration proceedings under the collective agreement as will give the employee or group of employees the rights and remedies to which he or they would otherwise have been entitled.