



Judicial Review in Trade Union Recognition Process: A Comparative Analysis Between Malaysia and Canada

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Abstract. Trade unions play a central role in upholding employees' rights through collective bargaining action with employers to improve the terms and conditions of employment and to resolve any conflicts within the employment relationship. The trade union recognition process is a prerequisite for collective bargaining in Malaysia. Trade unions are facing challenges in obtaining recognition from employers due to judicial review applications made by employers to the High Court. The aim of this study is to analyse the grounds of judicial review applications in the trade union recognition process in Malaysia and Canada. The qualitative method is adopted in this study in the form of content analysis of the judicial review cases in the trade union recognition process in Malaysia and Canada. Additionally, this study also involves content analysis of relevant laws on the trade union recognition process in Malaysia and Canada. The findings show that there are two grounds for challenge in judicial review applications in Malaysia. First, on the minister's decision regarding the capacity of workers to vote in the secret ballot. Secondly, on the minister's decision to declare the competency of the trade union. In Canada, employers filed for judicial reviews of the certification on the grounds of breach of the principle of natural justice, error of law, and jurisdictional issue. This study expands the knowledge of the trade union recognition process and judicial review principles. For practitioners, this study is useful for trade unionists and employers to understand the current situation in the trade union recognition process and its challenges.

Keywords: Trade Union, Recognition Process, Judicial Review, Collective Bargaining

1 Introduction

The trade union movement is one of the main components of the industrial relations system. Trade unions exist in most parts of the world but with different systems governing the movement. The early trade union movement was an outcome of the Industrial Revolution that caused drastic changes in the economic sphere of Great Britain. Workers in other countries later emulated this movement. The emergence of the trade union brought about awareness in workers to negotiate with their employers for better working conditions. It concurrently alerted the capitalists to the power of the working class in protecting their labour rights. Since then, the trade union has been able to position

itself in the industrial relations circle and successfully secure the rights of workers. The word trade union, also known as labour union, workers' association, workers' union, and employees' union has been used interchangeably in describing a group that represents workers in an organisation. This group expresses the workers' grievances and demands concerning the workplace to the employer. According to Mumtaj and Harlida (2018), collective bargaining and collective agreement play a role in improving the terms and conditions of employment and in resolving any conflicts within the employment relationship.

One of the rights of a trade union is to conduct collective bargaining with the employer to improve the rights of workers at work. Collective bargaining is a fundamental right of a trade union. The International Labour Organization (ILO) defines collective bargaining as the medium through which the employers, their workers, and the trade unions can establish fair wages and working conditions. The term collective bargaining is also defined as a method of jointly determining working conditions between employers on one side and organised employees on the other. Visser, Hayter, and Gammarano (2017) state that collective bargaining is a process of negotiation between independent unions and employers (or employers' organisations) to determine terms and conditions of employment—typically wages and working time—and relations between the parties. The outcome is a collective agreement, signed by the parties to the negotiations. It affords labour protection to workers, and legitimacy and stability to employers. Based on these definitions, it can be inferred that the aim of the collective bargaining action is to arrive at a collective agreement to regulate terms and conditions of employment. The collective bargaining rights of a trade union will safeguard the basic rights of the workers such as their wages, working time, training, occupational health and safety, and equal treatment. The collective agreement obtained through the collective bargaining process is able to maintain the rights and responsibilities of both employer and employee and indirectly guarantees harmonious workplace relations and productive industries. Collective bargaining is a fundamental principle and right at work, recognised by the ILO as one out of eight fundamental conventions. The Right to Organise and Collective Bargaining Convention, 1949 (No. 98) guarantees the negotiation process between the employer or employers' organisation and the workers' organisations to regulate the terms and conditions of employment by means of collective agreements.

In Malaysia, the Trade Unions Act 1959 defines a 'trade union' as any temporary or permanent association or a combination of any association or a combination of workmen or employers in West Malaysia, Sabah, or Sarawak as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries and having among its objects one or more of the objectives provided under the said provision. The trade union is registered in Malaysia based on the trade, occupation, or industry. Apart from that, the Industrial Relations Act 1967 (IRA 1967) defines a trade union to mean a trade union that is registered under any law relating to the registration of trade unions in Malaysia.

Trade unions in Malaysia are entitled to their right to collective bargaining. The Malaysian government ratified ILO Convention No. 98 on 5th June 1961. The right to

collective bargaining is therefore enshrined under Section 13 of the IRA 1967. The provision states that once the trade union has been accorded recognition by an employer, the trade union may invite the employer to commence collective bargaining. The negotiation process that is exclusively provided under the collective bargaining rights of the trade union is fundamental for reducing inequality between workers and extending labour protection to the workers. However, the government will normally impose measures and standards for the trade union to comply with before it can exercise the right to collective bargaining. The measures and standards will depend on the policy and interest of the government towards the workers. In practice, the government will require the trade union to go through the recognition process in order to ascertain its competency to represent the workers in the collective bargaining action. According to Brown, Deakin, Hudson and Pratten (2001), the differences in interests between employers and trade unions have made the collective bargaining task more difficult. The unreceptive law and practices on recognition have closed the avenue for trade unions to exercise their right to represent workers in collective bargaining actions. There is an extremely high number of judicial review cases concerning the recognition process of trade unions that have been brought to the High Court by employers and trade unions on various grounds. In some situations, judicial reviews have become a platform for delaying the recognition process of a trade union and are directly affecting the rights of the trade union to negotiate with the employer. The aim of this study is to analyse the grounds for judicial review applications in the trade union recognition process in Malaysia and Canada.

Canada is chosen in this study for comparative purposes due to its economic and labour development. In Canada, the key industries that contribute to its Growth Domestic Product (GDP) are the services sector, manufacturing, energy, and agriculture. The GDP of Canada in 2022 was reported to be USD1.894 trillion with a growth rate of 3.4%. Canada had a population of approximately 39.5 million people in 2022 and a labour force participation of 65.6% with a 4.9% unemployment rate. Two political parties, the center-left Liberal Party of Canada and the center-right Conservative Party of Canada dominate the political scene in the country. Currently, Canada is ruled by the Liberal Party of Canada, which in its policies recognises all forms of rights and favours a free market economy for the country. Both the Constitution of Canada and the Canada Labour Code recognise the freedom of association. The statutes governing collective bargaining in Canada are different according to the province. Each province in Canada has its own set of labour relations laws and these are further divided into public, para-public, and private sectors. Additionally, Canada is selected for comparative purposes as this country shares a common law legal system with Malaysia. As a Commonwealth country, the political system of Canada is a constitutional monarchy with a parliamentary system of government. The government of these countries consists of three arms: the legislature, the executive, and the judiciary. As Canada has a similar government system to Malaysia, presumably the Malaysian government can easily adapt to the model legislation. Furthermore, Canada is compatible with the Malaysian situation in the way these countries appreciate the rights of workers to exercise collective bargaining. A simple and efficient recognition process is a product of countries that are aware

of their responsibility to adhere to the core labour conventions set up by the International Labour Organization. Canada has ratified the ILO's Right to Organise and Collective Bargaining Convention No. 98 and has performed its obligation to provide a legal framework for collective bargaining actions between the trade union and the employer.

2 Methodology

The qualitative method is adopted in this study in the form of content analysis of judicial review cases in the trade union recognition process in Malaysia and certification process cases in Canada. Case laws related to judicial review of trade union recognition and certification are downloaded from the law database. Additionally, this study also involves content analysis of the relevant laws on the trade union recognition process in Malaysia and certification of trade unions in Canada, specifically, the Industrial Relations Act 1967, the Trade Unions Act 1959, and the Canada Labour Code.

3 Findings and Discussion

3.1 Trade Union Recognition Process

The concept of recognition was introduced in the American industrial relations system. Riddle (2004) in his study defines recognition as a mechanism by which the union attempts to demonstrate that it has sufficient support within the proposed bargaining unit to be certified. In subsequent work, Ratna (2009) defines the recognition process as the process through which the employer acknowledges and accepts the trade union as the representative of workers in an organisation and the employer is willing to have a discussion of all issues concerning the workers with the union. In Malaysia, there is no statutory meaning of the word 'recognition' in the current legal framework. However, local scholars have attempted to define the concept of the recognition process. Maimunah (2013) defines recognition as referring to the acceptance by an employer that a particular union has the right to represent their workers in the collective bargaining process. According to Suhanah (2012), the recognition process involves the process of the trade union obtaining the support of the majority of workers in the particular scope of work, and once recognition is granted, the trade union is eligible to represent the workers in collective bargaining and the outcome of the collective agreement will bind all the workers regardless they are members or not.

Based on the above definitions, it can be inferred that the trade union recognition process is a stage before collective bargaining action begins. This is where the competency of the trade union is determined, most commonly through the majority support of the workers and the background of the trade union. A trade union is recognised once an employer has agreed to negotiate with the trade union on the matter concerning the wages and working conditions of a particular group of workers. The subsequent negotiation process that follows the recognition process is known as collective bargaining.

The main objective of the recognition process is to determine the competency of the trade union to represent the workers of the employer in collective bargaining. The recognition process is important to reduce the multiplication of trade unions representing the interest of the workers, to facilitate the workers to choose the best trade union to represent their rights, and to reduce the employer's 'divide and conquer' tactics.

3.2 Trade Union Recognition Process in Malaysia

The recognition process of a trade union in Malaysia is stipulated under Section 9 of the Industrial Relations (Amendment) Act 2020 (IRA). The first step in the trade union recognition process is the trade union gaining the recognition of the employer by serving the employer with the recognition claim form. In the previous procedure stipulated under the Industrial Relations Act 1967, the recognition process requires that the trade union must first be competent. For a trade union to be recognised, the workers must be within any similar trades, occupations, or industries as written in the trade union's constitution. As to what constitutes similar trades, occupations, or industries, the court decided that they must be 'similar' according to the opinion of the Director General of Trade Unions (DGTU). The Director General of Industrial Relations (DGIR) is given the power to refer to the DGTU for ascertaining the competency of a trade union to represent a group of workers. All information pertaining to the steps undertaken by the DGIR and the DGTU under the IRA 1967 and TUA 1959 will be given to the Minister to enable the Minister to make an objective evaluation of the facts surrounding the trade union's claim for recognition before a decision whether to grant recognition is made. However, the latest amendment to the IRA provides that the DGTU and the Minister are no longer given the power to decide on the matter of competency of a trade union and recognition of the trade union.

Secondly, the trade union is to prove that the majority of its members do not consist of workers employed within the managerial, executive, confidential, or security posts in the employer's organisation. Section 9(1) of the IRA provides that members of the trade union who are eligible for the purpose of collective bargaining are as follows;

9. (1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say—

- (a) managerial capacity;*
- (b) executive capacity;*
- (c) confidential capacity; or*
- (d) security capacity,*

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above-mentioned capacities.

The provision above requires that a majority of the trade union members must not consist of workers in the managerial, executive, confidential, and security (MECS) capacities in order to seek recognition for collective bargaining. Nonetheless, workers under the MECS capacities can still be represented by a trade union as long as a majority of

the members are in the same capacity and interest. The DGIR shall have the final say to decide on the final list in Form B in the event that no consensus can be reached between trade union and employer. The final list will represent the workers of the employer's organisation who are eligible to vote during the secret ballot process.

3.3 Union Certification in Canada

The trade union recognition process in Canada is known as a certification procedure. A trade union must be certified before it can represent the workers in the collective bargaining process. In Canada, the certification process to become a bargaining unit of the process of collective bargaining is provided under Division III of the Canada Labour Code. A trade union that wishes to participate in collective bargaining is referred to as the 'bargaining agent' under the Labour Code. The Canadian government applies the majoritarian approach to determine the competency of the trade union to be the bargaining agent. The majoritarian approach is based on the American Wagner Model and has become the foundation of collective bargaining rules in Canada. The majoritarian approach requires the trade union to prove that there is a majority support from the workers for the trade union before the trade union can become their bargaining agent in the collective bargaining process. There are two ways for the Industrial Relations Board (the Board) in Canada to recognise trade unions; it can be by way of a card check or by mandatory vote. The method to determine the majority is different according to province. The recent amendment to the Federal rules made it not compulsory for the Canada Industrial Relations Board (Board) to conduct a mandatory vote in every case.

In certain provinces, recognition is given to the trade union if the Board is satisfied through evidence of signed membership cards that show a majority support (ranging from 50% to 55%) within the scope of the bargaining unit. This method is also known as automatic certification. However, the Board can consider conducting a mandatory vote if it believes to be necessary. In other provinces, if the evidence of card checks shows a result of less than 35% and not more than 50%, then it is mandatory to cast a vote. The outcome of that vote is determined by 50% + 1 of the workers who come out and vote. According to the Canada Labour Code, all categories of workers are eligible to vote except for professional employees, supervisory employees, and private constables. These groups of workers will only be eligible to vote if the trade union is representing their group's interest. Once the Board has certified the trade union as the bargaining agent, the trade union shall have exclusive authority to bargain collectively on behalf of the workers.

3.4 Judicial Review in Upholding Principle of Natural Justice

A judicial review is one of the features in the doctrine of separation of powers in a state. The power to review decisions made by administrative bodies is given to the court. The IRA deals with the procedures for settling disputes between employers and workers and their trade unions. The IRA established an Industrial Court to hear cases involving industrial relations disputes. Any party can apply for a judicial review of the Industrial Court's decision in the High Court. The power of the court to review the lawfulness of

the executive or the public bodies in exercising their discretion is encompassed in the court's supervisory jurisdiction. A judicial review has three functions: firstly, as a medium for check and balance in the government system; secondly, the doctrine of judicial review is one of the ways for the court to safeguard the principle of the rule of law, ensuring that the public authority will exercise their powers within their limits; thirdly, a judicial review protects the constitutional rights of citizens by striking down any laws that violate the constitution. The judicial review process is consistent with the principle of natural justice which advances the notion that if an individual's right is at stake because of an administrative decision, they are entitled to fair treatment. Any parties that claim to be a victim of abuse of process may apply to the court for a judicial review. The court in the case of *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 further explained the application of judicial review:

*Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times, it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on making the original findings of fact. They will not themselves on a rehearing of the matter: see *Healey v Minister of Health* [1955] 1 QB 221. Nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see *Re HK (An Infant)* [1967] 2 QB 617 at p 630 and *Reg v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v Ministry of Pensions and National Insurance* [1963] 1 WLR 186. And if the decision-making body has gone wrong in its interpretation, the court can set its order aside: see *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320. (I know of some expressions to the contrary, but they are not correct.) If the decision-making body is influenced by considerations that ought not to influence it; or fails to take into account matters that it ought to take into account, the court will interfere; see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at pp 1007-1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding -- so unreasonable that a reasonable person would not have come to it -- then again, the courts will interfere; see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too, the courts can interfere; see *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorized by law, its decision will be set aside: see *Sydney Municipal Council v Campbell* [1925] AC 338. In exercising these powers, the courts will take into account any reasons that the body may give for its decisions. If it gives no reasons -- in a case when it may reasonably be expected to do so, the courts*

may infer that it has no good reason for reaching its conclusion, and act accordingly; see Padfield's case. (Emphasis added.)

According to the above judgments, judicial review applications must be concerned with public law rather than private law issues. Before the court can hear an application for a judicial review, the court shall first identify whether the party has *locus standi*. The court can hear an application to review the lawfulness of a decision made by the executive. However, it does not have the power to review the decision of the executive on its merits, substance, or justification. The application for judicial review should only be made on the manners of the administration coming to the decisions, not the decision itself. In *Tanjong Jaga Sdn Bhd v Minister of Labour & Manpower* [1987] 1 MLJ 124, Abdoolcader SCJ stated that:

if a decision-making body comes to its decision on no evidence or comes to an unreasonable finding... so unreasonable that a reasonable person would not have come to it... then the court will interfere.

Among the grounds applied for judicial reviews are, first, that the executive used power for a wrong purpose, the executive abuses its powers, the executive adopts a policy that is so rigid that it fails to exercise discretion with which it has been invested or the executive fails to act in a reasonable manner in the performance of its decision-making power. Based on the plethora of judicial review cases, the court has outlined three principal grounds commonly used for judicial review. These are, firstly, on the irrationality of the decision, secondly, on the illegality of the decision, and thirdly, on the procedural impropriety of the executive in the course of making decisions. These categories however are not exhaustive. Meanwhile, the available remedies under judicial review for public law cases are the certiorari (quashing orders), prohibiting orders, and mandamus (mandatory) orders. In Malaysia, the court shall govern the substantive hearing for judicial review applications. The power of the court to review can be found under Order 53 Rule 1 of the Rule of Court (ROC) 2012 which states:

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 [Act 137].

According to the said provision, the High Court may order the reliefs specified in paragraph 1 of the Schedule to Courts of Judicature Act 1964 which includes an order in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. These orders are collectively referred to as the prerogative orders. According to Order 53 Rule 2 of the ROC, the High Court is also empowered to grant additional reliefs which include an order of declaration, injunction, or monetary compensation. Any person who is adversely affected by the decision of any public authority shall be entitled to make the application. The procedure for a judicial review starts with the application

made by the interested party. The applicant can apply for leave from the High Court three months from the date that they first had reason to bring a judicial review action.

3.5 Judicial Review in the Trade Union Recognition Process

Malaysia. Judicial review cases in the High Court in recognition of trade union cases are analysed in this study in order to highlight the weaknesses of the trade union recognition process system and to explore the grounds for judicial review that are frequently used by the parties in the application. The analysis of the judicial review serves two purposes: first, to demonstrate the inconsistencies of judgments in the recognition process as a result of loopholes in the legal framework of the recognition of trade unions; second, to exhibit the abuse of process by administrative bodies in performing their role in the recognition process. The procedure for a judicial review starts with the application made by the interested party. The applicant can request leave from the High Court three months from the date that they first had reason to bring a judicial review action. The minister in exercising his duty to decide on the issue of trade union recognition is expected to 'always be within the objectives of the legislation and the scope of his statutory responsibilities'. He must consider all the facts relevant to the recognition application, such as the reports of the DGIR and DGTU in their course of investigation, and the meetings and discussions held between the employer and the trade union before deciding on the issue. The application to review a minister's decision in the recognition process is not a new development. Despite Section 9(6) of the IRA stating that the minister's decision is final and shall not be questioned in any court, the clause is not conclusive as the parties are allowed to apply for a judicial review.

In *Tanjong Jaga Sdn Bhd v Minister of Labour & Manpower* [1987] 1 MLJ 124, Abdoolcader SCJ stated that:

if a decision making body comes to its decision on no evidence or comes to an unreasonable finding... so unreasonable that a reasonable person would not have come to it... then the court will interfere.

The application for judicial review should only be made on the manner of the minister coming to the decision, not the decision itself. This is as emphasised by the court in the case of *Minister of Human Resources, Malaysia v Diamet Klang (M) Sdn Bhd* [2013] MLJU 1617 and another appeal where the court stated that:

The learned judge should have found that there was no impropriety or unreasonableness in the decision by the Minister to accord recognition to the Union (or the competency of the Union) to represent the company's employees. In our view, the learned High Court judge should, in the circumstances and facts of the case give effect to s 9(6) of the Act as to the conclusiveness and finality of the Ministerial decision on competency. The provision was inserted so as to provide some stability in the labour management and organization in this country. Therefore, the courts should be slow to find fault

with the Minister's decision in exercising his discretion to accord recognition to a Union of workers.

It is notable from the above cases that the court should be vigilant in reviewing the minister's decision in the recognition process. Similarly, in the case of *RHB Bank Berhad v YB Menteri Sumber Manusia Malaysia* [2017] MLJU 898, the judicial review application by the employer to quash the minister's decision in according recognition to the trade union was dismissed as the grounds for judicial review was not on the administrative decision but more to the question of law. The judicial review process can also be an intimidating and costly process for the workers as it is the final stage for the workers to maintain their rights to form a trade union. However, employers who usually have almost unlimited resources at their disposal, tend to find judicial review to be their comfort zone and an easy way to obstruct the trade union movement. The filing of a judicial review during the recognition process will delay the recognition claim. No secret ballot process can be carried out until the Federal Court reaches a decision.

Canada. In Canada, unions that wish to challenge the decision of the Board can file an application for judicial review. The case for judicial review is heard at the Federal Court of Appeal of Canada. Unions can apply for judicial review not more than thirty (30) days from the date of the Board's decision. The Federal Court will check the reasonableness of administrative tribunal rulings through judicial review. Additionally, the court will decide whether the Board's procedure was fair and whether the parties had an opportunity to present their cases. Judicial reviews in Canada follow the UK tradition. Before the applicant can be remedied by the Federal Court, the applicant must prove that the administrative body's actions were unreasonable. The Federal Court would also ask whether the decision made by the administrative body was outside its jurisdiction. If it was reached out of jurisdiction, the Federal Court would declare it to be unlawful. In determining the standard of unreasonableness, the court in the case of *CUPE v NB Liquor Board*, [1979] 2 SCR 227 described the standard of unreasonableness as follows:

... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice, or misinterpreting the provisions of the Act to embark on an inquiry or answer a question not remitted to it.

While the court in the case of *Dunsmuir v New Brunswick* [2008] SCC 9 held regarding unreasonableness:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities

that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

Besides that, one of the most common grounds filed for judicial review in the certification process is the error of law on the face of the record. An example is the case of *Re International Brotherhood of Electrical Workers, Local 213 and Labour Relations Board (B.C.)*, [1955] 1 D.L.R. 502 which involved the certification process of an electrical workers' union to represent a unit of gas workers. The employer filed a judicial review to quash the certification given to the union. However, the court found that the employer did not provide sufficient grounds to quash the decision. Whittaker J., describes the grounds for certiorari as failure to perform the duty to act in good faith and fairly listen to both sides, exceeding jurisdiction, and declining jurisdiction.

Another ground for judicial review in the certification process of unions in Canada is a breach of the principle of natural justice. This is because administrative bodies are expected to act fairly in the certification of unions, as illustrated in the case of *Re Speers and Labour Relations Board*, [1947] 2 D.L.R. 835, where the employer filed an application for judicial review of the Board's decision to certify a union because the Board had shown bias as it had instructed its executive officer to interview the employees. In the case of *Traders Service* [1958] S.C.R. 672, a mistake occurred in the certification of a union where the employees were employed by a different employer. The Board failed to disclose the mistake and the findings of the investigation were not shared with the employer. The employer filed an application for judicial review to quash the certification of the union. According to the court, the failure of the Board to share the findings of the investigation had caused the employer to lose the opportunity to be heard.

Apart from the above ground, jurisdictional defects have also been grounds for judicial review in the certification process. In the case of *Conseil de la Nation Innu Matimekush-Lac John v. Association of Employees of Northern Quebec (CSQ)*, 2017 FCA 212, a judicial review was filed against the Board by Innu Nation of Matimekush-Lac John Band Council (the employer) in the Federal Court of Appeal. In this case, certification granted by the Board to the Association of Employees of Northern Quebec to represent school teachers at an indigenous reserve was challenged on the grounds that it was unconstitutional. However, the Federal Court of Appeal dismissed the application as it was found that the school fell under the category of federal jurisdiction and thus the Board was correct in granting certification to the union. Meanwhile, in the case of *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp.*, operating as Wal-Mart and Wal-Mart Canada, the United Food and Commercial Workers, Local 1400 (the union) had filed for a judicial review of the Board's administrative decision regarding certification of the union as the bargaining agent for the employees of Wal-Mart's store in Saskatchewan. The judicial review was made on the grounds that the Board had conducted unfair labour practices in certification matters. From these

case laws, it can be observed that there are also many cases where employers in Canada filed for judicial reviews of certifications given by the Board.

4 Conclusion

We can conclude that there are two common grounds for challenge in judicial review applications in Malaysia regarding trade union recognition. First, on the Minister's decision regarding the capacity of the workers to vote in the secret ballot. Second, on the Minister's decision to declare the competency of the trade union. Meanwhile, in Canada, judicial reviews for quashing the certification of trade unions by the Board are based on the grounds of unreasonableness, breach of the principle of natural justice, error of law, and jurisdictional issue. It is recommended for the court to provide a standard or test to determine judicial review cases, particularly for trade union recognition cases to prevent employers from abusing the judiciary avenue. This study expands the knowledge of trade union recognition process and judicial review principles. For practitioners, this study is useful for trade unionists and employers to understand the current situation in the trade union recognition process and its challenges.

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