CASE COMMENTARY

BRADLEY v. THE COMMONWEALTH[1] AND SECTION 57(1) OF THE POST AND TELEGRAPH ACT

Section 57(1) of the Post and Telegraph Act 1901-1971 (Com.) provides as follows:

> If the Postmaster-General has reasonable ground to suppose any person to be engaged either in the Commonwealth or elsewhere in receiving money or any valuable thing—
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> (a) as consideration (1) for an assurance or agreement express or implied to pay or give or (2) for securing that some other person shall pay or give any money or valuable thing on an event or contingency of or relating to any horserace or other race or any fight game sport or exercise; or
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> (b) for promoting or carrying out a scheme connected with any such assurance agreement or security or a lottery or scheme of chance or an unlawful game; or
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> (c) as contributions or subscriptions towards any lottery or scheme of chance; or
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> (d) under pretence of foretelling future events; or
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> (e) in connexion with a fraudulent obscene indecent or immoral business or undertaking;
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> he may by order under his hand published in the *Gazette* direct that any postal article received at a post office addressed to such person either by his own or fictitious or assumed name or to any agent or representative of his or to an address without a name shall not be registered or transmitted or delivered to such person.

I believe that an implied requirement that the Postmaster-General hold hearings prior to action under this subsection ought to be and would be found by the High Court were the issue to be raised before it today. In elaborating on my position I will refer particularly to two High Court decisions which have concerned themselves with s. 57(1), the most recent being *Bradley's* case.

The first of these decisions, *R.* v. *Arndel*,[2] decided in 1906, provides a convenient point of departure. In that case one Freeman, whose firm had been the subject of an order made under s. 57(1) without prior hearing, sought a writ of mandamus to compel the Postmaster-General to deliver mail to him. The basis of his application was his contention that the order under s. 57(1) had been a nullity because the Postmaster-General had wrongly come to the conclusion that he had reasonable ground to suppose

[1] (1973) 1 A.L.R. 241.
[2] (1906) 3 C.L.R. 557.

Freeman's firm to be engaged in a fraudulent and immoral business. The Court held, however, that it was incapable of reviewing the Postmaster-General's findings of fact that persons were engaged in any of the activities proscribed by s. 57(1).[3] Apparently sensing this outcome during argument, Freeman had also argued that certiorari would lie to quash the order because it had been made without giving him a hearing beforehand. The reason for this shift in the remedy sought must have been the view that failure to hold a hearing when one was impliedly required merely rendered the order voidable and not void,[4] so that certiorari was the only remedy available. In any event, Freeman was unsuccessful with this argument too, the Court holding that the Postmaster-General was under no implied duty to hold hearings prior to action under s. 57(1). Various reasons for this conclusion were advanced, some by more than one of the learned Justices.

Griffith C.J. doubted whether the courts ought ever to infer a duty to hold hearings before action when the power in question was one exercisable by a Minister.[5] Such doubts have since been laid to rest, although not in the way the learned Chief Justice would have expected. The fact that a power is exercisable by a Minister does not preclude the inference of a duty on him to hold hearings.[6]

The learned Chief Justice also believed that no duty to hold hearings prior to action under s. 57(1) ought to be inferred because the power was one to be exercised in emergencies[7]—if time were lost as a result of the need to hold hearings, great public harm would ensue.

The harm sought to be suppressed by s. 57(1) is the doing of the activities listed therein. The exercise of the power conferred in that subsection, however, is not particularly effective in achieving that result, since it only prevents a person from receiving mail, not from sending it as well, as do some other provisions in the Act.[8] Even if it did both, it would still not be a complete deterrent to the doing of those activities—only the criminal process could achieve that result. In view of the relative ineffectiveness of the power conferred in s. 57(1) in achieving its aim, it can hardly be said that it must be exercised without hearings' being held so as to overcome any emergency that would otherwise arise. It could not do so even if it were exercised without hearings.[9]

Barton J. suggested that no hearing requirement ought to be inferred in respect of s. 57(1) because of the wording of other provisions in the Act.[10] Other provisions conferring powers not to transmit or deliver mail in

[3] Ibid., 571, per Griffith C.J.; 577-8, per Barton J.
[4] This view has since been superseded. See S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed., London, Stevens & Sons, 1973), 1973, 209ff.
[5] Op. cit., 571-2.
[6] See *Durayappah* v. *Fernando*, [1967] 2 A.C. 337 (P.C.) and *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 A.C. 13 C.P.C.
[7] Op. cit., 572.
[8] See ss. 29(3) and 44. Cf. the Post Office Act, R.S.C. 1970, c. P-14, s. 7(1), the Canadian provision similar to s. 57(1).
[9] Cf. *Walker* v. *Popenoe*, 149 F. 2d 511 (D.C.C.A., 1945), an American case rejecting the "emergency" argument on the then-current legislation allowing the Postmaster-General to bar materials from the mails.
[10] Op. cit., 574-5.

certain circumstances expressly provided for judicial appeals from decisions to exercise them.[11] The failure to provide for appeals from decisions under s. 57(1), thought Barton J., implied that no hearings were to be held before action thereunder.

This reasoning is, to say the least, difficult to follow. It has been held that provision for an appeal, either administrative[12] or judicial,[13] from an administrative decision negatives any implication that a hearing is to be held before it is made. This reasoning is itself rather suspect,[14] but assuming its soundness, the fact that, while other provisions provide for appeals, s. 57(1) does not ought to strengthen rather than weaken the implication of a hearing requirement in respect of s. 57(1).

Although no evidence had been offered as to how often the Postmaster-General contemplated or took action under s. 57(1) or as to what his other duties were, Barton J. also offered as a reason for not inferring a hearing requirement the pressure of work on the Postmaster-General and suggested that the wheels of government would be intolerably slowed if the Postmaster-General had to hold a hearing whenever he contemplated acting under s. 57(1).[15] The force of this reason was not lessened for the learned Justice by his recognition that the power in question "gravely concern[ed] the business and other affairs of citizens"[16] and could "be exercised most harmfully unless . . . applied with great discretion".[17]

In offering this justification for not inferring a hearing requirement, Barton J. can be said to be both ahead of and behind the times. He was ahead in the sense that he anticipated the attitude towards the inference of a hearing requirement which the courts began to adopt shortly after the *Electricity Commissioners* case.[18] He was behind the times in that he chose to ignore the lead he could have taken from cases such as *Cooper* v. *Wandsworth*,[19] *Hopkins* v. *Smethwick*[20] and *Smith* v. *R.*,[21] all of which were later restored to (rightful) prominence in *Ridge* v. *Baldwin*[22] and all of which, incidentally, had been argued by Freeman in the *Arndel* case. Nowadays, the weight of the two considerations in the balance, viz., administrative convenience on the one side and the importance of the private interest which can be affected by a power on the other, would be

11 Ss. 29 and 43.
12 See *R.* v. *Randolph*, [1966] S.C.R. 260, the leading case on the Canadian Post Office Act, s. 7, op. cit. The final report of the Bland Committee on Administrative Discretions, 1973, recommended that directions made by the Postmaster-General under s. 57(1) should be capable of appeal to the proposed General Administrative Tribunal. See Appendix H, 119.
13 See *Literature Bd. of Review* v. *H.M.H. Publishing*, [1964] Qd. R. 261 (F.C.). See also *Twist* v. *Randwick Municipal Council*, (N.S.W.S.C.), *Sydney Morning Herald*, May 21, 1974.
14 See de Smith, op. cit., 170.
15 (1906) 3 C.L.R. 557, 576.
16 Ibid., 574.
17 Ibid., 576.
18 *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171 (C.A.).
19 (1863), 14 C.B. (N.S.) 180.
20 (1890), 24 Q.B.D. 713 (C.A.).
21 (1878), 3 App. Cas. 624 (P.C.).
22 [1964] A.C. 40.

much different than Barton J. thought it to be in 1906. More will be said later about the importance of the private interest involved when an order under s. 57(1) is contemplated.

O'Connor J. believed that no hearing requirement ought to be inferred because the power conferred in s. 57(1) might have to be exercised "after inquiry from the most secret sources".[23] The suggestion here was that the names of people giving the Postmaster-General information on which he might act would have to be disclosed to those against whom an order was contemplated if hearings were held and that fear of this happening would deter informants from coming forward, thus rendering the power conferred ineffective.

The short answer to this reason is that the holding of a hearing would not necessarily require revealing the names of informants, but only the tenor of their information. Griffith C.J. had recognized this in his reasons for judgment, saying,[24]

> In order that the Postmaster-General may act, it is necessary to have some information placed before him, but it would be entirely contrary to the rules of public policy if he were to disclose that evidence to the person sought to be affected by it. He might go so far as to tell that person that there was a charge against him, and to call on him to show cause; possibly that might be so as a counsel of perfection . . .

That "perfect" approach is now common[25] and overcomes this particular objection of O'Connor J. to inferring a hearing requirement.

O'Connor J. offered one final reason why a hearing requirement ought not to be inferred under s. 57(1)—the Postmaster-General's power was expressed to depend, not on the existence of any facts, but rather on his having reasonable ground to suppose their existence. 'That "reasonable ground" ', he said, 'may arise from his own knowledge, or from departmental reports, as well as from full proof'.[26]

Apropos this point, the Privy Council recently had to consider whether the fact that the ability to exercise a power had been expressed to depend on an administrator's belief that a fact existed excluded an implication that the administrator had to hold a hearing before acting. It held[27] that the conferring of a power in these terms gave "little guidance"[28] on the question whether a hearing requirement ought to be inferred. If this is so in respect of a power to act merely on satisfaction, then how much more so ought it to be true in respect of a power to act only on reasonable satisfaction?

Thus I submit that all of the reasons offered by the High Court as to why no hearing requirement ought to be inferred in respect of s. 57(1) are unconvincing.

There remained, however, one legacy of the *Arndel* case which could

[23] 3 C.L.R., 582.
[24] Ibid., 572.
[25] See H. W. R. Wade, *Administrative Law* (3rd ed., Oxford: O.U.P., 1971), 212-13.
[26] 3 C.L.R., 582.
[27] *Durayappah* v. *Fernando*, supra fn. 6.
[28] Ibid., 348.

have undermined any argument for inferring a hearing requirement under s. 57(1). The traditional formulation of the situations in which such a requirement will be inferred emphasizes the administrator's ability to affect "rights".[29] Is the receipt of mail a "right" for the purposes of this formulation or is a person's interest in receiving mail not sufficiently important to justify the inference of a hearing requirement in his favour? It will be recalled that Barton J. had, in his reasons for judgment, recognized the importance of the interest. Furthermore, none of the Justices had explicitly offered as a reason for not inferring a hearing requirement the belief that the ability to receive mail was not a sufficiently important interest. However, the reasons for judgment of O'Connor J. had contained an alternative ground for dismissing Freeman's action which was not directly commented on by the other Justices. He had held that even if there had been no order made against Freeman's firm, nevertheless Freeman could not have forced the Postmaster-General to deliver mail to him if the Postmaster-General had decided not to. In the learned Justice's view, the Postmaster-General's duty to deliver the mails was one he owed solely to the Crown and not to the public.[30] This conclusion could have fuelled an argument that the ability to receive mail is not a "right" for the purposes of inferring a hearing requirement.

This possibility has now been obviated by the recent High Court decision in *Bradley* v. *The Commonwealth*.[31] The case involved an action for declaration and injunction in respect of the Postmaster-General's order to deny Bradley mail, among other, services. The order, in so far as it concerned mail, had not been made under s. 57(1), but rather because Bradley was employed as a propagandist for the Rhodesian government. The Postmaster-General sought to justify the order as it related to mail services on the basis that he was under no duty to the public to deliver the mails, but the High Court, by a majority, denied this proposition. The majority's examination of the Act and cases from England, Canada and America convinced it that the Postmaster-General was under a duty to the public to deliver the mails, except in those circumstances in which the Act expressly authorized him not to. Sections such as 57 would not have been necessary, the majority said, unless the Postmaster-General was under such a duty generally.

Naturally, the *Arndel* case was referred to in the *Bradley* case, with the views of O'Connor J. as to the nature of the Postmaster-General's duty to deliver the mails being relied on by the Postmaster-General. In a joint judgment, Barwick C.J. and Gibbs J. referred to the *Arndel* case in a manner approved of by Stephen J., the third member of the majority. They first said that the case was distinguishable, so that it was unnecessary to comment on the correctness of the reasons for judgment of the majority. They added nevertheless that an error by the Postmaster-General in coming

[29] Supra fn. 17, 205, per Atkin L.J.
[30] 3 C.L.R., 580-1.
[31] (1973), 1 A.L.R. 241. For a case comment, see 47 A.L.J. 735. For other recent litigation involving the plaintiff, see *Corp. Aff. Comm.* v. *Bradley*, [1973] 1 N.S.W.L.R. 385, aff'd by the Court of Appeal, June 12, 1974 (unreported).

to the conclusion that there was reasonable ground to suppose a person was engaged in one of the activities listed in s. 57(1) would deprive him of jurisdiction to make an order under that subsection.[32] They also said that the views of O'Connor J. as to the nature of the Postmaster-General's duty to deliver the mails could not be regarded as authoritative. In fact, the judgment of Stephen J. suggests that those views were *per incuriam.*

The *Bradley* case, I submit, overcomes the last hurdle in the way of an argument that the Postmaster-General, when acting under s. 57(1), is under an implied duty to hold hearings beforehand. It is clear now that a person's interest in receiving mail is sufficiently important to justify such an inference and I believe that, should it arise, the High Court will take the opportunity of overruling what remains of the *Arndel* case. That it would not do so seems unthinkable in view of the statement of Barwick C.J. and Gibbs J. that,[33]

> there can be no doubt that the postal . . . services are among the most important amenities available to the people of the Commonwealth, and are essential to the conduct of trade and commerce as well as to the enjoyment of any real freedom in the dissemination of information and opinion . . . [I]f the Parliament intended to confer on the Postmaster-General an arbitrary power . . . to deprive any person of the liberty to use the postal . . . services, with all the grave consequences that might ensue, it would use clear words for that purpose.**

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[32] In so doing, they expressly preferred the interpretation of the phrase "has reasonable ground to suppose" adopted in *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66 (P.C.), to that adopted in *Liversidge* v. *Anderson*, [1942] A.C. 206.

[33] Op. cit., 247. For the current American situation on the legislation similar to s. 57(1), see *Blount* v. *Rizzi*, 400 U.S. 410 (1970). Not only must an administrative hearing be held before the Postmaster-General makes an order, but the Postmaster-General must also seek judicial confirmation of his order at the earliest possible moment after making it in a proceeding in which the burden of proof is on him.

** According to the present Postmaster-General, the subsection has not been used since about 1930. Letters to me, 28/8/1974 and 26/9/1974. No indication was given in these letters of an intention to use the subsection in the future. However, the Bland Committee, after detailed discussion with the Permanent Head of the PMG's department and his senior staff (see Interim Report of the Committee on Administrative Discretions, 1973, paras. 4(c), 10 and 11) made recommendations concerning the subsection, see footnote 12, *infra*, which suggests that the department does not consider the subsection moribund.

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