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The Labour Injunction in Canada
L'injonction et les conflits de travail au Canada

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Article abstract

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The Labour Injunction in Canada

A.W.R. Carrothers

This is an outline of the law of the injunction as used in labour disputes in the common-law provinces, with particular reference to recent developments in the law of picketing. The Author has prepared this essay for an audience not trained in law.

"The injunction is a form of judicial relief whereby the court orders a party to proceedings to refrain from doing specified acts." [1]

It is proposed to consider the operation of the injunction in labour disputes by dividing the definition, for convenience, into four heads: (1) the fact that it is a form of judicial relief; (2) the fact that it is a court order; (3) the fact that it is directed to a party to legal proceedings; and (4) the fact that it restrains specified acts. Of these, most will be said about the fourth head, which comprehends the law of picketing. Throughout, the law will be stated generally, with reference where appropriate to leading cases, and with illustrations, particularly in the law of picketing, drawn from recent instances in Canadian courts and from materials compiled from a study of court records in British Columbia. [2]

1) Judicial Relief

When a person "goes to law" to seek redress for what he believes to be a wrong done him, he generally seeks the remedy of monetary damages. But in cases where he cannot be adequately compensated in damages, it is open for him to seek a special order of the court requiring his transgressor to perform or to refrain from performing some course of conduct. This order is called an

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(1) Vol. 9 Encyclopedia of Court Forms (Atkin) 614.

(2) See Carrothers, *The Labour Injunction in British Columbia* (1956).

injunction and is available, generally speaking, "in all cases in which it appears to the court to be just or convenient." [3] It is an equitable remedy by no means peculiar to labour disputes. However, because of its special remedial qualities, it is frequently sought in labour-management disputes and its use and alleged abuse in this field is from time to time a matter of public consideration.

The injunction may be obtained as an interim remedy before trial or as a permanent remedy after the rights of the parties have been determined by a court. Where the injunction is sought before trial, the party to be enjoined may have notice of the intention of the aggrieved party to move the court for the order; or the motion may be heard *ex parte,* that is, without notice to the party enjoined. In this latter case the enjoined party is not represented at the hearing of the motion and may have no knowledge of the proceedings until a copy of the order is formally delivered to him. To illustrate, in British Columbia, from the years 1946 to 1955, 75 actions were commenced in which injunctions were sought in labour-management disputes; in 68 of these, interim injunctions were granted before trial; and of these 68 injunction, 63 were obtained *ex parte,* 5 on notice. Of the 63 *ex parte* injunctions, 51 were granted in the form in which they were sought and 12 were modified by the court in some respect.

2) Court Order

It is an essential feature of a court order that it is valid until it is set aside by judicial action. Whatever irregularities may enter into the creation of a court order, it cannot be ignored with impunity, but must be complied with until proper steps have successfully been taken to vary or dissolve it. Failure to obey the order constitutes civil or criminal contempt of court. Disobedience is a matter of criminal contempt if it amounts to contumacious misconduct so as to do public mischief or hold the administration of public justice up to ridicule. A person guilty of criminal contempt may be fined or committed to prison. Formerly there was no appeal from a conviction of and sentence for criminal contempt; but by recent amendment effected by the new Criminal Code [4] where a person is convicted of criminal contempt committed in the face of the court he may appeal the sentence, and where he is convicted of criminal contempt not committed in the face of the court he may appeal both the conviction and the sentence. There

(3) Cf. Laws Declaratory Act R.S.B.C. 1948, c.179, s.2(5).
(4) S.C. 1953-54, c.51, s.9.

have been two major cases of criminal contempt in labour cases in recent years, the *Poje* [5] case in 1952 and the *Hunchuk* [6] case in 1956. In the former case the accused was found to have flouted an injunction in the West Coast lumber strike of that year and was sentenced to six months' imprisonment and was fined $3,000.; in the latter case two officers of an unaffiliated union formed in a jurisdictional dispute were found to have defied an injunction and were sentenced to four months' imprisonment. More will be said of this case later.

3) Legal Proceedings

The interim injunction as an extraordinary judicial remedy is granted pursuant to legal proceedings. The significance of this is that the party seeking the remedy must have, or must at least claim to have, a cause of action, that is, an enforceable legal or equitable right, pursuant to which the injunction may go forth. In the first instance, then, the party seeking an injunction must commence an action, which means in effect he must issue a writ out of a superior court. [7]

Proceedings having been commenced, counsel then moves the court, *ex parte* or on notice, [8] for the injunction order. The motion is supported by an affidavit or affidavits purporting to establish the fact that irreparable and actionable harm is being caused and that it is just and convenient that an injunction before trial be granted. Where the motion is on notice, the defendant must be served with a copy of the writ and with copies of affidavits to be read in support of the motion. [9] At the hearing of the motion the court is not judging the merits of the case, as it would at trial, but is determining whether, in the circumstances then known, the plaintiff has brought himself within the requirements for an interim order. Counsel gives an undertaking

(5) *Poje* v. *A.-G. B.C.* (1952) 6 W.W.R. (N.S.) 473 (B.C.S.C.); (1953) 1 D.L.R. 385, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20 (B.C.C.A.); sub nom. *Canadian Transport (U.K.) Ltd. v. Alsbury et al* (1953) 2 D.L.R. 786, (1952) S.C.R. 516, 105 C.C.C. 311, 17 C.R. 176 (S.C. Can.).

(6) *Dawson, Wade & Co. Ltd. et al* v. *Tunnel & Rockworkers Union et al* (1956) 5 D.L.R. (2d) 663 and 715 (B.C.S.C.); *R.* v. *Hunchuk* (1957) 5 D.L.R. (2d) 663, 20 W.W.R. 446 (B.C.C.A.)

(7) Cf. B.C. Supreme Court Rules, 1943, O. 50, r. 6. It is conceivable that the action may be within the jurisdiction of an inferior court; but in British Columbia the only occasion between 1946 and 1955 in which a county court judge granted an injunction in a labour-management dispute he was functioning as a local judge of the Supreme Court.

(8) Cf. B.C. Supreme Court Rules, O. 50, r. 6 and O. 52, r. 3.

(9) *Ibid.* O. 52, r. 4 and 5; *Carrie & Hoskins* v. *Carpenters & Joiners* (1954) 11 W.W.R. (N.S.) 239.

to pay damages to those enjoined should it be found at the trial that the injunction should not have been granted. [10] However, of the 75 writs issued in British Columbia, in only 3 cases was the cause of action tried, [11] and in one of these the merits of the injunction were not judged. [12] The explanation is that the cause of action frequently gets compromised in the settlement of the labour-management dispute or the case is for practical purposes conceded at an early stage.

Upon the motion being heard and the affidavits in support read, the injunction order may be granted. The injunction may run for a fixed number of days, as is required for *ex parte* injunctions in Ontario, Saskatchewan and New Brunswick, [13] at which time the plaintiff must move the court on notice to continue, or it may run until the trial of the action or until further order. There is an inherent right in the defendants to apply to the court at any time on notice to dissolve the injunction for cause. [14]

Upon the order being granted, it is served on those enjoined; special provision may be made for what is called substitutional service by posting a copy of the order in a conspicuous place in the picketed area; of the 68 injunctions granted in British Columbia in the decade of the study, in 28 cases substitutional service was provided for.

The next stage in the proceedings, and as already noted rarely reached, is the trial of the action. The British Columbia Court of Appeal has repeatedly spoken out in favour of early trials in labour injunction cases. [15] If at the trial it is adjudicated that the conduct of the defendants as proved is actionable and enjoinable, the injunction

(10) Cf. B.C. Supreme Court Rules Appendix K, Form No. 26 F. A recent instance in which a defendant union sought damages unsuccessfully is *Christie Woodworking Co. Ltd.* v. *National Union of Woodworkers,* reported in Vol. 1 C.C.H. Canadian Labour Law Reporter page 11, 290, para. 15,096. (N.B.-S.C.)

(11) *Southam Co. Ltd.* v. *Gouthro et al.* (1948) 3 D.L.R. 178 (B.C.S.C.); *Aristocratic Restaurants (1947) Ltd.* v. *Williams et al* (1950) 4 D.L.R. 548 (B.C.S.C.); (1951) 1 D.L.R. 360 (B.C.C.A.); (1951) 3 D.L.R. 769 (S.C. Can.); *Poje* v. *A.-G. B.C. supra* note 5.

(12) *Poje* v. *A.-G. B.C. supra* note 5.

(13) Ontario Judicature Act, R.S.O. 1950, c. 190; Saskatchewan Queen's Bench Act, R.S.S. 1953, c. 67, s. 44, rule 20; New Brunswick Judicature Act, R.S.N.B. 1952, c. 120, am. 1956, c. 42, s. 2.

(14) *Fritz* v. *Hobson* (1880) 14 Ch. D. 542; *Penrice* v. *Williams* (1883) 23 Ch. D. 353.

(15) *Lakeman & Barrett* v. *Bruce* (1949) 1 W.W.R. 886; *Entzminger* v. *Berg* (1951) 2 D.L.R. 277; *Page v. Janzen* (1955) 15 W.W.R. 276; *Grinnell Co.* v. *Retail Wholesale Dept. Store Union* (1956) 3 D.L.R. (2d) 101.

will be made permanent; otherwise the temporary injunction will be set aside.

4) Specified Acts

This part of the definition of the injunction embraces the law of picketing. Labour injunctions in British Columbia from 1946 to 1955 were in practice sought principally in circumstances of picketing or some allied activity. In 42 of the 75 cases, the activity was direct picketing during collective bargaining by a certified bargaining authority and in 17 cases in the same circumstances, except by an uncertified union. Four were cases of picketing an employer not party to the labour dispute, one was a case of sympathetic picketing, three were cases of grievance picketing, and eight were of such singularity as to be unclassified.

The operative part of an injunction runs in the following formal language:

> "It is ordered and directed that the defendant, his agents and servants be restrained and an injunction is hereby granted restraining them from..."

performing specified acts.

The principal kinds of conduct specifically restrained in the British Columbia injunctions were watching and besetting, intimidating, interfering with contractual relations, deterring from entering or leaving premises, trespassing, picketing as such, persuading employees not to work, causing nuisance, preventing free access, and interfering with customers. All these acts may be summarized under the topic of picketing either as being inherent in it or as being, for practical purposes, from time to time associated with it.

The term picketing has never been described with a comprehensiveness approaching definition. But it is submitted there are three elements present in any course of conduct generically described as picketing: there is a physical presence of persons called pickets; there is a communication of information; and there is an intention to persuade those to whom the information is conveyed so to conduct themselves as to favour the cause of those responsible for the picketing. The leading case of *Aristocratic Restaurants (1947) Ltd.* v. *Williams*

et al,[16] decided by the Supreme Court of Canada in 1951, establishes that this kind of conduct can be lawful. But the conduct of picketing may vary from case to case in respect of the form which the picketing takes, the circumstances in which it occurs or the object for which it is instituted, and the result which it produces. Thus the lawfulness of any act of picketing may be determined by examining whether it is lawful in respect of form, object and result. If it is tortious in respect of any of these aspects, it is enjoinable at least to the extent of the tort, and perhaps in its entirety. The torts classified for purposes of analysis under the form of picketing are assault, battery, trespass, defamation, intimidation (a form of assault) and nuisance. The torts associated with object are conspiracy involving unlawful means or to accomplish an unlawful end, and conspiracy to injure. And the tort constituting the classification of result is inducing breach of contract.

Most of the recent cases have arisen out of instances in which a union uncertified under the applicable labour code has sought to induce the employer to recognize the union and to bargain with it over the contents of a collective agreement. This paper is concerned primarily with recent developments in this field of recognition picketing.

A. The Form of Picketing

Pickets must not directly threaten anyone with or commit bodily harm,[17] must not enter upon the property of another without permission, and must not utter defamatory statements, orally or in writing.[18] Some difficulty arises in determining when the sheer weight of numbers constitutes an unlawful threat, for it is not unlawful to threaten to do a lawful act. The courts have been reluctant to specify the number of pickets which will be allowed,[19] and will in appropriate

(16) *Southam Co. Ltd. v. Gouthro et al* (1948) 3 D.L.R. 178 (B.C.S.C.); *Aristocratic Restaurants (1947) Ltd.* v. *Williams et al* (1950) 4 D.L.R. 548 (B.C.S.C.); (1951) 1 D.L.R. 360 (B.C.C.A.); (1951) 3 D.L.R. 769 (S.C. Can.); *Poje* v. *A.-G. B.C. supra* note 5.

(17) *R.* v. *Reners* (1926) 3 D.L.R. 669 (S.C. Can.); *Dawson, Wade & Co. Ltd. et al* v. *Tunnel & Rockworkers Union, supra* note 6.

(18) *Schuberg* v. *L.I.A.T.S.E.* (1926) 3 D.L.R. 166 (B.C.C.A.); *Coastwise Pier Ltd.* v. *Cunningham et al* (1955) (unreported; see *The Labour Injunction in British Columbia* 254) (B.C.S.C.); and in the *Christie* case (*supra* note 10) signs reading "Do not cross over picket line", displayed in a lawful strike, were held to be "improper" and enjoinable.

(19) *Army & Navy Dept. Store* v. *R.W. & D.S.U.* (1950) 2 D.L.R. 850 (B.C.S.C.).

cases enjoin picketing altogether if the massing of pickets may, in the view of the court, lead to a breach of the peace. [20]

A recent case dealing with intimidation is *Dawson Wade & Co. Ltd. et al.* v. *Tunnel and Rockworkers Union.* [21] The plaintiff companies were engaged in large construction projects in British Columbia, including highway construction, tunnel work, a power dam and pipeline construction. In 1955 the companies entered into a collective agreement with Tunnel and Rockworkers Local 168 of the International Hodcarriers, Building and Common Labourers' Union of America. The international headquarters of the union, in Washington, D.C., required the members of the local to conform to an all-Canada wage scale considerably below the prevailing British Columbia scale. Upon protestation by members of the local, the international put the local under trusteeship and expelled the president and secretary, Andres and Hunchuk. These former officials then formed an independent Tunnel and Rockworkers' Union of Canada, in which most of the members of the local took out membership. The independent union then sought recognition by the employers, including the right to checked off dues. The companies, bound by collective agreements with a certified union, Local 168, refused recognition. A strike was called and picket lines were established. There was a general refusal to cross the picket lines, and work stopped. An injunction was obtained *ex parte* against, in brief, inducing and conspiring to induce breaches of the collective agreements and conspiring to delay the construction projects and inducing a strike, and watching and besetting to induce employees to cease work. The injunction was continued *ex parte* until trial or further order. The picketing continued, and the plaintiffs moved the court to commit or attach the defendant officers for contempt. The motion was unsuccessful for procedural reasons.

The plaintiffs again moved the court to commit the defendants Andres and Hunchuk and others for contempt, and after a lengthy hearing, during which picketing continued at some construction sites, the motion was granted.

The court found there was not mere communication of information but there was active intimidation, such as threats to employees

(20) *Hallnor Mines Ltd.* v. *Behie et al* (1954) 1 D.L.R. 135 (Ont. H.C.)

(21) *Dawson, Wade & Co. Ltd. et al* v. *Tunnel & Rockworkers Union et al* (1956) 5 D.L.R. (2d) 663 and 715 (B.C.S.C.); *R.* v. *Hunchuk* (1957) 5 D.L.R. (2d) 663, 20 W.W.R. 446 (B.C.C.A.).

of being blacklisted as scabs, and the court inferred from the evidence that the purpose of the pickets was to cause a work stoppage. The defendants Andres and Hunchuk defied the court orders in public meetings. The court found that there was a "public depreciation of the authority of the court tending to bring the administration of justice into scorn", and that the conduct of Andres and Hunchuk and three others constituted criminal contempt. Andres and Hunchuk were sentenced to four months' imprisonment. Their appeal in person was dismissed.

The reasons for judgment do not appear to make new law; but the case is illustrative of the kind of events that may surround the instances of recognition picketing which predominate the recent picketing cases.

The tort in the form of picketing which has received most exhaustive recent attention is nuisance, the unlawful interference with the enjoyment of land. The picketing which occurred in the *Aristocratic* case and which was not enjoined consisted of two persons walking on the pavement and bearing signs stating true facts. Although the Supreme Court of Canada may be said to have found that this conduct fell within the protection extended by the British Columbia Trade-unions Act, in the view of Clinton J. Ford J.A. in *Bennett & White Ltd.* v. *Van Reeder et al,* [22] the majority of the court held that the picketing did not amount to a nuisance.

It was a different story in the recent case of *Hammer* v. *Kemmis.* [23] This case is one of the most significant decisions of the past two years, and it is a matter of academic regret that it is not to be appealed to the Supreme Court of Canada. It falls within all three fields of form, object and result, and deserves detailed examination.

The operator of a small specialty bakery in Vancouver discharged an employee for drunkenness and insubordination. The employee forthwith joined the Bakery and Confectionery Workers' International Union of America. The union was not certified for the employees of the plaintiff. The following day the union picketed the bakery premises with signs indicating that the product of the bakery was not union made. A co-worker of the discharged employee joined the union

(22) (1957) 6 D.L.R. (2d) 326 at p. 330.
(23) (1956) 3 D.L.R. (2d) 565 (B.C.S.C.); (1957) 7 D.L.R. (2d) 684 (B.C.C.A.).

and the picket line. The other employees did not strike. The plaintiff's application for an interim injunction was treated by consent as a trial of the action, so that the whole proceedings were speeded up. The court recognized that the statements on the placards were true, but found that the pickets physically impeded access to the property and conveyed the impression that a strike was in progress; that wholesale purchasers terminated their contracts under threat of being picketed; that part-time van drivers terminated their employment out of apprehension of losing their regular jobs; that employees were threatened with the blacklist if they did not join the union and quit work; and that the business agent of the union demanded that the plaintiff sign the master collective agreement prevailing in the large bakeries in Vancouver. The court rejected the denial that the picketing was connected with the discharge of the employee, then being prosecuted by the union before the British Columbia Labour Relations Board, and rejected the suggestion that the picketers were merely "information patrollers" acting within their rights under the *Aristocratic* decision.

The cour distinguished the *Aristocratic* case on the facts, holding that in the *Hammer* case the conduct "was illegal and constituted nuisance." It held that the object of the picketing in the former case was to communicate facts, whereas in the latter case the purposes "were to interfere with the existing contractual relations of the plaintiffs" and to punish the plaintiffs for dismissing the employee. The *Aristocratic* case was further distinguished on the ground that the object and result of the picketing in that case was to dissuade prospective patrons and employees from dealing with the plaintiff, whereas in the *Hammer* case the objects and results were to induce breaches of contracts of sale and to induce termination of employment. It is not clear whether the finding of nuisance was based on the physical impediment or on the general result that the use and enjoyment of the land was interfered with. A majority of the British Columbia Court of Appeal (Sheppard J.A., Bird J.A. concurring) held that there was evidence to support the finding of nuisance at the plaintiffs' premises and that on the findings of the trial judge the defendants did not restrict themselves to the methods permitted by section 3 of the British Columbia Trade-unions Act. [24] The *Aristocratic* case was held inapplicable because of the tortious acts committed. Davey J.A. in a strong dissent expressed the opinion that the evidence did not support the finding of nuisance.

(24) R.S.B.C. 1948, c. 342.

Nuisance, in law, is regarded as a question of fact, not in the sense of establishing it as an event, but in the sense of inferring it from the evidence; it is, more accurately, a *conclusion* of fact, drawn from the evidence of events and relationships and purposes. The issue is not always an easy one to determine. The strong difference of opinion recorded in the judgments in the Court of Appeal over the interpretation of the evidence in the *Hammer* case illustrates how complex the issue of nuisance can be. And the issue being a question of fact, the answer to the issue may vary from case to case. The fact, therefore, that the form of recognition picketing that occurred in the *Hammer* case was found to be a nuisance does not mean that recognition picketing will or should as a matter of fact be found to be a nuisance in every case.

B. The Object of Picketing

The tort of conspiracy as related to picketing consists of two distinguishable principles.

Where two or more persons in concert commit an unlawful act causing damage, they not only may be liable individually for the unlawful act, but they may be liable for the added group tort of conspiracy. [25] Where the unlawful act is actionable as a civil wrong, the action founded in conspiracy may be superfluous to the plaintiff. But where the unlawful act is not actionable — and there is authority, although of waning strength, that a breach of the Labour Relations Act is punishable under the statute but is not actionable [26] — the injured party may rely for a remedy on his cause of action in civil conspiracy.

The second principle is that "a combination of two or more persons wilfully to injure a man in his trade is unlawful, and if it results in damage to him, is actionable." [27]

The point of greatest difficulty in applying the law of civil conspiracy to instances of picketing is in determining whether the object of the defendants was to injure the plaintiff. The problems were set out with particular exhaustiveness in the latest English case on labour

(25) *Southam Co. Ltd.* v. *Gouthro, supra* note 11.
(26) *Ibid.;* but cf. *Vancouver Machinery Depot v. U.S.W.A.* (1948) 1 D.L.R. 114 (B.C.S.C.) and *Therien v. I.B.T.* (1957) 6 D.L.R. (2d) 746 (B.C.S.C.).
(27) *Sorrell v. Smith* (1925) A.C. 700 (H.L.).

conspiracy, *Crofter Handwoven Harris Tweed Co. Ltd.* v. *Veitch et al*,[28] where the House of Lords pointed up the conflict of purpose between self-interest of the members of the confederacy, the union, and harm to the employer.

The greatest challenge throughout the cases is to seek to maintain a rational basis for determining the object of the group action. Once it is conceded that it is lawful for employees to take group action in relation to their employer to bargain over terms of employment, the challenge is to determine the lawful limits of such action. Our modern labour codes express legislative policy affecting a large area of these labour-managemnet relations, but there still remains a great field ruled by the common law. In this field the courts are being faced increasingly with determining in the language of legal principle these conflicts of economic interest between labour and management. The decisions perforce reflect not only judgments of precedent, of black letter law, but judgments of values, of the policy of the law. It is therefore of first importance to understand the significance of what the courts are saying — or, indeed, leaving unsaid — in this comparatively new field of civil conspiracy.

The *Hammer* case merits priority of consideration. The majority judgment in the Court of Appeal found that there was an agreement between the defendants resulting in damage to the plaintiffs. It was further found that there was evidence to support the findings of the trial judge of an unlawful purpose and the use of unlawful means, taking the case outside the protection of the *Crofter* case. On this judgment the appeal was dismissed.

Davey J.A. wrote a lengthy dissent directed largely to stating why he was unable to accept the findings and inferences of fact of the trial judge as being unsupported by the evidence. In his view of section 23(4) of the British Columbia Labour Relations Act:

> "... a union need not be certified for a unit of employees before attempting to negotiate a collective agreement on their behalf... There was, therefore, nothing unlawful or improper in the union attempting to negotiate a collective agreement with the respondent before having been certified as bargaining representative for his employees."

(28) (1942) A.C. 435 (H.L.).

After reviewing the evidence, including the fact, not recorded in the judgments previously reviewed, that the union sought to organize the shop some days before the discharge of the employee for drunkenness and insubordination, the judge concludes that:

> "... the purpose of the appellant's activity was to promote the legitimate and lawful interests of the union, and that the finding that the real design was to inflict injury upon the respondent cannot stand."

Before reaching this conclusion, the judge considered the question of the reasonableness of the object. He found the object not unreasonable, but also found that even if it were,

> "Unreasonable demands and infliction of disproportionate damage may be some evidence of bad faith and that the ostensible purpose of the combination was not its real purpose; but apart from its evidentiary value, it will not make a non-actionable conspiracy actionable; it is not for the courts to say whether a union's demands are reasonable or expedient, or whether they are well calculated to effect the proposed object. That is a matter for the union to determine. Nor, generally speaking, is a union required to consider the interests of the employer, and it is not likely to do so except so far as they coincide with its own interests. These principles seem to be deducible from the speeches in the *Crofters* case, of Viscount Simon at p. 447; Lord Wright, p. 464 — 5, quoting the speech of Lord Herschell in *Allen* v. *Flood*, [29] and at pp. 469, 472, 477."

He concluded:

> "Regrettable as the respondent's misfortune may be, there are ample legitimate reasons from the union's point of view for its policy, which prevent an inference of bad faith or ulterior purpose being drawn from it, harsh and unreasonable though some may think that policy to be."

If this view of the law is to prevail, the court's view of the reasonableness of the union's conduct is not definitive of civil conspiracy, but goes only to the weight of the evidence of object to injure. Thus even the standard of reasonableness may have a very limited func-

(29) (1898) A.C. 1 (H.L.).

tion in inducing from the evidence the object, and thus determining the lawfulness, of group action of employees.

Another British Columbia case of recognition picketing, which turned entirely on the law of conspiracy, is *Midland Superior Express Ltd.* v. *Scott et al.* [30] The facts are not set out in detail in the report of the case, but affidavits filed in support of the *ex parte* injunction indicate, briefly, that the plaintiff company, operating out of Alberta, was in the business of obtaining contracts of haulage on commission for independent owner-drivers. The Teamsters tried and failed to organize the owners and their drivers. (It is doubtful that owner-operators are capable of being certified under the Alberta Labour Act.) [31] The union picketed the plaintiff's premises in Edmonton, Alberta, and Burnaby, B.C. The object of the British Columbia picketing was to support the drive for unionization in Alberta. Business with a number of firms came to a halt and a number of haulage contracts were broken. An injunction was obtained *ex parte* restraining the defendants from watching and besetting, intimidating, and inducing breach of contract. At the hearing of the motion to continue the injunction, the court stated that "a legal picket can exist side by side with other illegal acts being carried on by the parties to a trade dispute" and quoted the *Aristocratic* case and *Mostrenko* v. *Groves* [32] as authorities for the proposition. It is respectfully submitted that these cases do not decide this principle. To the contrary, in both cases the court enjoined those acts which were considered illegal. The principle that a legal picket can exist side by side with other illegal acts, more specifically an unlawful strike, is supported by *Coles* v. *Cunningham,* [33] *General Dry Batteries* v. *Brigenshaw,* [34] *Peerless Laundry* v. *L. & D.C.W.U.* [35] and *Borek* v. *Amalgamated Meat Cutters,* [36] but is opposed by *Arsens* v. *H. & R.E.U.,* [37] *Oakville Wood Specialties Ltd.* v. *Mustin,* [38] *Comstock Midwestern* v. *Scott,* [39] *Smith Brothers Construction Co. Ltd.* v. *Jones,* [40] and *Dabous* v. *Thibault.* [41]

(30) (1957) 6 D.L.R. (2d) 302 (B.C.S.C.).
(31) Stat. Alta. 1947, c. 8; am. 1948, c. 76, 1950, c. 34, 1954, c. 51.
(32) (1953) 3 D.L.R. 400 (B.C.S.C.).
(33) (1954) 10 W.W.R. (N.S.) 507 (B.C.S.C.).
(34) (1951) 4 D.L.R. 414 (Ont. H.C.).
(35) (1952) 4 D.L.R. 475 (Man. Q.B.).
(36) (1956) C.S. 333 (Que. S.C.) following the *General Dry Batteries* and *Peerless Laundry* cases, and distinguishing the *Oakville Wood* case.
(37) (1950) unreported; see *The Labour Injunction in British Columbia* at page 246 (B.C.C.A.).
(38) (1950) O.W.N. 735 (Ont. H.C.).
(39) (1953) 4 D.L.R. 316 (B.C.S.C.).
(40) (1954) 2 D.L.R. 117; (1955) 4 D.L.R. 254 (Ont. H.C.).
(41) (1954) O.W.N. 793 (Ont. H.C.).

However, the court in the *Midland* case found the picketing illegal *per se* because the primary intent was not informative but was "coercive to the point of threatening loss of business" and as such was enjoinable under *Comstock Midwestern* v. *Scott* and *Canada Dairies* v. *Seggie,* [42] and was not protected by the British Columbia Trade-unions Act. [43] It is respectfully submitted that this proposition is bad law. The court does not spell out de nature of the coercion; I think it is fair to assume that the reference was to the general oppressiveness of the defendant's conduct, by itself a neutral factor in the issue of legality. And the threat of loss of business is common to virtually all acts of picketing: it is fundamental to and inherent in the collective bargaining process which is part of the fabric of modern trade unionism and which enjoys firm legislative and judicial recognition.

If there had been a finding that the defendants were seeking to accomplish a goal that was contrary to the Alberta Labour Act, the judgment could have been supported on the first principle of conspiracy. Or if, in the view of the court, the defendants were not acting within the area of their reasonable self-interest, the court might have found it persuasive or conclusive that the defendants' object was to injure. But neither of these findings is set out in the reasons for judgment.

Still another British Columbia case on recognition picketing is *Therien* v. *International Brotherhood of Teamsters.* It appears that the plaintiff operates a trucking business and has employees operating vehicles and equipment not operated by himself. He had a contract with a construction firm. Officials of the International Brotherhood of Teamsters told him that he must join the union or he would not be allowed to operate his truck on the project himself. An official of the union told the construction company that if the plaintiff continued to drive without joining the union, the union would picket any jobs on which the plaintiff worked. The construction company discontinued hiring the truck which the plaintiff was driving.

The plaintiff brought action against the Teamsters Union in its own name for damages and an injunction for unlawful interference

(42) 1940 4 D.L.R. 725 (Ont. H.C.)

(43) The court declined to find that the purpose of the picketing was to induce breach of contract as in the *Smith* case, on the ground that such a finding would amount to a final adjudication of the case and the application was merely for an interim injunction.

with his occupation. The defendant's motion to strike out the writ and the service of the writ on the ground that it is not a suable entity was dismissed.

It is understood that the collective agreement between the union and the construction company provided for something akin to a union shop on the project. The union may thus have been threatening to use pickets in support of what it considered to be its rights under the collective agreement. The implications of the case are therefore much broader than they may at first appear. There is much that can be said both in terms of civil conspiracy and inducing breach of contract. But although the case has gone to trial on the merits, judgment has not been delivered at the time of writing, and further comment should, I think, await the outcome of the trial.

The latest case on civil conspiracy is the unreported judgment in *Todd et al.* v. *Tomson et al,*[44] a British Columbia case of picketing by a certified union in circumstances not previously litigated. The plaintiff company operates an hotel and public house in Prince George, B.C. The defendant Beverage Dispensers' Union was certified as bargaining agent for the public house employees. In negotiations in 1956, the company rejected the terms of a collective agreement negotiated between the union and the B.C. Hotels Association affecting other hotels in Prince George. The conciliation machinery of the Labour Relations Act was exhausted and a strike vote applied for. None of the three employees affected voted. The defendant union then picketed the hotel with signs stating there was no collective agreement between the hotel and the union. The picketing was peaceful in form. The three employees did not enter the picketed premises.

The plaintiffs obtained an *ex parte* injunction. At the trial the plaintiff claimed that the defendants counselled the employees to cease work and conspired to injure the plaintiff and to induce breaches of contracts of employment, and that the picket line was established to induce breaches of contract and constituted an illegal strike. The court found that the employees left their work on their own volition and that the purpose of the picketing was to advance the interests of the union in protecting employees who were enjoying better conditions of work.

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(44) Prince George Registry No. 157/56.

The court further found that the defendants were protected by section 4 of the British Columbia Trade-unions Act which permits the publishing of information with regard to a labour trouble; the court also referred to section 3 of that Act. Finally, the court found that there was no strike within the meaning of the Labour Relations Act, but that if there were, the act of striking was severable from the act of picketing under the principle of *Coles* v. *Cunningham*. The case was held not to be distinguishable from the *Aristocratic* case. [45]

Reference has already been made to the conflict in judicial authority over the principle for which *Coles* v. *Cunningham* was quoted in this case. It is respectfully submitted that where picketing is invoked to make an unlawful strike effective, it becomes the means or part of the means to an unlawful end and is itself unlawful. To separate picketing from striking in circumstances in which they are clearly integrated is to ignore the law of civil conspiracy.

This case and the *Hammer* case typify the problems involved in determining the limits of the extension of the *Aristocratic* principle. In the *Aristocratic* case, picketing occurred by a certified trade union after the conciliation board report was rejected by the union but before a strike vote was taken. Picketing at this stage was described as a legitimate mode of "waging the contest." [46] The *Todd* case was authority that picketing is legitimate at the subsequent stage where a strike vote is taken and a strike is not authorized — indeed, the judge in the *Todd* case suggests it is indistinguishable from the *Aristocratic* stage. If picketing is legitimate at the *Aristocratic* stage, is it legitimate at any previous stage? — before the conciliation board report has been rejected by either party? — before the board report has been received? — during negotiations before the board or before the conciliation officers? — during negotiations between the parties? — after certification but before negotiation? — *before certification?* Each step back is only a difference in degree. Does not logic support the view taken by Davey J.A. that recognition picketing is not in itself unlawful? The fact that it may circumvent the Labour Relations Act, as noted in *Smith Brothers Construction Co.* v. *Jones et al*, does not meet the case where the Labour Relations Act, as pointed out by Davey J.A., contemplates its own circumvention or, indeed, where the labour code

(45) There was a further question of interpretation of the expired collective agreement which is not germane to the problem of picketing.

(46) Per Rand J.

does not purport to be exhaustive in determining the limitations on the use of economic power in labour-management disputes. But it is a timely reminder that "the life of the law is not logic but experience", [47] and the occasion must be awaited when there will appear before the courts a clear case of recognition picketing unencumbered by torts of form or result.

C. The Result of Picketing

The tort of inducing breach of contract owes its modern exposition to the case of *D.C. Thomson Ltd.* v. *Deakin et al.* [48] Stated in the language of labour relations, the tort may be committed where picketing causes a breach of contract by inducing employees to break their contracts of employment and to strike illegally. But before the tort can be attributed to the pickets, it must be shown (1) that there was a breach of contract, (2) that damage was intended, (3) that damage resulted, (4) that the pickets had knowledge of the contract, (5) that the pickets not merely sought support which could lawfully be given but induced the employees to do an unlawful act such as breaking their contracts of employment or unlawfully striking, and (6) that the breach of contract is a necessary consequence of the inducement. It will thus be seen that there are as many avenues of escape from the tort as there are requisites for its establishment. The challenge of the recent cases is to determine whether the evidence supports the conclusion that the requisites are met; and, more particularly, to determine the fifth requisite, that the pickets not merely sought support which could lawfully be given but induced employees to do an unlawful act. It is this requisite which combines the advocative power of the picket line with the disciplinary power of the union, giving to the persuasive request, so far as members are concerned, the status of law within the union. It is recognized that it is contrary to the practices of the trade union movement to enter picketed premises without special arrangement, and in given cases it is contrary to the constitution or rules of the union; in the latter cases, the instrument usually contains a sanction of disciplinary action administered within the union for its breach. Where union membership is a condition of employment, the significance of the sanction is obvious: the individual is bound, at the peril of losing employment in his trade, by rules which he has no part in shaping, no choice in accepting, and little hope of

(47) For an expansion of this theme see Holmes, O.W., *The Path of the Law* (1897).

(48) 1952 Ch. 646, 666 (C.A.)

altering. It remains only to determine whether the picketing is a command to behave contrary to the law of the land. If that behaviour is itself a breach of contract or results in a breach of contract, the fifth requirement for the tort of inducing breach of contract would seem to be met.

In *Smith Brothers Construction Co. Ltd.* v. *Jones et al,* the direct link between the picketing and the inducing of the breach of contract on three jobs was more obvious because of evidence that the defendants directly approached the owner of a fourth building under construction to stop work on that project. The evidence in the *Hammer* case supporting the same conclusion was les direct. The majority judgment in the Court of Appeal found that there was evidence to support the finding that the outlets for the plaintiff's wholesale business was lost through "illegal tactics" and "under threat of having their own place of business picketed". These findings supported the conclusion that the tort of civil conspiracy had been committed, but they have implications of interfering with contractual relations.

In dissent, Davey J.A. found that there was interference, without coercion or intimidation, with a course of patronage, as is allowed by section 3 of the British Columbia Trade-unions Act, but that there was no evidence that the appellants induced breaches of commercial contracts or contracts of employment.

As to the relevance of the significance of trade union practices in respect of picket lines, the judge said:

> "There is nothing to suggest they did not act in obedience to their own rules and in support of union solidarity, and out of respect for union principles, which I am prepared to assume in favour of the respondent are assiduously taught and enforced by all unions...
> Under other circumstances a case of actionable conspiracy for wrongfully procuring a breach of contract may have to be considered in which it is alleged that the unlawful means employed involved improper trading upon union loyalties adherence by members to union principles, and fear of union discipline, under the colour and pretence of communicating information or exercising the right of persuasion pursuant to section 3 of the Trade-unions Act. But on the evidence no such case arises here."

And later:

> "... the appellants... are not liable in the circumstances of this case for what the truck drivers and other union members did voluntarily upon seeing the pickets and reading the placards in the interest of union solidarity or because of adherence to union principles or rules."

Thus the dissenting judgment would leave open the question of the limitations on the freedom of trade unions to combine the persuasive power of the picket line with the disciplinary power of their constitutions.

But an excellent illustration of the misuse of internal disciplinary powers to guarantee illegal economic pressure is *Wheaton Ltd.* v. *United Brotherhood of Carpenters and Joiners.*[49] This was an action for a declaration, an injunction and damages. The plaintiff company had a collective agreement with the carpenters' local of the union, containing a closed shop clause. The company entered into a contract with the C.P.R. for certain dock repairs in Victoria. The pile drivers' local of the union claimed jurisdiction on the job, basing the claim on a rule of the parent union governing jurisdiction of locals in respect of working over water. The business agents of both locals asked the plaintiff to put pile drivers on the job. The plaintiff refused, as his men were old employees and he had a collective agreement with the carpenters' local. The business agents turned up at the job site with four or five pile drivers, and the plaintiff's foreman said the men were not wanted. The company suggested grievance of the dispute. The union officials rejected this on the ground that the dispute was jurisdictional. They told the carpenters the latter would be disciplined if they continued to work. The men stopped work. The plaintiff obtained an injunction against breach of the collective agreement.

The court found that the working rule of the parent union was not a custom in the trade, and that the work fell within the terms of the collective agreement between the plaintiff and the carpenters' local. It was held that the business agent of the carpenters' local committed breach of the collective agreement, and that the business agent of the pile drivers' local induced breach of the collective agreement. The plaintiff was granted a declaration of his rights, an injunction against violating the collective agreement, nominal damages against the locals, and costs.

(49) 1957 6 D.L.R. (2d) 500 (B.C.S.C.)

The case is significant in a number of respects. First, breach of the collective agreement was treated as giving rise to a cause of action; second, the union was treated as a legal entity for the cause of action; and third, the law of breach and inducing breach of contract was applied to breach and inducing breach of a collective agreement. The case was not fully argued on these points, but the judgment nevertheless gives a legal status to the union and to the collective agreement which was denied them in cases predating our present labour codes. [50]

But most important is the result that the use by union officials of the power of internal discipline, where union membership was a condition of employment, to interfere wrongfully with the performance of a collective agreement constituted the tort in the one case of breach and in the other of inducing breach of a collective agreement.

This, of course, was not a picketing case; but the analogy is clear and the essential ingredients are, it is submitted, identical. There was a request (or threat) backed by a sanction administrable within that private domain conceded to unincorporated associations by the common law. Picketing is also, it is submitted, essentially a request; and might, as a matter of fact, in any instance be backed by the same sanction. In the *Thomson* case the court distinguished between seeking a lawfully attainable end, such as help to the disputant union, and advocating unlawful means, such as refusing to work or to handle "hot" goods. Applying the distinction to the law of picketing raises a difficult question of fact.

> "... to post pickets may, as a matter of fact, be so clearly an invitation, within the mores of the trade union movement, to support the dispute by refusing to cross the line or by boycotting the goods, as to constitute advocating the means perhaps even more clearly than the end. Even in England, it has been suggested, [51] interpreting such conduct as advocating the end but not the means is not normally appropriate to the local union level of execution but to the higher level of policy. The distinction between the means and the end raises the obvious question, of

(50) *United Mine Workers* v. *Strathcona Coal* (1908) 8 W.L.R. (Alta. S.C.); *Caven* v. *C.P.R.* (1925) 3 D.L.R. 841 (P.C.); *Young* v. *C. Nor. Ry.* (1931) A.C. 83 (P.C.); *Wright* v. *Calgary Herald* (1938) 1 D.L.R. 111 (Alta. A.D.). But cf. such cases as *Re Patterson & Nanaimo Laundry Workers' Union* (1947) 4 D.L.R. 159 (B.C.C.A.). *Hume & Rumble Ltd.* v. *I.B.E.W.* (1954) 3 D.L.R. 805 (B.C.S.C.), and *Jackson & Cope* v. *Shipping Federation* (1955) 15 W.W.R. 311 (B.C.S.C.).

(51) C. Grunfeld, (1953) 16 Mod. L.R. 86 at page 90.

> which the court in *Klein* v. *Jenoves & Varley* [52] was acutely aware, whether the distinction invites the piously fraudulent admonition, "Don't throw him in the duck pond." It may invite protagonists in labour disputes to execute their functions with the common intrigue and ingenuity of characters from Uncle Remus. But whether picketing advocates the means or the end is a question not of law valid in all cases, but of fact, admittedly difficult, which may elicit different answer in different cases. What may amount to inducement is not clear." [53]

The last case for consideration here is again a situation of recognition picketing. Its facts hover in analogy between the events of the *Wheaton* case and Davey J.A.'s interpretation of the *Hammer* case. In *Bennett & White* v. *Van Reeder et al,* the plaintiff company was general contractor on a project for the T. Eaton Company in Calgary, Alberta. Budd Brothers Ltd. was a sub-contractor, employing non-union men. The general contractor had employees who were union members and whose union constitutions made them subject to penalty if they crossed a picket line. The International Union of Operating Engineers had no contract with the general contractor or with sub-contractors. A representative of the union sought a collective agreement with Budd Brothers Ltd. and the company agreed to sign if its employees joined the union. The union was unsuccessful in recruiting the employees, and it picketed the project. As a result other employees left work. That day the plaintiff company obtained an interim injunction; at the trial the order was made permanent and damages of $1,000 were awarded for the day's shutdown. The trial judge found the object of the picketing was not to convey information but to bring the operation to a halt. The *Aristocratic* case was distinguished on the ground stated in *Comstock Midwestern* v. *Scott* that the picketing in the instant case was not merely for the purpose of communicating and obtaining information but was to tie up the operations and thus to interfere with contractual relations.

In the Alberta Court of Appeal, Johnson J.A. (Porter J.A. concurring) distinguished the *Aristocratic* case principally on the ground that in the present case the defendants induced breach of contract within the tests set down by Jenkins J.A. in the *Thomson* case of

(52) (1932) 3 D.L.R. 571 (Ont. H.C.)
(53) Carrothers, *The Labour Injunction in British Columbia,* 83-4.

knowledge of the contract of employment (in his view, knowledge of the exact terms is irrelevant), procuration of the breach, actual breach of contract of employment, and breach of the contract forming the subsequent interference as a necessary consequence of the breach of contract of employment. *Sorrell* v. *Smith* was distinguished on the ground that in that case there was no procurement of breach of contract. Finally the judge found that there was no trade dispute present in this case.

Clinton J. Ford J.A. distinguished the conspiracy cases from *Mogul* to *Crofter*[54] on the ground that the issue in the present case is not unlawful conspiracy to injure but procuring breach of contract. He then concluded:

> "It cannot be held on the facts otherwise than that the appellants formed the picket line for the immediate if not the predominant purpose of procuring the breach of contract. Il may be accepted that they also had in mind to advance thereby the interests of their trade union, but this is not legal justification for committing a tortious act that in itself created common law liability. Furthermore, as pointed out by the learned trial judge the appellant trade union did not have a contract with the plaintiff, or with Budd and Company, its sub-contractor, whose employees were induced or procured to break their contract, nor were any employees of this company members of the appellant union. In such a situation it had no trade union rights to protect."

The *Aristocratic* case was distinguished on the further ground, *inter alia,* that in that case the union had a trade dispute with the employer.

I think it is fair to say that both judgments in the Court of Appeal turn in part on what the judges considered was an absence of a trade dispute, which deprived the picketing of justification or reasonable self-interest and branded it with the object of interfering with the operations and inducing breach of contract. The nub of the case may thus be to determine whether there was a labour dispute. Most Canadian labour codes contain a definition of "dispute", but it is of course for the purpose of the statute. There is no common law definition of

(54) *Mogul S.S.* v. *MacGregor, Gow & Co.* (1892) A.C. 25; *Allen* v. *Flood* (1898) A.C. 1; *Quinn* v. *Leatham* (1901) A.C. 495; *Crofter* v. *Veitch, supra* note 28.

the term that I am aware of. I gain the impression from reading the judgments that the courts concluded there was no dispute because there was no certification, no collective agreement and, in this case, no employees of Budd Brothers were members of the union. Indeed, there is an implication in Clinton J. Ford J.A.'s judgment that unions should confine their economic activities to the framework of the prevailing labour code. This view is also to be found in *Smith Brothers Construction Co. Ltd.* v. *Jones.* But as Davey J.A. rightly, it is submitted, pointed out in dissent in the *Hammer* case, the code itself may contemplate activity outside its framework. And the very fact that there is a common law of picketing is indicative that the labour codes are not necessarily definitive of the lawful use of economic power in labour-management disputes. Thus the pickets in the *Bennett & White* case were not seeking an end contrary to the statute as the defendants were in the *Hunchuk (Dawson, Wade)* case. The rationale of why it can be said there was a labour dispute in the *Bennett & White* case is set out vigourously in Davey J.A.'s dissent in the *Hammer* case. At best it goes only half way to say the union sought to induce breaches of contract: at best, because, as submitted earlier, whether picketing advocates unlawful means or merely a lawfully attainable end is a question of fact which may elicit different answers in different cases; only half way, because it is obvious that the ultimate object, to which picketing was a means, was to have the work on the job governed by a union-negotiated collective agreement.

Conclusion

Criticisms of the use of the injunction in labour disputes centre around the following allegations: it is frequently obtained *ex parte* in circumstances in which notice could and should be given, on biased affidavits based not on personal knowledge but on information and belief, in forms which do not meet the requirements of the law and are thereby onerous to the party enjoined, without regard to the protective provisions of such applicable statutes as the British Columbia Trade-union Act, in circumlocutory language broader than the circumstances warrant, on *pro forma* allegations of irreparable harm, in disregard of possible irreparable harm caused to the party enjoined by the injunction, and in effect strengthening the economic position of the employer at the expense of the union or employees without a hearing on the merits of the legal issue in dispute. But perhaps the greatest criticism lies in the uncertainty of the law of picketing, a portion of which has been outlined in this paper, and hence of the

kind of conduct which may be specifically enjoined. As has been noted, most of the recent picketing cases have been concerned with the lawfulness of recognition picketing. The heart of the issue is greater than the law of nuisance, or conspiracy, or inducing breach of contract. It is submitted that the determination of whether recognition picketing or any other use of economic power outside the framework of the prevailing labour codes is to be lawful or not is a decision of policy, which ought to be based on a consideration of the many factors which compose a truly balanced policy decision. If the legislature is to speak on the subject, the voice should be clear; if it is to attempt to codify the law of picketing, it would be undertaking an important and challenging task, in the pursuit of which the British Columbia Trade-unions Act is a model failure. If the decision is to be a matter of judge-made law, it is respectfully submitted that the judgments should be framed in the language of policy in order that this important if obscured premise in the rationale of the cases may be identified and considered.

> "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious... " [55]

L'INJONCTION ET LES CONFLITS DE TRAVAIL

L'injonction est une forme d'assistance judiciaire par laquelle la Cour ordonne à une partie impliquée dans une poursuite de s'abstenir d'accomplir certains actes clairement spécifiés.

1) « ASSISTANCE JUDICIAIRE »

Quand une personne s'adresse aux tribunaux pour obtenir réparation d'un tort présumé à son endroit, c'est généralement pour obtenir une compensation monétaire. Mais quand celle-ci ne peut être complète, la personne qui se croit lésée peut chercher à obtenir de la Cour un ordre obligeant le transgresseur à accomplir certains actes ou à s'abstenir d'en exécuter d'autres. C'est justement cet ordre qui est l'injonction; et on peut l'obtenir dans tous les cas où la Cour l'estime juste et appropriée. L'injonction est donc loin de se limiter au domaine des conflits de travail; cependant, en raison de son efficacité particulière, on y a fréquemment recours à l'occasion de ces conflits. Et un tel recours, « abusif » selon certains. ne manque pas à l'occasion d'intéresser fortement l'opinion publique.

(55) Holmes, O.W., *The Path of the Law* (1897).

Il est possible d'obtenir une injonction comme remède temporaire avant que la cause soit entendue, ou comme remède permanent, une fois déterminés judiciairement les droits des parties. Dans le premier cas, il n'est pas nécessaire que la partie contre laquelle l'injonction est recherchée soit avertie de ce fait. Dans ce cas d'une motion entendue *ex parte*, la partie visée par l'injonction n'est donc pas représentée à l'audition de la motion, et peut fort bien n'être mise au courant des procédures prises contre elle qu'au moment où un exemplaire de l'ordre judiciaire lui parvient officiellement. C'est d'ailleurs ce qui arrive dans la grande majorité des cas.

2) « ORDRE DE LA COUR »

C'est l'un des caractères essentiels d'un ordre de Cour qu'il reste en vigueur jusqu'à ce qu'intervienne un acte du judiciaire. La création d'un tel ordre aura beau avoir été entourée de maintes irrégularités: on ne peut le mettre au rancart impunément, et on doit s'y soumettre jusqu'au moment où des démarches appropriées auront réussi à le modifier ou à le dissoudre. Agir autrement serait se rendre coupable de mépris de cour, civil ou criminel. Cette dernière forme de mépris de cour se vérifiera quand la désobéissance sera de nature à nuire au bien commun et à tourner en ridicule l'administration de la justice. Et celui qui s'en rend coupable peut être condamné à l'amende ou à l'emprisonnement. Jusqu'à l'adoption du nouveau code criminel (1953-54), le responsable d'un mépris de cour criminel n'avait pas droit d'appel.

3) « POURSUITE JUDICIAIRE »

L'injonction intérimaire, remède judiciaire qui sort de l'ordinaire, est accordée dans l'optique d'une poursuite en justice. Ce qui signifie que celui qui requiert le remède doit posséder, ou prétendre posséder une cause d'action, *i.e.* un droit strict qu'il peut faire valoir et en regard duquel l'injonction peut être accordée. En d'autres termes, il doit prendre action, ce qui veut dire pratiquement qu'il doit obtenir l'émission d'un bref d'une cour supérieure.

Une fois les procédures amorcées, l'avocat du requérant présente, *ex parte* ou sur avis, une motion pour obtenir l'ordre d'injonction. Cette motion s'appuie sur un ou des affidavits qui s'efforcent de prouver que l'intimé est en train de causer des torts irréparables et qui peuvent donner prise à une action en justice, et qu'il est à la fois juste et convenable qu'une injonction (antérieure au procès) soit accordée. Lors de l'audition de la motion, la cour ne juge pas le cas en son fond même, comme ce serait le fait au cours d'un procès; elle décide plutôt si, eu égard aux circonstances alors connues, le requérant a réuni les conditions nécessaires à l'émission d'une injonction intérimaire.

Sur audition de la motion et après lecture des affidavits, l'ordre d'injonction peut être accordé. L'injonction vaudra alors pour un nombre déterminé de jours, après quoi le requérant devra, s'il désire qu'elle continue d'être en vigueur. présenter une motion en ce sens à la cour; ou bien l'injonction aura cours jusqu'au procès ou jusqu'à nouvel ordre. L'intimé a le droit inhérent d'en appeler devant la cour, moyennant préavis, pour obtenir la dissolution de l'injonction pour juste cause.

L'ordre, une fois accordé, est signifié à ceux qu'il vise: il pourra suffire d'afficher un exemplaire de l'injonction bien en évidence près des lignes de piquetage, par exemple.

Suit l'instruction de l'affaire. La Cour d'appel de la Colombie-Britannique s'est plusieurs fois prononcée en faveur de jugements sans délai dans les cas d'injonctions intervenant dans des conflits de travail. Si le jugemet dit que les intimés ont posé des gestes condamnables, l'injonction devient permanente; sinon, l'injonction temporaire sera éliminée.

4) « CERTAINS ACTES CLAIREMENT SPÉCIFIÉS »

Cette partie de la définition de l'injonction embrasse la loi sur le piquetage, l'injonction venant interdire le piquetage d'un syndicat, certifié ou non, contre l'employeur pertinent ou un employeur non directement impliqué dans le différend, aux cours de négociations collectives ou à l'occasion de griefs.

Les gestes les plus souvent interdits sont: la surveillance et l'assaut, l'intimidation, l'obstacle aux relations contractuelles, l'obstacle à l'entrée ou à la sortie du lieu de travail, l'empiétement sur la propriété, le piquetage comme tel, la tentative de persuader des employés de ne pas travailler, le fait de « causer du trouble », de nuire au libre accès au lieu de travail et d'intervenir auprès de la clientèle. Tous ces gestes sont considérés comme inhérents au piquetage, ou liés au piquetage de temps à autre.

Le piquetage n'a jamais été clairement défini. Mais on peut lui supposer trois éléments constants: la présence physique des piqueteurs; la transmission d'informations; et enfin l'intention de persuader les objets de la transmission d'informations de se comporter de façon à favoriser la cause des piqueteurs. La Cour Suprême du Canada a décidé en 1951 que pareille conduite peut être licite. Mais d'un cas à l'autre, la conduite du piquetage peut varier suivant la forme qu'adopte le piquetage, les circonstances qui l'entourent ou l'objet qui en a provoqué l'institution, et enfin les conséquences qui en découlent.

Si le piquetage pèche par l'un de ces trois aspects (*forme, objet et résultat*), il peut être interdit, même complètement. Les dommages rangés sous la *forme* sont l'assaut, les coups, la violation de propriété, la diffamation, l'intimidation et la nuisance; ceux qui réfèrent à l'*objet* sont la conspiration pour causer des dommages, pour employer des moyens illicites ou pour atteindre une fin illégale; et celui qui s'attache au *résultat* est celui d'induire à la rupture de contrat.

CONCLUSION

On s'en prend à l'utilisation de l'injonction dans les conflits de travail surtout pour les motifs suivants: on l'obtient souvent *ex parte* dans des circonstances où l'avertissement préalable eût été facile à donner et de rigueur, sur la foi d'affidavits fondés sur du ouï-dire ou des opinions, et non sur des connaissances personnelles; on se la ménage encore en des formes illégales, par des circonlocutions qui dépassent de beaucoup le langage des faits eux-mêmes, en invoquant « dommages irréparables » sans égard aux dommages vraiment irréparables qui peuvent être causés par l'injonction à l'intimé, consolidant ainsi la position économique de l'employeur aux dépens des employés ou du syndicat en cause sans qu'on ait à statuer sur le fond de la dispute légale en cause.

Mais on en a surtout contre le caractère confus de la loi portant sur le piquetage, qui laisse dans le doute sur la sorte de conduite qui peut spécifiquement faire l'objet d'une injonction. Le problème se pose d'une façon particulièrement grave quand il s'agit de piquetage établi en vue d'obtenir de l'employeur la reconnaissance du syndicat.

La loi a donc grand besoin d'être éclaircie, le législateur examinant courageusement les impératifs sociaux qui en de nombreux cas rendent le piquetage comme inévitable, et ne se contentant pas du recours à des principes individualistes de « nuisance, conspiration ou bris de contrat ».

Congrès des Relations industrielles de Laval
qui se tiendra au Château Frontenac
les 21 et 22 avril 1958