

## Is Picketing a Crime?

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### Résumé de l'article

Cet article examine les sanctions criminelles imposées aux piqueteurs. L'auteur suggère que les observateurs académiques ont traditionnellement sous-estimé l'impact du droit criminel dans ce domaine. L'expérience récente d'un certain nombre de grèves démontre que les accusations criminelles ne font pas exceptions en contexte de piquetage. L'utilisation à grande échelle d'accusations criminelles portées contre les piqueteurs durant la grève des mineurs de charbon britanniques démontre également le potentiel pour l'État du droit criminel comme outil lui permettant de régler le conflit industriel.

Cinq infractions criminelles plus pertinentes au piquetage font ici objet d'examen: «surveiller et cerner», «le méfait», «troubler la paix publique», «l'attroupement illégal» et «l'outrage au tribunal». Après avoir étudié les lois provinciales contre la violation de la propriété, nous examinerons brièvement l'impact de la *Charte canadienne des droits et libertés* dans ce contexte. L'examen de l'histoire de la disposition du *Code criminel* interdisant de cerner ou de surveiller certains lieux indique qu'elle fut introduite pour contenir les piquetages à l'occasion des conflits du travail. Deux courants de jurisprudence se sont développés eu égard au caractère légal ou non du piquetage. Le premier prétend que le piquetage est en soi une forme de coercition et à ce titre est presque toujours illégal. Le second soutient que le piquetage n'est illégal que s'il constitue un obstacle ou est accompagné d'autres comportements illégaux. Ces deux courants de jurisprudence ont été suivis au Canada, cependant, la Cour suprême du Canada a penché en faveur du second.

La disposition concernant le méfait dans le *Code criminel* prévoit que le fait d'empêcher quelqu'un d'utiliser sa propriété constitue une infraction. La possibilité de voir cet article appliqué en contexte de piquetage est illustrée par une affaire récente en Ontario où la Cour d'appel a statué que le simple fait d'être membre d'un grand groupe obstruant l'entrée à un lieu pouvait être suffisant pour constituer cette infraction.

La jurisprudence est aussi divisée dans l'interprétation de la disposition concernant le trouble à la paix publique. L'approche orthodoxe prétend que la Couronne doit prouver à la fois que l'accusé a commis un des actes énumérés à la loi et qu'un trouble en a résulté. La seconde approche soutient pour sa part que le simple fait de commettre en public un des actes prévus à la loi est suffisant pour constituer une infraction. Une décision récente de la Cour d'appel de l'Ontario a eu pour effet de mettre l'école de pensée orthodoxe en doute dans le contexte du piquetage.

Les articles du *Code criminel* visant les attroupements illégaux ne sont pas fréquemment utilisés dans les cas de conflits industriels. Cependant, un examen des exigences de la loi à cet effet révèle que des accusations d'attroupements illégaux pourraient bien être portées dans le cas de piquetage massif accompagné de violence.

Le *Code criminel* réserve le pouvoir inhérent des cours de condamner pour outrage au tribunal. L'expérience récente de la grève du Syndicat des employés du gouvernement de la Colombie-Britannique démontre que les cours sont prêtes en certaines circonstances à utiliser leur pouvoir inhérent pour limiter le piquetage même si ce dernier est paisible.

Les lois provinciales portant sur la violation de la propriété reflètent le contrôle absolu accordé traditionnellement par la common law au droit à la propriété privé. Cependant, des affaires récentes impliquant de l'organisation syndicale dans des centres commerciaux démontrent que les cours sont maintenant prêtes à faire la juste balance entre le droit à la propriété privée et d'autres droits tels celui de devenir membre d'un syndicat et de s'engager dans ses activités légales.

La Cour suprême du Canada a reconnu que le piquetage est une forme d'expression protégée par l'article 2b) de la Charte. Cependant, il est clair que les bornes de la liberté d'expression n'incluent pas toute forme de piquetage. De plus, les cours ont conclu que les restrictions au piquetage que l'on retrouve dans le droit criminel sont des limites raisonnables et justifiées dans le cadre de l'article 1 de la Charte.

L'auteur conclut que l'utilisation du droit criminel pour régler le piquetage, et particulièrement le piquetage paisible est incompatible avec les objectifs fondamentaux du régime canadien des relations industrielles. Il suggère que la plupart des sujets associés au piquetage pourrait trouver meilleur traitement dans les Commissions de relations du travail qui, en fait, ont une juridiction spécialisée en ce domaine.

# ***Is Picketing a Crime?***

**Jonathan B. Eaton**

*This paper focuses on those offenses contained in the Criminal Code that are the most pertinent to picketing: watching and besetting, mischief, public disturbance, unlawful assembly and contempt of court. As well, the role of provincial trespass legislation in regulating picketing is examined. The impact of the Charter of Rights and Freedoms is considered and the overall impact of the criminal law on picketing is assessed.*

The history of offenses related to trade and labour is one of the most characteristic and interesting passages in the whole history of the criminal law.

Sir James Stephen, History of the Criminal Law of England, 1883.

Four words – “Good morning fellow workers” – were broadcast over a sound truck at the strike-bound Rogers Majestic plant in Leaside today, after which Chief of Police John McGrail stepped over to the sound truck and said: “You’re under arrest”.

Ross Russell, United Electrical Workers’ Union organizer, was arrested, according to Chief McGrail, “not for using a sound truck, but because there was likely to be a breach of the peace by what he was about to say.” McGrail told reporters at the time Russell was arrested: “I haven’t decided what charges will be laid against Russell and I won’t know until I have a chance to study the criminal code.”

The Toronto Star, May 9, 1948.

While Sir James Stephen and Chief John McGrail may have had little else in common, they both appear to have recognized the usefulness of the criminal law to regulate industrial conflict and picketing. Most academic commentators on Canadian labour law do not share this interest. Little has been written on the subject of criminal sanctions against picketing<sup>1</sup> and where the issue is dealt with in conventional labour texts, it is generally asserted that criminal charges rarely result from picketing, and that the significance of the criminal law in this area is minimal, especially when compared to the civil remedies that are available.

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1. There are three notable exceptions : Jacob Finkelman, “The Law of Picketing in Canada” (1937), 2 U. of T.L.J. 67; R.S. Mackay, “Peaceful Picketing and the Criminal Code” (1963), 3 Current Law 114; and Aubrey Golden, “Picketing and Criminal Law” In *Strikes, Lockouts, Picketing and Injunctions* (Toronto: Department of Continuing Education of the Law Society of Upper Canada, 1974).

This approach to picketing and the criminal law fails to recognize that, whether utilized frequently or not, *Criminal Code*<sup>2</sup> provisions provide an ever-present and powerful tool for the state to regulate industrial disputes and to discipline workers whose behavior on the picket line is seen as "excessive". The suggestion that criminal sanctions are rarely used in this context is itself belied by the experience of recent labour disputes. For example, in the course of a strike between Voyageur Bus Lines in Montréal and 300 office workers, ticket vendors, maintenance workers and messengers, over 100 picketers have been, "arrested, handcuffed and spent the night in jail for blocking buses. They've paid \$300 fines and gone right back on the line."<sup>3</sup> Criminal prosecutions have also resulted from recent strikes at Gainers,<sup>4</sup> Canada Post,<sup>5</sup> C.P. Rail<sup>6</sup> and Radio Shack.<sup>7</sup> An extreme example of the use of criminal law to control strike activity can be seen in the recent British coalminers' strike. Over 10,000 criminal charges were brought in connection with the miners' dispute, and in the first 27 weeks of the strike 164,500 "presumed" picketers were prevented by police from entering Nottinghamshire, where the conflict was centered.<sup>8</sup>

It is not surprising that the state, in attempting to limit and contain industrial conflict, should direct its attention at picketing. Through the course of the nineteenth and twentieth centuries, picketing has increasingly become the focal point of industrial strife. This can be seen in the origin of the term itself:

The word 'picketing' is derived from the habit of carrying wooden stakes similar in size and shape to those used in the construction of picket fences. To those stakes are affixed signs carrying the message of the picketers. The term was in common usage in the early nineteenth century in England and the practice of picketing accompanied the very earliest strikes in England. Now the term has been extended to anyone physically present at the place picketed, whether signs are being carried or worn or not. It has been loosely used to describe leafleting as well.<sup>9</sup>

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2. R.S.C. 1985, c. C-46. Hereinafter referred to as the "*Criminal Code*" or just the "*Code*".

3. *Montréal Gazette*, Friday, September 15, 1989 at A-3.

4. *R. v. Arias*, Alberta Court of Appeal decision, January 26, 1987 (unreported); *R. v. Thibeault*, Alberta Court of Appeal decision, January 5, 1987 (unreported).

5. *R. v. Nielsen*, Alberta Provincial Court decision, December 15, 1987 (unreported).

6. *R. v. James-Davies* (1988), 90 A.R. 388 (Prov. Ct.).

7. *R. v. Berry* (1980), 56 C.C.C. (2d) 99 (Ont. C.A.).

8. See Andrew Gray, "Picketing and the Criminal Law: Further Observations" (1986), 13 *Solic. J.* 46; R. Handley, "Preventive Powers and N.U.M. Pickets" (1986), 10 *Crim. L.J.* 93.

9. Golden, *supra*, note 1 at 101. The earliest use of the term "picket" in legal literature has been traced to the case of *R. v. Druitt* (1867), 10 *Cox C.C.* 592; see Hazel Carty, "The Legality of Peaceful Picketing on the Highway", [1984] *Pub. L.* 600.

Picketing has been described positively as "the working [person's] means of communication"<sup>10</sup> and negatively as an "electric fence" – a dangerous but intangible barrier preventing access to the picketed site.<sup>11</sup> Following either view, the importance of picketing as a strike weapon should not be underestimated. As one author has concluded:

Peaceful picketing is the most familiar trademark of any strike, probably because the picket line is thought to serve such a variety of purposes. The picket line animates the quarrel and makes the strike more effective; the picket line communicates the information of the dispute to the rest of the community; the picket line enlists the support of independent parties and serves to identify people for the purposes of both the employer and the strikers; the picket line very often simply intimidates.<sup>12</sup>

The *Criminal Code* contains a number of offenses that may be relevant to industrial conflict: from assault<sup>13</sup> to criminal breach of contract involving public utility workers.<sup>14</sup> This paper will focus on those offenses that are the most pertinent to picketing:

- Watching and Besetting;
- Mischief;
- Public Disturbances;
- Unlawful Assembly; and
- Contempt of Court.

As well, the role of provincial trespass legislation in regulating picketing will be examined. While these statutes are not criminal law in the strict sense, they do create quasi-criminal sanctions that may constrain the activity of picketers. The impact of the *Charter of Rights and Freedoms* on the law of picketing will also be briefly considered. Finally, the overall impact of the criminal law on picketing will be assessed. It will be suggested that criminal sanctions do have a considerable, if somewhat intangible, impact on picketing, and thus on the whole industrial relations system. Judges have shown an alarming readiness to characterize conduct on the picket line as criminal. If picketing is a right in Canada, it is a limited one.

## WATCHING AND BESETTING

Section 423 of the *Criminal Code* states in part:

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10. *Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc.* (1941), 312 U.S. 287 at 293.

11. *Heather Hill Appliances v. McCormack*, [1966] O.R. 12 (H.C.).

12. W.K. Winkler, "Picketing of Private Homes: The Anomalous Peaceful Picketing Clause" (1963), 2 O.H.L.J. 437.

13. Section 266.

14. Section 422(1)(d).

423. (1) Everyone who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing,

... (f) besets or watches the dwelling-house or place where that person resides, works, carries on business or happens to be

... is guilty of an offence punishable upon summary conviction.

(2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

In order for a person to be convicted of this offence, then, the Crown must prove beyond a reasonable doubt that the accused:

- a) wrongfully and without lawful authority;
- b) for the purpose of compelling ...;
- c) beset or watched; and
- d) *not* for the purpose only of obtaining or communicating information.

The nature of each of these requirements will be examined. But first, a brief review of the legislative history of the provision will help shed some light on its purpose.

### Legislative History of Watching and Besetting

The criminal provision prohibiting watching and besetting originated in England, as a consequence of the wave of strikes and violence that followed the repeal of the *Combination Act* in 1824.<sup>15</sup> The new legislation, *An Act to Repeal the Laws relating to the Combination of Workmen and to make other provisions in lieu thereof*<sup>16</sup> enumerated five types of wrongful conduct: violence, threats, intimidation, molestation and obstruction, when committed with the intention of coercing the will of another in respect of industrial relations. This law was rigorously applied by the courts.<sup>17</sup> In 1875, after a great deal of political agitation by labour, this Act was repealed and replaced by section 7 of *The Conspiracy and Protection of Property Act*.<sup>18</sup> The following year the same provision was adopted by the Parliament of Canada<sup>19</sup> and, with minor modifications of language, comprises the present s. 423 of the *Criminal Code*. At the time that this legislation was introduced in England it was "widely hailed as

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15. Golden, *supra*, note 1 at 103.

16. 1825, 6 George IV, c. 129.

17. Golden, *supra*, note 1 at 103.

18. 1875, 38-39 Victoria, c. 86.

19. S.C. 1876, c. 37.

liberating trade unions from the last vestige of criminal laws."<sup>20</sup> Interestingly, the proviso which excludes "obtaining or communicating information" from watching and besetting was included in the original Canadian statute, but was inexplicably dropped in 1892 when the criminal law was codified<sup>21</sup> and was not reintroduced until 1934.<sup>22</sup>

### Wrongfully and without Lawful Authority

Two lines of authority have emerged in the determination of whether picketing is carried out "wrongfully and without lawful authority". In *Lyons and Sons v. Wilkins*<sup>23</sup> the English Court of Appeal held that *all* picketing was "wrongful", because it *per se* constituted a common nuisance, and unless it came within the saving clause as "*only* obtaining and communicating information" it was criminal.<sup>24</sup> The Court further held that, as picketing is carried on with a view to persuade it could not be said to be *only* for the purpose of obtaining or conveying information.<sup>25</sup> In a case decided seven years later, *Ward, Lock and Company Limited v. Operative Printers' Assistants' Society*<sup>26</sup> the same Court held that picketing was not "wrongful" within the meaning of the *Conspiracy and Protection of Property Act* unless there was evidence that it constituted a nuisance in fact, or some nominate tort or crime such as trespass or assault, independently of the statute. R.S. Mackay has summarized the difference between these two cases as follows:

The *Lyons Case*, for all practical purposes, makes all picketing illegal under section 366 [now s. 423], however peaceful it may be, because the saving clause will, in practice, never be applicable and no other basis of justification seems available, at least so far as trade unions are concerned. The *Ward, Lock Case*, on the other hand, indicates that picketing is not a crime under section 366 unless it amounts to an actual nuisance or is akin to molestation or harassment, and therefore peaceful picketing, whether to persuade or not, is not an offence under the statute.<sup>27</sup>

20. Golden, *supra*, note 1 at 104.

21. S.C. 1892, c. 29, s. 523.

22. S.C. 1934, c. 47, s. 12. Finkelman, *supra*, note 1 at 84, states that Canadian courts emphasized this omission as differentiating Canadian picketing law from that of England. However, in *R. v. Burns* (1903), 2 O.W.R. 1115 (Co. Ct.) it was held that the absence of the clause from the *Criminal Code* did not make the Canadian law different from that of England.

23. [1899] 1 Ch. 255 (C.A.).

24. [1899] 1 Ch. 255, at 267, 271; summarized by Mackay, *supra*, note 1 at 122.

25. Mackay, *supra*, note 1 at 122.

26. (1906) 22 T.L.R. 327 (C.A.).

27. Mackay, *supra*, note 1 at 123.

In England, *Ward, Lock* is now deemed to be the binding decision,<sup>28</sup> but in Canada both decisions have been followed.

The adherence to these two different lines of authority has led to diverse results. In *R. v. Blacksaw*<sup>29</sup> the two accused were charged with watching and besetting a movie theatre; they had been distributing handbills in front of the theatre informing the public that the theatre employed non-union musicians. As the Court was in no doubt that this activity constituted watching and besetting, the only issue was whether it was carried out "wrongfully and without lawful authority". It was held that since the intent of the Union was to harm the business of the theatre owner, the act was unlawful. Beck J.A. put the onus on the accused to prove lawful authority:

The question of lawful authority is clearly a question of defence, that is, a question of showing that something which is done without lawful authority is wrongful has in fact, in the particular case, been done with lawful authority.<sup>30</sup>

*R. v. Baldassar*<sup>31</sup> is a case with facts virtually identical to those in *Blacksaw*. The two accused had paraded in front of the Lyric Theatre in Hamilton wearing raincoats, on the back of which were printed "This Theatre is trying to destroy Union working conditions" and similar slogans. Again, the only issue was whether they acted "wrongfully and without lawful authority". In this case, however, the convictions of the accused were quashed. Rose C.J. stated:

The conduct of the appellants was peaceable; there was no uproar or disturbance; no one was seen to be accosted; no crowd gathered; there was no evidence of any threats, obstruction, molestation, impeding or incommoding of patrons or prospective patrons of the theatre. ... I am of opinion that proof merely that the defendants acted with the view stated in s. 501 [now s. 423] of the Criminal Code is not proof that they acted 'wrongfully and without lawful authority'...<sup>32</sup>

Perhaps the best illustration of the divergence in judicial opinion on this issue is in yet another theatre case, *R. v. Richards and Woolridge*.<sup>33</sup> A four judge panel of the British Columbia Court of Appeal split right down the middle, with two judges appearing to follow one line of authority and two judges following the other! The defendants had quit their jobs after a

28. *Fowler v. Kibble*, [1922] 1 Ch. 487 (C.A.).

29. (1925), 21 Alta. L.R. 580, [1925] 4 D.L.R. 427, 44 C.C.C. 286 (C.A.).

30. 21 Alta. L.R. 580 at 593.

31. [1931] O.R. 169, 55 C.C.C. 318 (H.C.).

32. [1931] O.R. 169 at 170-171. See also *R. v. Goldman* (1928), 45 Que. K.B. 287, where it was held that it was for the jury to decide on the evidence of each case whether the picketing was done wrongfully or not – although in *Goldman* the picketing was found to be wrongful.

33. (1933) 61 C.C.C. 321, [1934] 3 D.L.R. 332 (B.C.C.A.).

reduction of wages and walked in front of the theatre wearing "slickers" (raincoats) on the back of which read "The Edison Theatre does not employ Union Picture Projectionists". In dismissing their appeal of their convictions, Macdonald C.J.B.C. held:

The appellants beset and watched the theatre whether peacefully or not makes, in my opinion, no difference. The offence falls within the very language of the section and since they did these things without lawful authority they were guilty of the crime aimed at by the said section...<sup>34</sup>

McPhillips J.A. agreed:

The fact that it was true [that the theatre did not employ union projectionists] does not absolve the appellants – it only accentuates the infraction of the criminal law. It establishes watching and besetting when we find that so garbed and labelled these men walked up and down on Columbia St. where the theatre is situate. It was not at all necessary to do more than this. To commit an infraction of the law it was in no way necessary to establish the offence to prove that they attempted to prevent people going into the Edison Theatre.<sup>35</sup>

On the other hand, Martin J.A. (dissenting) held that the British Columbia *Trade Unions Act*<sup>36</sup> allowed picketing such as this, and therefore the act was done "with sanction of a 'lawful authority' as that expression is used by the National Parliament".<sup>37</sup> Macdonald J.A. also dissented:

*Because therefore the 'watching and besetting' was carried on without creating a nuisance and without violence or intimidation I think, without considering the effect, if any, of the provisions of the Trade Unions Act referred to, that appellants' acts were not 'wrongful' at common law, nor committed 'without lawful authority' within the meaning of s. 501 of the Code ... (emphasis added).*<sup>38</sup>

The only thing that is made clear by the four different judgments in this case is that there is a great deal of judicial confusion in this area of the law.

The only case involving a prosecution under this section of the *Criminal Code* decided by the Supreme Court of Canada, *Reners v. R.*,<sup>39</sup> failed to settle the law on this issue in Canada. This case involved a "wildcat" strike by a group of miners in Drumheller, Alberta. After reviewing the lines of authority following *Lyons* and *Ward, Lock, Newcombe J.* stated:

34. 61 C.C.C. 321 at 322.

35. *Ibid.* at 333. McPhillips J.A. applied *R. v. Blackhawk*, *supra*.

36. R.S.B.C. 1924, c. 258.

37. *Supra*, note 33 at 326.

38. *Ibid.* at 336.

39. [1926] S.C.R. 499, [1926] D.L.R. 669, 46 C.C.C. 14.



The judgments concur in the view that watching or besetting, if carried on in a manner to create a nuisance is at common law wrongful and without legal authority. In the *Lyons Case* the Court of Appeal found the essential facts to constitute a common law nuisance. In the *Ward, Lock Case* they found that the sort of picketing there in proof afforded no evidence of a nuisance, and these cases do not really assist in the determination of the present question, which depends upon its own facts, except in so far as they affirm, what is evident by the statute itself, that if picketing be carried on in a manner to create a nuisance, or otherwise unlawfully, it constitutes an offence within the meaning of the statute.<sup>40</sup>

In the circumstances of this case Newcombe J. found that there was ample evidence that the conduct of the accused amounted to a nuisance and a trespass so the watching and besetting was unlawful. In a concurring opinion Idington J. followed *Lyons* in holding that the simple act of watching and besetting without overt acts of a character likely to create a nuisance is a crime.<sup>41</sup> But his is not the controlling judgment.<sup>42</sup>

The decision in *Reners* must be considered in light of the more recent Supreme Court decision in *Williams v. Aristocratic Restaurants*.<sup>43</sup> This case involved a civil action in which a restaurant owner sought an injunction enjoining the picketing of his premises. The Supreme Court held that the peaceful picketing in this case could not be enjoined, as it did not amount to a criminal offence or to a common law nuisance. The majority of the Court inclined towards the *Ward, Lock* doctrine that peaceful picketing was not *per se* unlawful. As Kerwin J. stated:

It was said [in] the *Reners* case, that the judgments in the *Ward, Lock* case and the *Lyons* case concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. Picketing is a form of watching and besetting but that still leaves for decision, in each case, what amounts to a nuisance. *Whatever might have been held some years ago, in those days the actions of the appellants did not constitute a nuisance* (emphasis added).<sup>44</sup>

Rand J. also held that whether or not picketing was "unlawful" would depend on the facts of each case:

There is nothing in the statute placing a limit of time on the 'attending'; but there is a difference between watching and besetting for the purpose of coercing either workmen or employer by presence, demeanour, argumentative and rancorous badgering or importunity, and unexpressed,

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40. [1926] S.C.R. 499 at 506.

41. *Ibid.* at 513.

42. Hence Macdonald J.A. in *R. v. Richards and Woolridge*, *supra*, note 33 did not feel bound to follow it.

43. [1951] 1 S.C.R. 762, [1951] 3 D.L.R. 769, 101 C.C.C. 273.

44. [1951] 1 S.C.R. 762 at 780.

sinister suggestiveness, felt rather than perceived in a vague or ill defined fear or apprehension, on the one side; and attending to communicate information for the purpose of persuasion by the force of rational appeal on the other. That difference was acted upon by Wilson J. at the trial in this case ...<sup>45</sup>

The best conclusion that can be reached based on the authorities discussed above is that peaceful picketing that does not constitute a nuisance will not generally be considered to be "wrongful and without lawful authority" for the purposes of s. 423(1) of the *Criminal Code*. However, mass picketing of 300 to 400 striking employees was found to be unlawful even where no physical violence was involved.<sup>46</sup> Similarly, if force is used or if any threat or threatening gesture is made, or if access to the picketed premises is blocked by the picketers closing ranks, such an act is wrongful and without lawful authority.<sup>47</sup>

#### For the Purpose of Compelling...

The phrase "for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing" has not received a great deal of judicial comment. In one case, incredibly, a judge even went so far as to say, "There is *nothing* in the section relating to the purpose for which the acts complained of were done".<sup>48</sup> However, the purpose of the accused in besetting or watching a place is one of the essential ingredients of the offence created by s. 423, and the onus rests on the Crown to prove that fact beyond a reasonable doubt.<sup>49</sup> The purpose must necessarily be found by reference to the circumstances and by inference from the evidence showing the circumstances in each particular case. In *R. v. Branscombe*<sup>50</sup> the conviction of the accused was quashed as there was no evidence sufficient in law from which a finding could be made that it was the purpose of the accused to compel the complainant to abstain from doing anything she had a lawful right to do, or, to do anything she had a lawful right to abstain from doing. In the

45. *Ibid.* at 784. Kellock J. and Cartwright C.J.C. in separate concurring judgments indicated that the picketing was lawful as it fell squarely within the provisions of the saving clause in (what is now) s. 423(2). Locke J. (dissenting) would have granted the injunction.

46. *R. v. Doherty and Stewart* (1946), 2 C.R. 293, 86 C.C.C. 286, [1946] 4 D.L.R. 686 (Ont. Mag. Ct.).

47. *R. v. Carruthers* (1946), 86 C.C.C. 247 (Ont. Co. Ct.).

48. *Per* Macdonald C.J.B.C. in *R. v. Richards and Woolridge*, *supra*, note 33 at 322 (emphasis added).

49. *R. v. Branscombe*, [1956] O.W.N. 897, 25 C.R. 88 (C.A.).

50. *Ibid.*

absence of evidence to warrant such a finding the Crown had failed to make out its case.<sup>51</sup>

Generally, however, courts have had little difficulty in inferring the purpose of picketing in labour disputes so as to meet this requirement of the section. For example in *R. v. Carruthers*<sup>52</sup> Shaunessy Co. Ct. J. stated:

This blocking of access was ... a besetting or watching with a view to compel Ellis to abstain from doing what he had a lawful right to do, to work for the Ford Motor Company of Canada.<sup>53</sup>

Similarly, in *R. v. Doherty and Stewart*<sup>54</sup> it was held that the picketing was carried out with a view to compelling the general manager and the other employees from working and carrying out their employment, which they had a lawful right to do.

### Besets or Watches

The term "watching and besetting" has been held to be simply the legislative term for "picketing".<sup>55</sup> In *Williams v. Aristocratic Restaurants*<sup>56</sup> Locke J. considered this phrase:

The expression 'watching and besetting' in s. 501 [now s. 423] of the *Criminal Code* and in s. 7 of the *Conspiracy and Protection of Property Act* is not defined in either statute, and by that name does not appear to have been a criminal offence at common law. 'Watching', as pointed out by Pallas, C.B. in *R. v. Wall* ... implies something more continuous and less temporary than 'mere attending' within the meaning of that expression in the *Trade Disputes Act, 1906*. ... The legal meaning to be assigned to the word 'besetting' originally a military term, appears to me unsettled.<sup>57</sup>

In *Canada Dairies Ltd. v. Seggie*,<sup>58</sup> on the other hand, Mackay J. stated that this section of the *Criminal Code* contains a correct statement of the

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51. This was not a case involving an industrial dispute. The facts given are scant, but it appears that the accused was watching the house of a friend of his estranged wife to see if his wife entered the premises. Perhaps if the Court had considered the "other person", who was being compelled to do something or abstain from doing something, as the wife rather than the occupier of the house, the result in this case would have been different.

52. *Supra*, note 47.

53. *Ibid.* at 250.

54. *Supra*, note 46.

55. See for example: *R. v. Doherty and Stewart*, *supra*, note 46 at 295; *Canada Dairies Ltd. v. Seggie*, *supra*, [1940] 4 D.L.R. 725, 74 C.C.C. 210 (Ont. S.C.) at 218; *Allied Amusements Ltd. v. Reaney*, [1937] 4 D.L.R. 175 (Man. C.A.).

56. *Supra*, note 43.

57. *Ibid.* at 771.

58. *Supra*, note 55.

common law, and merely adds penal consequences to acts which previously constituted torts.

In the cases discussed above, everything from distributing handbills<sup>59</sup> to gatherings of 300 striking employees<sup>60</sup> have been characterized as watching and besetting. Hence, in spite of the uncertain origin of the term and its lack of legislative definition, it does not appear that it would be difficult for the Crown to prove that picketing activity in almost all cases constitutes "watching and besetting" for the purposes of this offence.

### For the Purposes only of Obtaining or Communicating Information

The significance of the saving clause, allowing picketing that is carried out only for the purpose of obtaining or communicating information, is difficult to measure. In one case it was suggested that this clause was inserted *ex abundanti cautela*.<sup>61</sup> This view would appear to be supported by the decision in *Aristocratic Restaurants*, where the Supreme Court of Canada recognized the legality of "attending to communicate information for the purpose of persuasion by the force of rational appeal".<sup>62</sup> On the other hand, the clause has been applied strictly; if "the picketing extends beyond the mere act of obtaining or communicating information, the subsection ceases to be of any effect".<sup>63</sup> In the case of *R. v. Elford*<sup>64</sup> it was held that where a private residence is picketed the saving clause will have no relevance at all — any picketing will be unlawful.<sup>65</sup> All that can be concluded from these cases is that while purely informational picketing will be protected by subsection 423(2), there are any number of corollary acts which will remove the activity from the ambit of this clause.

## MISCHIEF

Section 430 of the *Criminal Code* reads in part:

430. (1) Every one commits mischief who wilfully

59. *R. v. Blacksaw*, *supra*, note 29.

60. *R. v. Doherty and Stewart*, *supra*, note 46.

61. *Wasserman v. Sopman*, [1942] O.R. 313 (H.C.).

62. *Supra*, note 43 at 797, *per* Rand J.

63. *R. v. Doherty and Stewart*, *supra*, note 46 at 295.

64. (1947), 87 C.C.C. 372 (Ont. Mag. Ct.).

65. This is, of course, in direct contradiction with the terms of the clause, which explicitly includes a "dwelling-house"; see *Winkler*, *supra*, note 12.

- (a) destroys or damages property;
  - (b) renders property dangerous, useless, inoperative or ineffective;
  - (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
  - (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property. ...
- (7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

In *R. v. Nielsen*<sup>66</sup> Ketchum Prov. Ct. J. concluded that the wording of this section is "so broad and all inclusive that it could catch everything from a momentary interference with the operation of property such as a person running in front of a car, to a deliberate act of sabotage".<sup>67</sup> An examination of the contents of this section supports this conclusion. Following amendments to this section in 1985,<sup>68</sup> the value of property damaged is no longer an essential element of the offence, but is relevant only to sentencing.<sup>69</sup> The words "any person" in subsection 430(1)(d) are not limited to the owner of the property but would include employees or invitees of the owner or leaseholder.<sup>70</sup> Subsection 430(7) contains the same precautionary formula found in s. 423. In practice, this provision provides little comfort, as courts tend to find that evidence amounting to an obstruction goes beyond that which is necessary merely to communicate information.<sup>71</sup>

The application of the mischief provision to industrial conflict is illustrated by the case *R. v. Mammolita*.<sup>72</sup> The accused were part of a large group of 75 to 100 persons who formed a picket line in front of the Hawker Siddeley plant in Thunder Bay. The company was attempting to maintain production at the plant;

Police reinforcements were summoned and some 31 police officers moved in to drive a wedge through the large crowd. At first they were repulsed. However, they regrouped and created an opening at the main gate so that the management and office personnel could pass through. The incident lasted about half an hour. During the incident, a police photographer took pictures of the group, and of what was transpiring.<sup>73</sup>

66. *Supra*, note 5.

67. *Ibid.* at 2.

68. S.C. 1985, c. 19.

69. *R. v. LeBrun* (1988), 65 C.R. (3d) 280 (Que. C.A.).

70. *R. v. Biggin* (1980), 55 C.C.C. (2d) 408 (Ont. C.A.).

71. Golden, *supra*, note 1 at 109.

72. (1983), 9 C.C.C. (3d) 85 (Ont. C.A.).

73. *Ibid.* at 87.

Thirty-three persons were charged with mischief as a result of this incident.

The accused were acquitted at trial on the basis that their mere presence and passive acquiescence at the time did not render them liable as aiders and abettors to the offence. The Court of Appeal reversed this ruling, finding that there was sufficient evidence to convict the accused either as aiders and abettors or as principals to the offence:

... a person may be guilty as a principal of committing mischief ... if he forms part of a group which constitutes a human barricade or other obstruction. The fact that he stands shoulder to shoulder with other persons even though he neither says nor does anything further may be an act which constitutes an obstruction. The presence of a person in such circumstances is a very positive act.<sup>74</sup>

While the onus is still on the Crown to prove *mens rea* beyond a reasonable doubt:

It may not be difficult to infer that a person standing shoulder to shoulder with other persons in a group so as to block a roadway knows that his act will probably cause the obstruction and is reckless if he does not attempt to extricate himself from this group. This is particularly the case if the person knows of the existence of a strike and is confronting a large group of police officers who are trying to clear a passage. The same conclusion could be drawn where a person is part of a group which was walking around in a circle blocking the roadway. Those who are standing on the fringe of the group blocking the roadway may similarly be principals if they are preventing the group blocking the roadway from being by-passed.<sup>75</sup>

The *Mammolita* decision indicates that the mischief section of the *Code* may be a particularly potent weapon against picketers, since simply being a member of a large<sup>76</sup> group that is blocking access to a struck plant will be enough to constitute the offence.

## PUBLIC DISTURBANCE

The offence of causing a public disturbance is set out in s. 175(1) of the *Code*:

175. (1) Every one who  
 (a) not being in a dwelling-house, causes a disturbance in or near a public place,

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74. *Ibid.* at 89.

75. *Ibid.*

76. Howland C.J.O. noted (at 90) that, "The strength of numbers may at times be an important source of encouragement".

- (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
  - (ii) by being drunk, or
  - (iii) by impeding or molesting other persons ...
- (c) loiters in a public place and in any way obstructs persons who are at that place ...  
is guilty of an offence punishable on summary conviction.

Two lines of authority have emerged regarding the elements required to prove this offence. Following the "orthodox" approach<sup>77</sup> the Crown must prove not only that the accused did one of the enumerated acts, but that this resulted in a disturbance. This approach was articulated by Davis J. in *Poole v. Tomlinson*.<sup>78</sup> In this case, some 50 young citizens of Prince Albert had gathered on the street in front of the police station and there shouted "We want Morgan". In considering whether proof of this activity constituted a public disturbance, Davis J. stated:

The question of whether or not a disturbance resulted from the act of an accused does not depend on its impact on any particular person. He might be a crank. What is music to one may be a nightmare to another. *It must first be established that what was said or done could reasonably cause a disturbance in the circumstances and further, that it did.* That is a matter for the Court to decide. *It is not proper to assume the result from the bare act itself. There must be some evidence from which the Court could reach a conclusion of fact or draw the necessary inference that a disturbance had resulted. The gist of the offence is the disturbance* (emphasis added).<sup>79</sup>

*Poole* was followed in the more recent case of *Mysak v. R.*<sup>80</sup> In this case the accused had shouted profanities at a police officer. The only other persons in the area were the accused's two companions. Mysak's conviction was quashed by the Saskatchewan Queen's Bench for these reasons:

... one or more persons must be affected by the conduct of the accused before there can be a disturbance. Before a conviction can be obtained there must be a disturbance, which can be either the secondary reaction on the part of others or a disturbance caused by the act of the accused himself. A disturbance is disorderly conduct which must interrupt the peace and tranquillity of the community ... and there must be persons affected by the conduct of the accused. It is impossible to have a disturbance in circumstances where no one is disturbed.<sup>81</sup>

77. So named in *Mysak v. R.* (1982), 30 C.R. (3d) 386 (Sask. Q.B.).

78. (1957), 26 C.R. 92, 21 W.W.R. 511, 118 C.C.C. 384 (Sask. Q.B.).

79. *Ibid.* at 93. Unfortunately, the reported decision does not tell us who "Morgan" was. This may be helpful in determining why the chanting could be considered a disturbance.

80. *Supra*, note 77.

81. *Ibid.* at 393. See also *R. v. Cruise*, [1970] 4 C.C.C. 338, 9 C.R.N.S. 225 (Man. Mag. Ct.).

The second approach to this offence arose from *R. v. Murray*,<sup>82</sup> where it was held that performing one of the enumerated acts in public was enough to constitute the offence, regardless of whether there was evidence of a disturbance. Following this approach, an accused can be convicted merely for using insulting language or loitering<sup>83</sup> in a public place.

In the labour context, courts have tended to follow the "orthodox" approach to public disturbance. In *R. v. Sturdevant*<sup>84</sup> two picketers, who delayed several foreman from leaving the plant in a motor vehicle, by blocking the company's driveway, were acquitted of causing a disturbance. McMahon Prov. Ct. J. held that it was not sufficient that a specific individual was disturbed – the conduct must actually cause a public disturbance. Similarly, in *R. v. Goddard*<sup>85</sup> a group of picketers who had prevented a bus carrying strikebreakers from entering the premises of the employer were acquitted of this offence, because there was no evidence that an actual disturbance had resulted from their action. The evidence that the act might well have provoked a reprisal was insufficient to establish the ingredients of the offence.<sup>86</sup>

The "orthodox" line of authority was placed in doubt by the Ontario Court of Appeal decision in *R. v. Berry*.<sup>87</sup> This case arose as a result of a strike at Radio Shack:

The facts are that a disorderly group of pickets were impeding the entrance to a business premises by persons in vehicles who sought entry. The appellant was a leader in those activities and himself impeded the entry of several vehicles, notwithstanding that he was warned not to do so by the police.<sup>88</sup>

The trial judge acquitted on the basis of *R. v. Goddard*. In a one page judgment the Court of Appeal reversed this decision with alacrity, stating *per* Jessup J.A.:

In our view *R. v. Goddard* was wrongly decided to the extent that it said that an offence under s. 171(a) (iii) [now s. 175(1)(a)(iii)] 'by impeding' required proof of an affray, riot or unlawful assembly. In our view, the meaning of 'disturbance' in s. 171(a) is the ordinary meaning which can be found in any dictionary.<sup>89</sup>

82. (1958), 29 C.R. 269, 123 C.C.C. 20 (N.B. Mag. Ct.).

83. In *R. v. Burt*, [1941] O.R. 35 (H.C.) it was held that picketing was "loitering" prohibited by the *Defence of Canada Regulations* promulgated under the *War Measures Act*, R.S.C. 1927, c. 206.

84. (1969), 8 C.R.N.S. 322 (Ont. Prov. Ct.).

85. (1971), 14 C.R.N.S. 179, [1971] 3 O.R. 517, 4 C.C.C. (2d) 396 (S.C.).

86. 14 C.R.N.S. 179 at 184.

87. (1980), 56 C.C.C. (2d) 99 (Ont. C.A.).

88. *Ibid.* at 100.

89. *Ibid.* No dictionary definitions are provided by Jessup J.A., however.



It was held that the facts clearly proved the offence in this case. Following *Berry*, it appears that a picketer may be convicted under s. 175(1) for impeding or obstructing other persons, even in the absence of evidence that a public disturbance resulted. In a recent *non-picketing* case, however, *R. v. Lohnes* (released January 23, 1992), the Supreme Court of Canada held that to establish the offence of causing a disturbance, the conduct "must cause an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question."

## UNLAWFUL ASSEMBLY

Unlawful assembly is defined in s. 63(1) of the *Criminal Code*:

63. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they,
- (a) will disturb the peace tumultuously; or
  - (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

This provision has not been used often in cases of industrial disputes. In fact, Golden has suggested that resort to this section is "extremely uncommon and beyond imagination in ordinary circumstances".<sup>90</sup> However, it is not difficult to imagine the circumstances in which this section could be applied to picketing. The requisite elements of the offence are:

- a) an assembly with
- b) a common purpose, that
- c) creates a reasonable fear that the peace will be disturbed tumultuously.

A picket line with three or more persons will be an assembly within this section. Since the section only requires that the members of the assembly have the "intent to carry out *any* common purpose"<sup>91</sup> this element of the offence will also be evident in most picketing cases. The key question, then, will be whether or not the activity in each case is such

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90. Golden, *supra*, note 1 at 117.

91. For example, in *R. v. Kalya* (1980), 52 C.C.C. (2d) 378 (Sask. Prov. Ct.), the common purpose of the assembly was "to have a party".

that it creates a reasonable fear that the peace will be disturbed tumultuously. In this respect, Goliath Prov. Ct. J. held in *R. v. Kalyn*.<sup>92</sup>

A tumult is a commotion or disturbance caused by a multitude, so that what distinguishes a disturbance of the peace *per se* from a tumultuous one is that in the latter case it is being caused by a 'multitude'.

It would appear from this analysis that the offence of unlawful assembly would be most likely to arise in cases of mass picketing. Note, however, that the actions of only a few members of the assembly may make it unlawful and render all persons liable as members.<sup>93</sup> Where a person is charged with being a member of an unlawful assembly, it is no defence that this person was passively acquiescent. Simply being part of an unlawful assembly is sufficient to found a conviction.<sup>94</sup> The original purpose of the assembly is not relevant, where it becomes unlawful through the conduct of members of the assembly.<sup>95</sup> In particular, it is no defence for individuals charged with this offence to claim that they were expressing a legitimate grievance against the government.<sup>96</sup> It does not matter whether the assembly becomes unlawful by reasons of the actions of those assembled, or by reasons of the improper actions of others in response thereto.<sup>97</sup> Hence, if mass picketing of a struck plant leads to violence (whether initiated by the picketers or not) one might well see charges against the picketers for unlawful assembly result.

## CONTEMPT OF COURT

As has been noted, civil actions to restrain picketing are much more common than are criminal prosecutions. However, it must be remembered that civil injunctions themselves are respected because they are supported by the "full panoply of state power".<sup>98</sup> As Golden has stated:

To the extent that the injunctions granted are based upon Judge-made law as opposed to legislation and are capable of being enforced by criminal sanctions, each separate injunction represents a form of criminal legislation.<sup>99</sup>

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92. *Ibid.* at 379.

93. *Ibid.* at 381.

94. *R. v. Paulger and Les* (1982), 18 C.C.C. (3d) 78 (B.C. Co. Ct.).

95. *R. v. Patterson* (1930), 55 C.C.C. 218, [1931] 3 D.L.R. 267, 66 O.L.R. 461 (Ont.

C.A.).

96. *R. v. Thomas* (1971), 2 C.C.C. (2d) 514 (B.C. Co. Ct.).

97. *R. v. Kalyn*, *supra*, note 91 at 381.

98. See *Shelley v. Kramer* (1948), 334 U.S. 1 at 19.

99. Golden, *supra*, note 1 at 119.

Section 127 of the *Criminal Code* makes it an indictable offence to disobey an order of the court. As well, section 9 of the *Code* preserves the inherent power of the court to punish summarily for contempt. Breach of an injunction against picketing may not only be civil contempt but may constitute a criminal contempt depending on the seriousness of the offence and the willingness of the Attorney-General to get involved by prosecuting.<sup>100</sup>

In *Tilco Plastics Ltd. v. Skurgat*<sup>101</sup> the defendants had violated an injunction limiting the number of picketers to 12. Gale C.J.H.C. described the conduct of the defendants, who were part of a group of 200 to 300 participants, as amounting to "a direct and open challenge to the authority of the courts".<sup>102</sup> Individuals who were not parties to the original court order could be held in contempt for knowingly acting in contravention of the order, if it is established that they must have known about it. The five individuals identified as the "ringleaders" in this case were sentenced to 2 months in jail, while the rest of the defendants were sentenced to 15 days.<sup>103</sup> Similarly, in *Bassel's Lunch Ltd. v. Kick*<sup>104</sup> the defendants were sentenced to 10 days in the common goal for contempt, after contravening an injunction against picketing.

A final issue in this area of law that should be noted concerns the picketing of the courts themselves. This issue arose in the recent case of *British Columbia Government Employees' Union v. Attorney-General of British Columbia*.<sup>105</sup> Members of the B.C.G.E.U. were engaged in a lawful strike. They picketed court-houses. The Union issued picket passes which authorized people, including officers of the court, to pass through the picket lines. The Chief Justice of the British Columbia Supreme Court, on his own motion and *ex parte*, issued a temporary injunction restraining picketing at all court-houses. The Supreme Court of Canada upheld the injunction, holding that the picketing constituted a criminal contempt. As Dickson C.J.C. stated:

A picket line *ipso facto* impedes public access to justice. It interferes with such access and is intended to do so. A picket line has great powers of influence as a form of coercion. ... A picket line both in intention and in effect is a barrier. By picketing the court-houses of British Columbia, the appellant Union, in effect, set up a barricade which impeded access to the Courts by litigants, lawyers, witnesses, and the public at large. It is not

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100. Golden, *supra*, note 1 at 119.

101. [1966] 2 O.R. 547 (H.C.).

102. *Ibid.* at 563.

103. *Ibid.*

104. [1936] O.R. 445 (C.A.).

105. [1988] 2 S.C.R. 214, 44 C.C.C. (3d) 289, 53 D.L.R. (4th) 1.

difficult to imagine the inevitable consequences to the administration of justice.<sup>106</sup>

Dickson C.J.C. defined criminal contempt as follows:

Conduct designed to interfere with the proper administration of justice constitutes contempt of court, which is said to be 'criminal' in that it transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole.<sup>107</sup>

The *B.C.G.E.U.* case demonstrates both that the courts are prepared to use their inherent power over contempt of court actively and creatively to guard their authority, and that peaceful picketing can in the right circumstances be enough to constitute this offence. It is significant that the injunction was granted *ex parte*. The Chief Justice of the British Columbia Supreme Court assumed, and the Supreme Court of Canada agreed, that the peaceful picketing of court houses would cause "irreparable harm" to the administration of justice. Dickson C.J.C.'s comment that a picket line is "*ipso facto*" a barrier and his reference to picketing as "a form of coercion" illustrate the suspicion that judges have historically had for picketing, no matter how peaceful it is.

## TRESPASS

Trespass is not an offence in the *Criminal Code*, but rather is governed by provincial legislation and judge-made tort law. In Ontario, for example, s. 2 of the *Trespass to Property Act*<sup>108</sup> states:

2. (1) Every person who is not acting under a right or authority conferred by law and who
    - (a) without the express permission of the occupier, the proof of which rests upon the defendant,
      - (i) enters on premises when entry is prohibited under this Act
 

...
- is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.

106. 44 C.C.C. (3d) 289 at 301.

107. *Ibid.* at 305. In another decision rendered on the same day as *B.C.G.E.U.*, the Supreme Court held that a union could not discipline a member for failure to respect a picket line at a court-house, because it could not exercise disciplinary authority to enforce respect for an unlawful picket line. Any action to prevent, impede or obstruct access to the courts runs counter to the rule of law and constitutes a criminal contempt of court: see *Newfoundland Association of Public Employees v. Attorney-General of Newfoundland*, [1988] 2 S.C.R. 204, 44 C.C.C. (3d) 186.

108. R.S.O. 1980, c. 511. Note that the reverse onus in this provision, requiring the accused to prove the express permission of the occupier, has been struck down as a violation of the right to be presumed innocent guaranteed by s. 11(d) of the *Charter*: see *Re R. and K. (John) and D. (Jason)* (1986), 22 C.R.R. 292 (Ont. Prov. Ct.).

- (2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he had title to or an interest in the land that entitled him to do the act complained of.

In addition to such statutory provisions, at common law the owner of property has been held to have an almost unfettered control over their property.<sup>109</sup>

The Supreme Court of Canada followed this approach in *Harrison v. Carswell*.<sup>110</sup> The accused in this case was charged with trespass after picketing her employer, which was situated in a shopping center. The Supreme Court held that the owner of a shopping center had sufficient control or possession of the common areas, notwithstanding the unrestricted invitation to the public to enter, to enable it to invoke the remedy of trespass. The majority held that in the absence of a statutory provision, it was not for the court to depart from the traditional recognition of private property. The Supreme Court followed the earlier picketing case of *R. v. Peters*,<sup>111</sup> in which the Ontario Court of Appeal held that an owner who allows public entry does not relinquish the right to withdraw that invitation to any particular member. If a member of the public whose invitation to enter has been withdrawn refuses to leave, she or he becomes a trespasser.<sup>112</sup>

Section 2 of the *Trespass to Property Act*, however, only makes trespass an offence if the accused is not acting "under a right or authority conferred by law". Some guidance to the application of this phrase is provided by the decision in *R. v. Layton*.<sup>113</sup> In this case the accused had been passing out leaflets in support of an organizing drive at a department store in a shopping mall. Layton relied on sections 3 and 64 of the *Labour Relations Act*<sup>114</sup> as providing the lawful authority for his actions. These provisions state that individuals in Ontario have a legal right to join trade unions and participate in their lawful activities. Employers are prohibited from interfering with these rights.

Scott J. accepted this defence in the following words:

I am prepared to accept, for the purposes of this ground of appeal, that the legislature, in enacting ss. 3 and 64 of the *Labour Relations Act*, has

109. See, for example: *Russo v. Ontario Jockey Club* (1987), 46 D.L.R. (4th) 359 (Ont. H.C.) at 361.

110. (1975), 25 C.C.C. (2d) 186 (S.C.C.).

111. (1970), 2 C.C.C. (2d) 396 (Ont. C.A.).

112. In a strong dissenting judgment, Laskin C.J.C. held that the property owner's right to private property was not absolute. The defendant had a right to free expression through peaceful picketing. Laskin C.J.C. stated that it was the defendant's rights that had been denied in this case.

113. (1986), 33 C.C.C. (3d) 550 (Ont. Prov. Ct.).

114. R.S.O. 1980, c. 228.

created an exception to s. 2(1) of the *Trespass to Property Act* sufficient to shelter *organizers* of the complainant union in the factual situation obtaining at the Eaton's Center on the day in question. (emphasis in original)<sup>115</sup>

In another case arising from the same organizing campaign, the Ontario Labour Relations Board found that the *Labour Relations Act* gave union organizers the right to appear on the premises of the shopping mall before business hours in order to distribute union literature. This decision was upheld by the Ontario Court of Appeal. As Robins J.A. stated:

The relationship between the conduct proscribed by s. 64 and the rights protected by s. 3 [of the *Labour Relations Act*] mandates that the Board, in the exercise of its jurisdiction, resolve conflicts between property rights and organizational rights. The resolution of the conflict will turn upon a balancing of those rights with a view to arriving at a fair accommodation between the interests sought to be vindicated by the assertion of the rights.<sup>116</sup>

The decisions in *Layton* and *Cadillac Fairview* suggest that the absolute right of property owners to control who comes on their premises articulated in *Harrison v. Carswell* no longer prevails. The Court must balance the owner's property interest against the right of the picketers' to engage in union activity authorized by labour relations legislation. Primary picketing occurring during the course of a legal strike, in particular, could be argued to be acting "under a right or authority conferred by law", having regard to the labour relations act of that jurisdiction.

## PICKETING AND THE CHARTER

While a thorough discussion of the impact of the *Charter* on picketing law is beyond the scope of this paper, it must at least be noted that picketing is a constitutionally protected activity. In *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*<sup>117</sup> the Supreme Court of Canada held that picketing was a form of expression protected by s. 2(b) of the *Charter*. However, it is clear from this decision that the ambit of s. 2(b) is not so broad as to include all forms of picketing. As McIntyre J. stated:

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115. 33 C.C.C (3d) 550 at 558-9. The evidence in this case did not establish that Layton was an "organizer" for the union, so he was not found to be acting under a right or authority conferred by law.

116. *Re Cadillac Fairview Corp. Ltd. and R.W.D.S.U.* (1989), 71 O.R. (2d) 206 (C.A.) at 219.

117. [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 9 B.C.L.R. (2d) 273, [1987] 1 W.W.R. 577, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 25 C.R.R. 321, 7 N.R. 83.

There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. *That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct* (emphasis added).<sup>118</sup>

It is suggested that in almost any case of picketing giving rise to criminal prosecutions, the court would be able to find "other unlawful conduct" such as to bring the activity outside of the protection afforded by s. 2(b). This conclusion is supported by the decision in *R. v. James-Davies*.<sup>119</sup> In this case the three accused were charged with mischief after a picket line incident in which a number of picketers tried to prevent a car from getting into the premises of the employer. There was "no serious violence, just a general pushing and jostling".<sup>120</sup> After citing the passage quoted above from *Dolphin Delivery*, Oliver A.C.J. Prov. Ct. held that the picketers' activity was not protected by s. 2(b) of the *Charter*:

In my view, these three accused, by their actions and by their words of encouragement to others in blocking the entry of Mr. Langlois' vehicle to the plant, went far beyond the parameters of Charter protection for freedom of expression set out by Mr. Justice McIntyre in the *Dolphin Delivery* case. In short, this was not simply a case of peaceful picketing.<sup>121</sup>

Even where picketing is considered to be "peaceful" enough to be a protected form of expression as defined in *Dolphin Delivery*, it is submitted that courts will generally have little difficulty in finding the criminal laws restraining picketing to be reasonable limits on this right that can be justified under s. 1 of the *Charter*.<sup>122</sup>

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118. 33 D.L.R. (4th) 174 at 187. This argument may become circular. McIntyre J. suggests that "other unlawful conduct" may remove picketing from *Charter* protection. Yet, it is the very legitimacy of the laws constraining picketing that the courts are being asked to scrutinize under the *Charter*.

119. *Supra*, note 6.

120. *Ibid.* at 5.

121. *Ibid.* at 13. See also: *Everywoman's Health Center Society v. Bridges*, British Columbia Supreme Court decision, February 10, 1989 (unreported), a case involving the picketing of an abortion clinic. Here it was held that the "active element" in the picketers' action of besetting the clinic went beyond the scope of freedom of expression protected by the *Charter*.

122. See the discussion of s. 1 in *Dolphin Delivery*, 33 D.L.R. (4th) 174 at 189, and *B.C.G.E.U. v. A.-G.B.C.*, 44 C.C.C. (3d) 289 at 304. In *R. v. Layton*, *supra*, note 113, Scott J. did find that the conviction of the accused of trespass did violate the accused's *Charter* right to freedom of expression, where that person had been peacefully distributing union

## CONCLUSION

Criminal prosecutions are not a common incident in industrial disputes. However, it cannot be denied that there exists a range of criminal sanctions that can be (and are) used to punish picketers who "get out of line". Peaceful, informational picketing is a protected right, but the criminal law is ready to step in if picketing is too loud, too pushy, untimely, in the wrong place,<sup>123</sup> or if there are simply too many picketers. Criminal sanctions thus act as an important state instrument in regulating industrial conflict.

It is suggested that the use of the criminal law to restrain picketing is inappropriate and incongruous with the stated aims of our industrial relations regime. Among the underlying goals of this regime is the fostering of successful collective bargaining through promoting equality of bargaining power and recognizing that the employment relationship is an on-going one. Criminal prosecutions of picketers skew the odds in a strike in favour of the employer, by imposing added constraints on striking employees and holding out the threat of fines or incarceration for improper behavior. While one can certainly accept that individuals responsible for assault or other violent actions should face criminal charges in this as in other contexts, it is submitted that a provision criminalizing picketing itself (watching and besetting) has no place in the *Criminal Code*. The *Code* is not merely a set of rules; by defining certain acts as "criminal" it sets out a normative order for our society. The use of criminal sanctions against picketers can only impair the long term relationship between workers and their employer, and between individuals and the state.

Picketing is an incident of Canadian industrial relations that does have important social, political and economic ramifications. Unfortunately, judges have historically viewed this activity as a social menace with no redeeming value. The vast majority of issues arising from picket line conduct – or misconduct – could, it is suggested, be more appropriately dealt with by labour boards, which have a specialized jurisdiction in this area. Any attempt to provide a balanced response to the negative social effects of picketing must start with the recognition both that picketing has a fixed and important place in our system of industrial relations and that picketers are exercising a *Charter* right. It follows from this recognition that picketing, in and of itself, should not be a crime.

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literature in a shopping mall. However, Scott J. clearly confined his decision to the particular facts of that case. He stated (at 561) that the accused's actions did "not even qualify as picketing".

123. For example, in *R. v. Eford*, *supra*, note 64, picketing was found to be unlawful because it was in front of a private residence. In *B.C.G.E.U. v. A.-G.B.C.*, *supra*, note 105, picketing at court houses was found to be unlawful.



## ***Le piquetage est-il un crime?***

Cet article examine les sanctions criminelles imposées aux piqueteurs. L'auteur suggère que les observateurs académiques ont traditionnellement sous-estimé l'impact du droit criminel dans ce domaine. L'expérience récente d'un certain nombre de grèves démontre que les accusations criminelles ne font pas exceptions en contexte de piquetage. L'utilisation à grande échelle d'accusations criminelles portées contre les piqueteurs durant la grève des mineurs de charbon britanniques démontre également le potentiel pour l'État du droit criminel comme outil lui permettant de régler le conflit industriel.

Cinq infractions criminelles plus pertinentes au piquetage font ici objet d'examen: «surveiller et cerner», «le méfait», «troubler la paix publique», «l'attroupement illégal» et «l'outrage au tribunal». Après avoir étudié les lois provinciales contre la violation de la propriété, nous examinerons brièvement l'impact de la *Charte canadienne des droits et libertés* dans ce contexte.

L'examen de l'histoire de la disposition du *Code criminel* interdisant de cerner ou de surveiller certains lieux indique qu'elle fut introduite pour contenir les piquetages à l'occasion des conflits du travail. Deux courants de jurisprudence se sont développés eu égard au caractère légal ou non du piquetage. Le premier prétend que le piquetage est en soi une forme de coercition et à ce titre est presque toujours illégal. Le second soutient que le piquetage n'est illégal que s'il constitue un obstacle ou est accompagné d'autres comportements illégaux. Ces deux courants de jurisprudence ont été suivis au Canada, cependant, la Cour suprême du Canada a penché en faveur du second.

La disposition concernant le méfait dans le *Code criminel* prévoit que le fait d'empêcher quelqu'un d'utiliser sa propriété constitue une infraction. La possibilité de voir cet article appliqué en contexte de piquetage est illustrée par une affaire récente en Ontario où la Cour d'appel a statué que le simple fait d'être membre d'un grand groupe obstruant l'entrée à un lieu pouvait être suffisant pour constituer cette infraction.

La jurisprudence est aussi divisée dans l'interprétation de la disposition concernant le trouble à la paix publique. L'approche orthodoxe prétend que la Couronne doit prouver à la fois que l'accusé a commis un des actes énumérés à la loi et qu'un trouble en a résulté. La seconde approche soutient pour sa part que le simple fait de commettre en public un des actes prévus à la loi est suffisant pour constituer une infraction. Une décision récente de la Cour d'appel de l'Ontario a eu pour effet de mettre l'école de pensée orthodoxe en doute dans le contexte du piquetage.

Les articles du *Code criminel* visant les attroupements illégaux ne sont pas fréquemment utilisés dans les cas de conflits industriels. Cependant, un examen des exigences de la loi à cet effet révèle que des accusations d'attroupements illégaux pourraient bien être portées dans le cas de piquetage massif accompagné de violence.

Le *Code criminel* réserve le pouvoir inhérent des cours de condamner pour outrage au tribunal. L'expérience récente de la grève du Syndicat des employés du gouvernement de la Colombie-Britannique démontre que les cours sont prêtes en certaines circonstances à utiliser leur pouvoir inhérent pour limiter le piquetage même si ce dernier est paisible.

Les lois provinciales portant sur la violation de la propriété reflètent le contrôle absolu accordé traditionnellement par la common law au droit à la propriété privé. Cependant, des affaires récentes impliquant de l'organisation syndicale dans des centres commerciaux démontrent que les cours sont maintenant prêtes à faire la juste balance entre le droit à la propriété privée et d'autres droits tels celui de devenir membre d'un syndicat et de s'engager dans ses activités légales.

La Cour suprême du Canada a reconnu que le piquetage est une forme d'expression protégée par l'article 2b) de la Charte. Cependant, il est clair que les bornes de la liberté d'expression n'incluent pas toute forme de piquetage. De plus, les cours ont conclu que les restrictions au piquetage que l'on retrouve dans le droit criminel sont des limites raisonnables et justifiées dans le cadre de l'article 1 de la Charte.

L'auteur conclut que l'utilisation du droit criminel pour régler le piquetage, et particulièrement le piquetage paisible est incompatible avec les objectifs fondamentaux du régime canadien des relations industrielles. Il suggère que la plupart des sujets associés au piquetage pourrait trouver meilleur traitement dans les Commissions de relations du travail qui, en fait, ont une juridiction spécialisée en ce domaine.

### **Le point sur l'arbitrage des griefs**

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