PART II.

THE RIGHT TO STRIKE IN CANADA.

The right to strike is limited by two general kinds of provisions in the laws of Canada: (1) Those in the Dominion Statutes which make certain strikes illegal because of their purposes; and (2) those in the Provincial Statutes which apply to the so-called public utilities and prohibit strikes as well as lock-outs prior to and during official investigation.

1. *The purpose of strikes.* Statutory provisions concerning the purposes of strikes were embodied in the Criminal Code (1892). The few cases that have come before the courts of Canada in which the issue related to the purpose of the strike has appeared have been settled chiefly on an intepretation of Section 590 of The Code[1] which follows:

> No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute.

Section 2(41) defines a trade combination as

> Any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workmen in or respect of his business or employment, or contract of employment or service.

Two cases, one before the Supreme Court of Canada and one before the Manitoba Court of Appeals, involve an interpretation of section 590 and apparently define the illegal strike purposes as they exist in Canada to-day.

In *Local Union No. 1562 United Mine Workers of America* v. *William and Rees*[2] before the Supreme Court of Canada appeal was made by defendants from the judgment of the Appellant Division of the Supreme Court of Alberta.[3] Plaintiffs had twice extended invitations to defendants, their co-workmen, to join the union, being refused both times. Subsequently upon application for membership defendants were refused by union, and soon afterward the union objected to their employment and with the threat

[1] R.S. 1927, c. 146, s. 590.
[2] [1919] 49 D.L.R. 578, at pp. 587-8.
[3] [1919] 45 D.L.R. 150.

of a general strike induced Tapper, the employer, to expel them from employment. The interpretation of the majority on this issue was that the intent of the plaintiff was to injure defendants rather than to advance the legitimate interests of the union, and therefore appeal was not allowed.[4] The intent to injure was deduced largely from the fact that plaintiff had previously refused defendants membership.

Where the strike is clearly for a closed-shop there is apparently no issue of legality. Thus in *The International Ladies Garment Workers' Union* v. *Rother*,[5] appealed before the Court of King's Bench in which plaintiffs were striking for a closed shop no question arose as to the purpose of the strike.

In *Rex* v. *Russell*,[6] before the Manitoba Court of Appeals the legality of the general strike for political ends and the sympathetic strike was passed upon. Defendant and his associates, who were admittedly communists, had gained control of the Winnipeg Trades and Labour Council in early 1919. In May they engineered a resolution that a vote should be taken by all the unions authorizing a general strike. The majority favoured such a strike, which began on May 15th. Twenty-four thousand labourers left their work, among them practically all of those who manned the public utilities and other necessary services such as hospitals, police and fire protection. The very necessary services were subsequently provided, with only partial adequacy, however. The charge of the city was taken from the Mayor by the strike committee and all publications were suppressed except the Committee's *Strike Bulletin.* Serious rioting occurred toward the end of the strike, which lasted six weeks, finally being broken up by the militia.

Justice Perdue, in the first place, maintained that the strike was a sympathetic strike and declared that as such is not protected under Section 590 of *The Code.* He said at p. 633:

> It is lawful for workmen to combine in a strike in order to get higher wages because that would be a combination to regulate or alter the conduct of a master in his employment of his workmen. . . . But supposing there is a strike by the moulders in A's foundry and in order to assist the strike the employees of a cartage company combine in a refusal to carry goods to or from A's foundry, or the railway company's employees combine in refusing to receive or handle A's goods; neither of these combinations comes within the protection afforded by sec. 590. . . . "Sympathetic" or "secondary" strikes are no longer "actionable" in England by *The Trades Disputes Act,* 1906, . . . We have no similar enactment in Canada legalizing such

[4] While union was not held liable to damages the union committee which delivered ultimatum to Tapper was held liable.

[5] (1923), Q.R. 34 K.B. 69.

[6] (1920), 1 W.W.R. 624.

strikes. The law in Canada applying to such strikes would be the same as it was in England before *The Trades Disputes Act* was passed.

In the second place he said that the strike was not protected under Section 590 because it was seditious conspiracy and therefore criminal under Section 132 of *The Code* (p. 634).

Another kind of strike declared criminal under the Dominion Statute[7] is that which makes criminal wilful certain breaches of contract involving danger to persons or property. The provision follows:

> Everyone is guilty . . . who (a) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequence of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or
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> (b) being bound, agreeing or assuming, under any contract made by him with any municipal corporation or authority, or with any company to supply any city or any other place, or any part thereof, with electric light, or power, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequence of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place or part thereof, wholly or to a great extent, of their supply of power, light, gas, or water; or
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> (c) being bound, agreeing or assuming, under any contract made by him with a railway company, or with His Majesty, or anyone on behalf of His Majesty, in connection with a Government railway on which His Majesty's mails, or passengers, or freights are carried, to carry His Majesty's mails, or to carry passengers or freight, wilfully breaks such contract, knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car, on the railway.

This provision was passed under the Act of 1877 (Ch. 35). Apparently few decisions have been made under it. Justice Cameron in *Rex* v. *Russell* (*supra*), however, as one of the crimes of the strikers, listed the offence under Section 499 of breaking contract with consequent danger to the public (p. 643).

2. *Compulsory investigation.* The first Canadian legislation restricting the right to strike pending official investigation was the Industrial Disputes and Investigation Act passed in 1907 by the Dominion Parliament. This law provides that wherever any dispute exists between an employer and any of his employees and no adjustment can be made, either of the parties may apply to the Minister of Labour for the establishment of a board to which the dispute may be referred.[8] Section 57 of the Act provides that:

[7] R.S., 1927, c. 146, s. 499.
[8] 6-7 Edw. VII, c. 20, s. 6.

> Employers and employees shall give at least thirty days' notice of an intended or desired change affecting conditions of employment with respect to wages or hours; and in the event of such intended or desired change resulting in a dispute, it shall be unlawful for the employer to make effective a proposed change in wages or hours or for the employees to go on strike, until the dispute has been finally dealt with by a board, and a copy of its report has been delivered through the registrar to both parties affected.

Employees declaring a lock-out in violation of the Act are liable to a fine ranging from $100 to $1,000 for each day of its duration (s. 58); each employee who so strikes is liable to a fine ranging from $10 to $50 for each day of the strike (s. 59); and any person who incites, encourages or aids such strikes or lock-outs is liable to a penalty of from $50 to $1,000 (s. 60).

The findings of a board are not mandatory and, once its report has been submitted to the parties involved, a strike or lock-out may be declared. However, either party to a dispute may agree in writing at any time before or after the board has made its report to be bound by the recommendation of the board. If the other party agrees in like manner to be bound, then the recommendation is made a rule of the court and can be thus enforced (s. 62).

The scope of the Act is presented in Section 2, which defines "employer." Employer "means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication or public service utility, including . . . railways, whether operated by steam, electricity or other motive power, steamships, telegraph and telephone lines, gas, electric light, water and power works."[9]

Although the compulsory features of the Act apply only to mines and the "public service utilities," Section 63 provides that boards may be appointed in other industries if agreed to in writing by both parties. Upon notification to the parties that the Minister has decided to refer such dispute, the lock-out or strike, if in existence, must cease and the provisions of the Act are binding on the parties.

The Minister of Labour has the general administration of this Act (s. 3) but the details of administration are in the hands of the Registrar (s. 4). An application for a board may come from either party, and, having been made, the Minister must within fifteen days establish such a board if satisfied that the provisions of the Act imply (ss. 5-6). The application must be made in writing and

[9] "Or any number of such persons, companies or corporations acting together, or who in the opinion of the Minister have interests in common" was added at this point by an amendment in 1920 (10-11 Geo. V, 1920, ch. 27).

include the parties to the dispute, the nature and cause of the dispute, the approximate number of persons involved in the dispute, the efforts made by the parties themselves to adjust the dispute, and a declaration that, failing the adjustment of the dispute, necessary authority has been obtained to order a strike or lock-out (s. 15).

The party wishing a board appointed must transmit a letter to the other party of the dispute (s. 18). The other party must then without delay prepare a statement in reply and transmit it to the Registrar and to the party making the application (s. 19).

Every board consists of three members appointed by the Minister. Of the three members one is appointed on the recommendation of the employer, one on the recommendation of the employee, and the third on the recommendation of the members chosen (s. 7). The Minister makes the appointments that are not made within five days by these parties (s. 8). The boards are given the power to summon witnesses, administer oaths, to require witnesses to give evidence, to inspect all relevant documents, books, or papers, and to visit in person work places which relate to the dispute (ss. 30, 39). The proceedings of the board are conducted in public unless the board decides that such shall be conducted in private (s. 45).

If a settlement of the dispute is arrived at by the parties during the course of its reference to the board, a memorandum of the settlement is drawn up and, if the parties so agree, it is binding upon them (s. 24). If a settlement is not arrived at, the board must make a full written report to the Minister, which includes the procedure followed to obtain the facts, the facts themselves, and the recommendations of the board (s. 25). Copies of the report are sent to the parties of the dispute and to any newspaper so desiring (s. 28); and to the *Labour Gazette*, which must publish it immediately (s. 29).

No important amendments were made to the Act until 1925 when the scope of the Act was considerably restricted as a result of the Act being declared by the Privy Council *ultra vires* to the British North America Act of 1867 (*Toronto Electric Commissioners* v. *Snider et al.*[10] Litigation began in the summer of 1923. A board appointed by the Minister of Labour at the application of the Canadian Electric Trade Union, which was in dispute with the Toronto Electric Commissioners, was restrained by an interim injunction granted by the High Court Division of the Supreme Court of Ontario from proceeding with the inquiry. In the Privy Council the

[10] [1925] 2 D.L.R. 5.

subject-matter of the Disputes Act was considered as clearly affecting property and civil rights, jurisdiction over which was reserved exclusively to the provincial legislature by Section 92 of the British North America Act. Viscount Haldane pointed out at p. 8:

> Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by s. 92 of the B.N.A. Act. For its provisions were concerned directly with the civil rights of both employers and employed in the Province. . . . It did no more than what a Provincial Legislature could have done under s. 92 (15) when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It interfered further with civil rights when, by s. 56, it suspended liberty to lock-out or strike during a reference to a Board.

The Viscount went on to admit that strikes were in the orbit of criminal law on the grounds of conspiracy. He said at pp. 12-13:

> There is no conspiracy involved in a lock-out, and the statute under discussion deals with lock-outs *pari ratione* as with strikes. It would be impossible, even if it were desirable, to separate the provisions as to strikes from those as to lock-outs so as to make the one fall under criminal law while the other remained outside it; and therefore, in their Lordships' opinion this argument also fails.

Those arguments which would make the Act constitutional on the basis that it regulated trade and commerce and that it concerned the peace, order and good government of Canada and thus came within the enumerated powers under Section 91 failed also, in the opinion of their Lordships. "Trade and commerce" meant only general trade and commerce (p. 13); and since the Act was not for the purpose of providing for a national emergency it could not be justified by the power to make laws for "peace, order and good government" (p. 15).

The amendment which was immediately made to meet the unconstitutionality of the Act of 1907 provided that the Act should apply only to disputes of the following nature:[11] Navigation and shipping; railways, canals, telegraphs and other works connecting any province with others; ferries and steamships between provinces and a foreign country; works carried on by aliens; such works which may be declared by the Parliament of Canada to be for the general advantage of Canada; works, incorporated by or under the authority of the Parliament of Canada; any dispute which is not within the exclusive legislative authority of any provincial legislature to regulate in the manner provided by the Act; any dispute which the Governor in Council may because of a national emergency

[11] 15-16 Geo. V, 1925, ch. 14.

declare subject to the provisions of the Act; and "any dispute which is within the exclusive legislative jurisdiction of any province and which by the legislation of the province is made subject to the provisions of this Act."

Six States, British Columbia (1925), Manitoba (1926), New Brunswick (1926), Saskatchewan (1926), Nova Scotia (1926), and Alberta (1928) had, in 1930, passed laws which provided that the provisions of the Industrial Disputes and Investigation Act of 1907 should apply to every industrial dispute of the nature therein defined which is within or subject to the exclusive jurisdiction of the province.[12]

Several interpretations of the Industrial Disputes and Investigation Act have been made in the Canadian courts which are of some significance. In *Rex* v. *McGuire*[13] before the Ontario High Court of Justice there was a motion to quash the conviction of McGuire made by the police magistrate of Cobalt in a charge of "having unlawfully incited the employees of the Nipissing Mining Company to go on strike." The conviction was made by the magistrate under Section 60 of the Industrial Disputes and Investigation Act of 1907 which makes any person liable who incites or encourages any strike or lock-out contrary to provisions of the Act. No application had been made for a board by either party to the dispute. The issue was, "Was the strike prior to or during a reference of such dispute to a board of conciliation," as provided in Section 56. Judge Clute for the majority said, pp. 524-5:

> I think the meaning of the statute to be that in the class of cases to which it applies there shall be no lock-out or strike, on account of any dispute as therein defined either prior to or during a reference under the Act. The evidence was clear that the defendant did incite the employees of the mine to go on strike on account of a dispute within the meaning of sec. 2, sub-sec. (e).
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> The fact that the dispute was prior to a reference of such dispute to a board of conciliation is expressly provided for by sec. 56, and is thereby declared to be unlawful.

Contrary to this position that all strikes and lock-outs prior to and during an investigation in the industries covered are unlawful. Justice Duff for the majority of the Supreme Court of Canada in *Local Union No. 1562, United Mine Workers of America* v. *William and Rees* (*supra*) (referring to the Act) said at p. 583:

[12] British Columbia, Statute of 1925, ch. 19; Manitoba, Statutes of 1926, ch. 17; New Brunswick, Statutes of 1926, ch. 158; Saskatchewan, Statutes of 1926, ch. 58; Nova Scotia, Statutes of 1926, ch. 15; Alberta, Statutes of 1928, ch. 42.

[13] (1908), 16 O.L.R. 522.

There is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

The dispute has not been referred by the parties to a board. An interpretation similar to that in *Rex* v. *McGuire* (*supra*), was apparently made in *Rex* v. *Russell* (*supra*). In this case there apparently had been no application for a board by any of the parties, but Justice Cameron said, at p. 643:

I refer also to *The Industrial Disputes Investigation Act*, 1907, 6-7 Edw. VII, ch. 20, the provisions of which were flagrantly violated during the strike at the instigation of those directing its operations.

Another case involved the interpretation of one of the important provisions of the Act. *District No. 26 United Mine Workers of America* v. *Dominon Coal Company*[14] before the Nova Scotia Supreme Court involved the issue of the meaning of Section 57 of the Act (see p. 2) which provided in brief that thirty days' notice must be given of an intended change affecting condition of employment, hours and wages; and that during such an interval or until the dispute has been reported on, if it was referred to a board, there shall be no change in the conditions of employment, hours or wages. The parties involved in the case had an agreement fixing rate of wages until November 30, 1921. On November 11, 1921, it was agreed by parties that the agreement should be extended until December 31, 1921. On December 16, 1921, the defendant announced that a twenty-five per cent. reduction in wages would become effective on January 1, 1922. An application was made soon after the 16th by plaintiffs to the Minister for a board, who granted it on December 24th. An interim injunction was meanwhile granted plaintiffs to prevent defendant from changing wages until the board made its report.

Judge Mellish held that defendant was not violating the Act. He said at p. 278:

The section of the Act hereinbefore quoted is, I think, dealing with such a change in "conditions" as might arise by the coercive action of either employers or employees and not with such as might arise by reason of the beginning or ending of the operation of such a contract as the Montreal agreement. The notices given by defendants did not purport to change or alter any existing conditions.

This interpretation of Section 57 of the Act seems to nullify to a great extent the application of that provision at least in Nova Scotia; for the interpretation would make the Section apply only

[14] [1922] 63 D.L.R. 274.

to those changes of condition which were induced by coercion, which may include strikes and lock-outs, but which are already during reference of a dispute prohibited by Section 56 of the Act.

The Ontario Courts apparently would consider Section 56 to prohibit all strikes in the industries covered by the Act.[15] This seems also to be the position of the Manitoba Courts. The Supreme Court of Canada, on the other hand, apparently considers the Act not to prohibit all strikes or lock-outs. If all strikes and lock-outs are not prohibited, then the question arises as to which are prohibited. These apparently would be the ones arising during the thirty days which must precede any change of conditions of work, as provided in Section 57, and during the reference of the dispute to a board. "Prior to a reference" applies, then, according to the courts, either to all strikes until a board has passed on the matter in dispute or only to those arising during the thirty days preceding a change in conditions or during the actual reference of the dispute to a board.

Other provincial enactments placing some restriction on the right to strike are the Ontario Railway and Municipal Board Act of 1913, and the Quebec Municipal Strike and Lock-out Act of 1921. The former Act[16] provides, in brief, that a dispute between a railway, state railway, or public utility company and its employees might be submitted to the Ontario Railway and Municipal Board. This request must, however, be accompanied by an agreement not to strike or lock out during the investigation. When a strike or lock-out had occurred or was threatened, the board was to endeavour by mediation to effect a settlement.

The Quebec Act[17] applies to every municipal corporation which employs twenty-five or more men for fire protection, public safety, waterworks, or sanitary incineration. Lock-outs by the municipality or strikes by the employees arising over wages or labour union membership are unlawful before and during the submission of such dispute to a board of arbitration. The board consists of three members, two appointed by the two parties and the third by the Minister of Public Works and Labour.

(To be continued.)

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[15] Ontario is not now covered by the Act, but an Act now in force contains provisions similar to those of the Act.

[16] R.S.O., 1927, ch. 224.

[17] R.S. of Quebec, 1925, ch. 98.