TRADE UNIONS IN CANADA

PART III.

The Right to Picket in Canada.

Possibly the greatest restriction on trade union activities in Canada is that concerning picketing. Picketing is clearly in the orbit of criminal law and legislation concerning such is, therefore, for the most part national. By the Conspiracy and Protection of Property Act of 1875 peaceful picketing was expressly authorized. This provision was omitted, however, in the Criminal Code which contains the law as it exists on the subject at the present time. Section 501 of the *Code* (R.S., 1927, c. 146, s. 501) contains the following provisions:

> Every one is guilty of an offense punishable at the option of the accused, on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,
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> (a) uses violence to such other person, or his wife or children, or injures his property; or
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> (b) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or
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> (c) persistently follows such other person about from place to place; or
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> (d) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or
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> (e) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or
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> (f) besets or watches the house or other place where such other person resides or works or comes on business or happens to be.

The question of the legality of picketing has been the subject of a number of recent judicial decisions most of which would appear to make even peaceful picketing illegal.

In *Meretsky* v. *Arntfield*[1] before the Weekly Court of Toronto an injunction granted by a local judge was motioned by plaintiff for continuation. The union which defendant represented which was on strike had published by means of hand-bills and banners the statement that the Windsor Theatre was unfair to organized labour; and they had gathered around the entrance of the theatre and had

[1] (1922), 21 O.W.N. 439.

attempted without violence to persuade persons from entering or working there. In regard to the legality of such activities Mr. Justice Rose said, at p. 440.

> In Sec. 501 of the Criminal Code, there is no clause, as there is in Sec. 7, of the Conspiracy and Protection of Property Act, 1875, declaring that attending at a place to obtain or communicate information shall not be deemed a watching or besetting within the meaning of the section . . . even the most peaceful picketing of the approaches to a theatre is likely to amount to coercion in the case of timid theatre-goers.

In *Rex* v. *Russell*[2] Mr. Justice Cameron in regard to picketing took a position very similar to that of Judge Rose in *Meretsky* v. *Arntfield* (*supra*), by saying in reference to section 501 that "in this section there is no longer the previously existing provision which sought to legalize peaceful picketing by permitting attending at the house of another for the purpose of communication." (p. 643).

In *International Ladies Garment Workers Union* v. *Rother*[3] before the Quebec Court of King's Bench the judgment of the Superior Court maintaining an injunction against the union was appealed. Appellants had gone on strike, the first day of which they sent "pickets" to respondent's place of business and continued to do so in ever increasing numbers up to the time a restraining order was issued. At opening and closing times numbers, often as high as 40, of union members stood at the door of respondent's factory. The names "scab" and "traitor" were freely flung at employees of respondent as they entered and emerged from the factory. They were followed to their homes. At one time one of the city streets was so filled with strikers that traffic could not pass. The restraining order enjoined appellants from molesting or interfering with respondent and from in any way picketing in front of or at his place of business or from besetting or watching his place of business or following employees with a view of intimidating them not to work.

It was urged that the terms of the order were too broad, in that all picketing was restrained. Mr. Justice Martin on this point said that "the whole purpose of the union in placing these pickets around respondent's establishment was to interfere with respondent's business and intimidate those of his employees who remained loyal to him and who desired to continue in his employ." (p. 73). Mr. Justice Greenshields, referring to Section 501, Subsection f, said:

> This is nothing more than a clear recognition of the right of a man to carry on his business without interference and the added or further right of freedom of action without surveillance, besetting or watching. (p. 75).

[2] (1920), 1 W.W.R. 624.
[3] (1923), 34 Q.L.R. 69.

The appeal was not allowed.

In *Dick* v. *Stephenson et al*,[4] before the Supreme Court of Alberta, action for damages was brought for the picketing of plaintiff's restaurant by defendants, who were members of a trade union. Plaintiff had refused to sign a contract drawn up by the union. Thereupon the union commenced picketing, which consisted in members of the union patrolling the streets in front of plaintiff's premises and at times distributing to the public patronizing the café hand-bills, whereby the recipient was informed of those restaurants in the city which were fair to union labour. There resulted a very serious decline in plaintiff's business.

Mr. Justice Ives, for the court, said that

there was no evidence that any malice actuated the defendants or that injury to the plaintiff was their primary object or intent. They did legally what they were legally entitled to do. . . . His customers could lawfully cease their patronage at any moment and were induced to do so by the defendants in an effort to advance the legitimate interests of themselves and other members of the union. (p. 762).

In *Robinson* v. *Adams* and *Patzalek* v. *Adams*,[5] before the Appellate Division of the Supreme Court of Ontario, plaintiff moved for orders continuing interim injunctions granted by a local judge. Motion was also made to enlarge the existing injunction "so as to restrain the defendants from publishing by means of hand-bills or banners or otherwise any defamatory statements of or concerning the theatres owned by the plaintiffs, and from watching or besetting the said theatres for the purpose of persuading or otherwise preventing any person or persons from entering the same." Mr. Justice Wright, without entering into a discussion of the law applicable to cases of picketing, stated that he would follow the decision of Mr. Justice Rose in *Meretsky* v. *Arntfield* (*supra*), the acts complained of in that case being similar to those alleged by the plaintiff in the present actions. (p. 218).

In *Rex ex rel. Barron* v. *Blacksawl* and *Rex ex Rel. Barron* v. *Hangsjaa*,[6] before the Appellate Division of the Alberta Supreme Court, appeal was made by defendants from conviction by a local police magistrate for wrongfully and without lawful authority besetting and watching a moving picture theatre contrary to Section 501 (f) of *The Code*. Defendants had been hired by a union of musicians to distribute hand-bills in the neighbourhood of plaintiff's theatre. Plaintiff and the union had had a disagreement, the result of which was the union's withdrawal and the continued employment by

[4] (1923), 3 W.W.R. 761.
[5] (1924), 56 O.L.R. 217.
[6] (1925), 21 A.L.R. 580.

plaintiff of some non-union men. The hand-bills distributed by defendants read as follows:

> Locked out: Union employees: Palace Theatre does not use union musicians, moving picture operators or stage employees. Union men will not patronize; others are asked not to.

Mr. Justice Stuart, for the court, said, in the first place, that there could be no doubt that defendants were watching and besetting the theatre within the meaning of clause (f) of Section 501. "They came frequently to the immediate neighbourhood of the entrance of the theatre and stood there at least for a few moments before moving away." (p. 583) But the real issue before the court was whether the watching and besetting was done "wrongfully and without lawful authority," so as to make it illegal under Section 501. In determining the application of the words "wrongfully and without lawful authority," Mr. Justice Stuart (pp. 588-9) followed Lindley, M.R., in *Lyons and Sons* v. *Wilkins,*[7] who said, in regard to an identical section in the English statute of 1875 (38 and 39 Vict., Ch. 86):

> If on the trial the evidence before the Court is consistent with the legality of the acts complained of, this reasonably possible legality must be excluded by evidence before the accused can be properly convicted. But it is not necessary to show the illegality of the overt acts complained of by other evidence than that which proves the acts themselves if no justification or excuse for them is reasonably consistent with the facts proved. . . . The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence.

In answer to the contentions of the defence that the actions of defendants were not illegal because the decision in *Sorrell* v. *Smith, Mogul SS. Co.* v. *McGregor, Gord & Co.,* and to *Allen* v. *Flood* recognized the principle that a man has a right to conduct his business as he pleases, and in doing so, to injure another with a view to injure ultimately a third person as long as his purpose is to advance his own business interests, Mr. Justice Stuart said, at p. 590:

> But I think the answer to this contention is that the defendant musicians were not conducting their own business at all in doing what they did. They had no business relations with the members of the promiscuous crowd whom they accosted on the street. And I think this is the essential distinction which must turn the decision against the appellants.

Rex v. *Reners*[8] involved another interpretation of Section 501(f)

[7] 68 L.J. Ch. 146; 79 L.T. 709, 15 T.L.R. 128.
[8] (1926), 22 A.L.R. 81.

by the Appellate Division of the Alberta Supreme Court. In this case the employees of the Alberta Block Coal Company, having disagreed among themselves on the question of accepting a new wage contract between the company and the officials of the United Mine Workers, a number of the men broke away from the United Mine Workers and formed an independent union. Members of the new union picketed the mines with the object of persuading the miners not to go to work, no violence apparently being either used or intended. The pickets were divided up into groups and stationed around the shaft of the mine. At night they occupied the hills surrounding the mine and overlooking the approach. They lighted fires and kept them burning all night. The parties kept in communication with one another by shouting. When constables were sent to arrest the men they were greeted with insults, curses and threats, but with no violence. Appeal had been made by defendants. Chief Justice Harvey, pronouncing the judgment of the court, said in conclusion that

> a picketing effected in the way this was—to constitute a menace and practical compulsion by moral force, even if no physical force were contemplated, as to which one might have doubts—would not be such a picketing as would be warranted and, therefore, would be wrongful. (p. 86).

Appeal was taken against this decision to the Supreme Court of Canada, where the decision was upheld.[9] Mr. Justice Newcombe contended that it depended upon the nature of the particular acts committed as to whether they were wrongful. In this regard, he said, at p. 506:

> Coming now again to the facts in the present case, the acts with which the appellant is charged were wrongful and unlawful if the watching and besetting in which he, in common with his comrades or associates, was engaged amounted to a nuisance or to a trespass, or if the men who were watching and besetting constituted an unlawful assembly, and there is evidence as to each of these particulars which ought not be overlooked.

There was trespassing, because many of the hills on which appellants were stationed were property of the company. There was a common law nuisance because "some of the fires lighted must have been very near a powder house" stationed 800 feet from the mine's shaft. Furthermore, the shouting of the miners from hill to hill constituted a nuisance (p. 507). As to unlawful assembly, he said, at p. 508:

> The numbers of men who assembled, their distribution about the premises, including the company's property, their attendance there by day and by night, the fires, the shouting, their reception of the police, their threats and conduct when the police approached, afford cogent evidence, not only of a nuisance, but also of unlawful assembly.

[9] [1926] C.L.R. 499.

Mr. Justice Idington considered the acts of defendants wrongful on somewhat different grounds. He said, at p. 510:

These men were, clearly as noon-day, doing what the subsection (f) forbids, unless in the case of one having lawful authority to beset or watch. For example, the sheriff or his officers often have lawful authority to go very far in discharging their duty—even to the extent of besetting or watching a house. No pretense of authority is shown here. None existed. Indeed, the accused were in fact trespassers, I imagine, on the property of the coal company. And surely the company in question carrying on business in and on the premises in question, had a perfect right to refuse to employ men belonging to the Red Deer Union.

And can there be a shadow of doubt that the men taking part in the besetting and watching complained of were doing so with a view to compel said company to abstain from pursuing their business without the aid of workmen belonging to the said Red Deer Union?

British Columbia is the only province that has laws applying to picketing and boycotting. R.S.B.C., 1924, ch. 258, ss. 2 and 3 provide that no trade union or its officers as members can be enjoined or made liable for damages

for (Sec. 2) communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or distributor of the products of labour or the purchase of such products or for persuading or endeavouring to persuade by fair and reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee, or person, at the expiration of any existing contract not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour"; or "for (Sec. 3) publishing information with regard to a strike or lock-out, or proposed or expected strike or lock-out, or other labour grievance or trouble, or for warning workmen. artisans, labourers, employees, or other persons against seeking or urging workmen, artisans, labourers, employees or other persons not to seek employment in the locality affected by such strike, lock-out, labour grievance or trouble, or from purchasing, buying or consuming products produced or distributed by the employer of labour party to such strike, lock-out, labour grievance or trouble during its continuance."

The case of *Schuberg* v. *Local International Alliance of Theatrical Stage Employees et al*,[10] before the Supreme Court of British Columbia, interpreted this law as well as the legality of picketing in British Columbia. The owner of the theatre had for a long time employed seven stage hands, and his announcement that, after a certain date, he would employ only five proved unsatisfactory to the stage hands and their local union and a strike followed. The owner having engaged five new stage hands, the union placed men at the entrance to the theatre, who distributed hand-bills, stating in large type that the theatre was "unfair to organized labour."

[10] (1924), 37 B.C.R. 284.

Signs and banners bearing the same statement were also paraded about the theatre.

Mr. Justice Gregory, for the court, held that "these acts were all done with the intention of injuring the plaintiff's business. . . . Defendant's intention was to injure plaintiff; its object was to force him to conform to the Vancouver Theatrical Federation's views of the proper number of stage hands to be employed at the Empress Theatre. Apart from this, I find no evidence of any personal malice against the plaintiff." (p. 285). As to Section 2 of the Act quoted above, he said, at pp. 285-6:

> Section 2 only permits the communication of facts, etc., and the persuasion by fair and reasonable argument, without any unlawful act. The statement that the theatre was unfair to organized labour is not a statement of fact but one of opinion merely, about which people may and do differ—an attribute which does not belong to a statement of fact. The statements on the hand-bills, banners and sandwich-boards were not "fair or reasonable argument"—they were not argument at all and, in addition, they were accompanied by the unlawful act of watching and besetting.

Judgment was given for damages with costs of action and an injunction against the union was also granted. The case was taken before the British Columbia Court of Appeal.[11] The appeal was dissmissed, two judges dissenting. Chief Justice MacDonald, for the majority, held that even though the picketing was peaceful and admitting the absence of actual malice, it was an actionable wrong to compel the plaintiff, by inflicting loss upon him, to do something from which he had a legal right to abstain from doing. (p. 21).

Furthermore, the Trade Unions Act of the Province does not assist the defendants. "It would protect them only against civil liability for the act of communicating information. . . . It does not protect them from liability for conspiring to injure the employer in his business and from intentionally injuring him." (pp. 21-2).

Dissenting, Mr. Justice Martin maintained that defendant had lawfully made use of the rights conferred upon them by the statute of the province. (p. 29). He contended that there were no nuisances or unlawful assemblies present as in the *Reuers* case; and that, since the provinces had a right to legislate on civil matters, it gave "lawful authority" to the acts done by defendants. (p. 28).

There can be little doubt from these decisions that picketing taken in its ordinary meaning, is unlawful in Canada. With the one exception of the Supreme Court of Alberta, in *Dick* v. *Stephenson* (*supra*), the final decisions in these disputes made the activities which the trade unions pursued in enforcing their strikes illegal

[11] [1927] 2 D.L.R. 20.

The reasons given by the judges for declaring picketing illegal vary somewhat and, in some cases, seem extremely curious. The Ontario Courts look to the words "watching and besetting," and call everything illegal which might be described by these words.[12] This also was the reasoning of the Manitoba Court in *Rex* v. *Russell* (*supra*).

The Quebec Court of King's Bench looked not so much at the physical acts of watching and besetting as to the purpose and result of these acts.[13] In this decision one finds the reasoning that it was the purpose of the union by their acts to interfere with an employer who had the right to carry on his business without interference. Against this interpretation was that of the Supreme Court of Alberta, in *Dick* v. *Stephenson* (*supra*), that there was no malice in the union's intent to hurt the employer's business; and that the union had a right to advance its own interests as long as done peacefully.

The problem of whether "watching and besetting" was done "wrongfully and without lawful authority," as provided in Section 501 of *The Code*, was apparently recognized for the first time in 1925 by the Appellate Division of the Alberta Supreme Court.[14] The answer was that watching and besetting were illegal, because they compelled the employer to do that which he had a legal right not to do. But the difference from the reasoning of the Quebec Court appears in Mr. Justice Stuart's admission that people do not have the right to conduct their own business without exposure to the activities of others in carrying out their rights to conduct their business. But the union, according to him, was not conducting its own business in picketing, because it had no business relations with the "promiscuous crowd." The business relations of the trade union in this situation could not be justified, because they were not business relations in the same sense as those involved in *Mogul SS. Co.* v. *McGregor, Gord & Co.*, *Sorrell* v. *Smith* and *Allen* v. *Flood*, The decision of Judge Howay, with whom Mr. Justice Stuart concurred, in *Rex* v. *Reners* (*supra*) was based on somewhat different reasons. Picketing here was unlawful because it produced an effect on those against whom it was directed which, even though not physical, constituted a "menace and practical compulsion."

The decision of the Supreme Court of Canada in *Rex* v. *Reners* seemed to be the most logically developed of all those studied. Here

[12] *Meretsky* v. *Arntfield* (*supra*), *Robinson* v. *Adams* and *Patzalek* v. *Adams* (*supra*).

[13] *International Ladies Garment Workers Union* v. *Rother* (*supra*).

[14] *Rex ex Rel. Barron* v. *Blacksawl* and *Rex ex Rel. Barron* v. *Hangsjaa* (*supra*).

each act of the defendant's was examined by Mr. Justice Newcombe to determine their legality in the light of existing rules of law. Shouts and fires were common law nuisances, there was trespassing and unlawful assembly. The latter violation, however, was stated obscurely and unconvincingly. It was unlawful assembly apparently, because of the large numbers involved, because it was on the company's property, because it was perpetual over a period of time, because it resulted in fires and shouting, and because an unorderly reception of the police issued from it. Of these, the fact that large numbers were involved and the fact that the assembly was maintained constantly, can logically only be considered to define "unlawful" assembly, since the other attributes were considered as separate and self-sufficient violations. Mr. Justice Idington introduced a new test for the legality of "watching and besetting." Watching and besetting are with lawful authority, for example, if done by a sheriff. Idington, J., moreover, went back to the Quebec line of argument by maintaining that it was the intent of the union that the company be compelled to alter its conditions of employment, and was therefore unlawful.

This line was also followed by the British Columbia Court of Appeal[15] when Chief Justice MacDonald, apparently without reservation, declared that it was an actionable wrong to inflict loss to compel plaintiff to do something he had lawful right not to do.

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[15] *Schuberg* v. *Local International Alliance of Theatrical Stage Employees et al. (supra).*