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THE BRITISH COLUMBIA TRADE-UNIONS ACT, 1959*

A. W. R. CARROTHERS†

An Act Relating to Trade-unions, S.B.C., 1959, c. 90.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. This Act may be cited as the Trade-unions Act.
2. In this Act,

"employers' organization" means an organization of employers that has for its objects, or one of its objects, the regulation of relations between employers and employees;

"labour dispute" means a difference or apprehended difference between an employer or a group of employers and one or more of his or their employees or a trade-union as to matters or things affecting or relating to terms or conditions of employment or work done or to be done;

"lockout" includes the closing of a place of employment, a suspension of work, or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another employer to compel his employees, to agree to conditions of employment;

"trade-union" means an international, national, provincial or local organization or association of employees that has for

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†Faculty of Law, University of British Columbia, Vancouver.

its objects, or one of its objects, the regulation of relations between employers and employees.

3. (1) Where there is a strike that is not illegal under the Labour Relations Act or a lockout, a trade-union, members of which are on strike or locked out, and anyone authorized by the trade-union may, at the employer's place of business, operations, or employment, and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to
   (a) enter the employer's place of business, operations, or employment; or
   (b) deal in or handle the products of the employer; or
   (c) do business with the employer.

   (2) Except as provided in subsection (1), no trade-union or other person shall persuade or endeavour to persuade anyone not to
   (a) enter an employer's place of business, operations, or employment; or
   (b) deal in or handle the products of any person; or
   (c) do business with any person.

4. (1) An employers' organization, trade-union, or other person who
   (a) does, authorizes, or concurs in anything prohibited by the Labour Relations Act; or
   (b) fails to do anything required by the Labour Relations Act; or
   (c) does, authorizes, or concurs in anything that is contrary to section 3 of this Act

   is liable in damages to anyone injured thereby.

   (2) The act of any member of an employers' organization or trade-union is presumed, unless the contrary is shown, to be done, authorized, or concurred in by the employers' organization or trade-union.

5. Any act done by two or more members of a trade-union, if done in contemplation or furtherance of a labour dispute, is not actionable unless the act would be wrongful if done without any agreement or combination.

6. (1) Notwithstanding the provisions of this or any other Act, no injunction before trial shall be granted *ex parte* by a Court to enjoin a trade-union or other person in respect of any act relating to a strike or lockout that is not illegal under the Labour Relations Act, except

(a) to safeguard public order; or
(b) to prevent substantial or irreparable injury to property.

(2) An injunction granted *ex parte* under subsection (1) shall not be for a period longer than four clear days.

7. (1) An employers' organization is a legal entity for purposes of prosecuting and being prosecuted for offences against the Labour Relations Act and for purposes of suing and being sued under this Act.

(2) A trade-union is a legal entity for purposes of prosecuting and being prosecuted for offences against the Labour Relations Act and for purposes of suing and being sued under this Act.

8. The Trade-unions Act, being chapter 342 of the Revised Statutes of British Columbia, 1948, is repealed.

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From the point of view of statute interpretation, the British Columbia Trade-unions Act has two outstanding characteristics. First, it cannot be understood except in the perspective of the law as it existed before the statute was passed. Second, in dealing in so short a compass with divers aspects of an area of human relations involving a complex of social, economic and political interests in potential and actual conflict, the Act may be expected to lead to problems of construction and to uncertainties in its application.

The Trade-unions Act deals directly not with the causes of industrial conflict, but only with some of its manifestations. The Act is directed to three subjects: (I) the use of persuasive powers, more generally characterized by the terms "picketing" and "boycotting"[1] (sections 3 and 5); (II) liability in damages (sections 4 and 7); and (III) the *ex parte* injunction (section 6).

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[1] These words are used in this article as convenient descriptive terms. They have no precise meaning in law and, although they have for over a hundred years been used colloquially both within and without the cases, the only place I know the word "picketing" to be used in a statute is in an amendment to the British Columbia Constitution Act, S.B.C., 1959, c. 17, passed in March, 1959, (but not proclaimed) to prevent picketing by provincial government employees; I am not aware of the term "boycotting" being used as a technical term. The word "picketing" appears to have been adapted in England from military usage towards the end of the disturbed decade 1830-1840; the term "boycotting" is said to have been derived from an incident in Ireland in 1880, involving ostracism of one Captain Boycott.

I. *The Economic Sanction of Persuasion, with Particular Reference to Picketing and Boycotting.*

The common law takes a "nominate tort" approach to picketing and boycotting. The cases seek to evaluate the use of the economic sanctions not in terms of the concept of picketing and boycotting, their nature and their significance to the withholding of labour in the course of an industrial dispute, but in terms of whether the conduct constitutes one or more of the recognized torts. Because this approach can differ markedly from the industrial and economic nature of the events, the legal approach may appear in some cases to be a legalistic approach. The tort principles of the common law, many of which were designed for other situations, or which turn on a determination of the slippery element of intent, have not always provided the courts with the tools necessary to the task of resolving those conflicts of legal rights which are cast up in the process of the settlement, through the self-determination of the parties, of the conflicts of economic interest that are inherent in industrial disputes. This failing in the common law of torts is particularly observable in the law of nuisance, of civil conspiracy, and of inducing breach of contract.

The British Columbia Trade-unions Act of 1959 seeks to shift the general character of the law relating to the use of economic sanctions from the nominate tort view to what may be described as a conceptual approach. This shift is noticeable in two respects. First, section 3(1) recognizes that picketing is not the mere communication of information, but is intended to be a persuasive force which can be prejudicial to the party against whom it is directed; and the Act recognizes the lawfulness of such persuasion. Thus the Act speaks, not of "picketing" and "boycotting", terms which have no common law or statutory meaning, but of the right to persuade or endeavour to persuade anyone not to enter an employer's place of business, operations or employment, or to deal in or handle the products of an employer, or to do business with an employer. Second, section 3(1) sets out the situation or circumstance in which a union may picket or urge a boycott, namely, in support of a lawful strike; it specifies who may endeavour to persuade, namely, the trade union involved in the strike and anyone authorized by it; and the statute specifies where the activity may occur, namely, at the employer's place of business, operations, or employment. The nominate tort approach is retained, however, in that the persuasion must not involve "acts that are otherwise unlawful".

Section 3(2) prohibits efforts at persuasion except as provided in section 3(1). This prohibition is the root cause of much of the criticism of the policy of the Act. In order to appreciate the nature of some of the limitations imposed by the prohibition, it is necessary to understand recent trends in the common law of picketing.

The nominate torts applied to picketing may be classified under three headings, relating to the form of picketing, the object of picketing, and the result of picketing. This classification is tendered not as adding anything new to the substantive law, but to present a medium for examining the multitude of nominate torts relating to the use of economic sanctions by unions.[2]

A. *The Form of Picketing.*

Torts relating to the form in which picketing is carried out are preserved by the prohibition in section 3(1) against "acts that are otherwise unlawful". In this respect the section is similar to section 3 of the repealed Trade-unions Act[3] which permitted persuasion of certain courses of conduct "by fair or reasonable argument, without unlawful threats, intimidation or other unlawful acts."

Under this heading of form are collected the torts of assault and battery, intimidation, trespass, defamation and nuisance.

Violence and threats of violence are not as readily discernible in the recent cases as they once were. There seems to have settled upon the act of picketing a sophistication both in its use and in the manner in which it is perceived by others,[4] of which the judicial recognition that " . . . fear is a term relative to the courage and embarrassment of the person who experiences it"[5] is symptomatic. This very sophistication may lead to special difficulties in the evaluation of evidence. One of the points on which the courts in the

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[2] The bulk of the cases considered in this article relate to litigation occurring since the publication of Recent Developments in the Tort Law of Picketing (1957), 35 Can. Bar Rev. 1005. That article in turn attempts to consider the cases decided since the publication of A Study in the Law of Picketing (1955), II U.B.C. Legal Notes 187. The latter article formed the basis for Chapter Three, on the law of picketing, in The Labour Injunction in British Columbia (1956). See also Lewin, 1958 Cases in the Law of Picketing (1959), 1 U.B.C. L. Rev. 73.

[3] R.S.B.C., 1948, c. 342.

[4] For an exception see *Lever Bros. Ltd.* v. *Briggs et al.* (1957), 10 D.L.R. (2d) 758 (Ont. H.C.) in which an injunction was granted to prohibit picketing within two blocks of the plaintiff's premises in order to prevent violence; an application to commit the defendants for contempt for breach of an injunction against using force or interfering with the plaintiff was adjourned *sine die.*

[5] Locke J., diss., in *A. L. Patchett & Sons Ltd.* v. *P.G.E. Ry. Co.* (1959), 17 D.L.R. (2d) 449, at p. 478.

Patchett[6] case differed widely was over the nature of picketing. The International Woodworkers of America called a strike in the northern interior lumber operations in September, 1953. The employees in a number of units for which the union was certified voted against a strike; in some instances the union was not certified at all. But the union picketed operations indiscriminately, the pickets wearing arm bands or placards indicating, falsely in some cases, that the plants were on strike. One such plant was that of the Patchett Company.[7] The presence of pickets deterred employees of the Pacific Great Eastern Railway from giving railway service to the plant, and an action was brought against the railway for breach of a statutory duty. The case went through three courts on this issue, with disagreement throughout. In the view of the trial judge, "the picketing was not of a very serious character".[8] But one member of the British Columbia Court of Appeal considered that the railway employees rightly feared violence;[9] another considered there was intimidation;[10] and in the Supreme Court of Canada Rand J. was outspoken in the same direction:[11]

> There was the threat of violence made to the conductor. It is easy to minimize the effect of this in the apparent light of what happened subsequently: but we know too well how vengeance can be wreaked on individuals by ruffians in a community from which a determined public attitude and adequate protection are absent.

Yet Locke J. said in dissent:[12]

> One would think, to read the evidence, that there had been a general breakdown in the administration of justice in the Cariboo country in October, 1953. Nothing could be further from the truth.

In result, the case turned on the determination of the nature and extent of a statutory duty to provide rail service. But the strong difference of opinion in the evaluation of the act of picketing is not uncharacteristic of recent cases.[13]

Intimidation usually takes the form of threatening physical harm, the threat technically being an assault and the carrying out of the threat a battery.

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[6] *Ibid.*; also (1956), 18 W.W.R. 217 (trial), (1957), 23 W.W.R. 145 (B.C.C.A.).

[7] See also *Pacific Western Planing Mills Ltd.* v. *I.W.A.*, *infra*, footnote 17.

[8] *Ibid.*, (1956), 18 W.W.R. 217, at p. 221.

[9] *Ibid.*, (1957), 23 W.W.R. 145, at p. 162.

[10] *Ibid.*, at p. 185.

[11] *Ibid.*, (1959), 17 D.L.R. (2d) 449, at p. 452.

[12] *Ibid.*, at p. 471.

[13] See also *Acme Construction Co. Ltd.* v. *Merloni et al.*, [1959] CCH Canadian Labour Law Reporter, para. 15, 226 (S.C.N.B.), in which the taking of photographs weighed in the mind of the court in determining that the picketing was intimidatory.

There are two developments in the law of intimidation relating to the form of picketing which bear special consideration. The first is the application of the criminal law of besetting to civil liability; the second is the determination that the prohibition in section 6 of the Labour Relations Act against the use of "coercion or intimidation of any kind" to induce or discourage union membership is not limited to conduct that is coercive or intimidatory at common law.

The criminal law of besetting has found its mark in the technique used by unions in some recent cases of issuing permits allowing persons to enter the picketed premises with the union's consent. The rigidity which the practice introduces into the persuasive nature of picketing was ripe for judicial disapproval. It came in two British Columbia cases and a Quebec case: the *Pacific Coast Terminals* case,[14] *Attorney-General of British Columbia* v. *Ellsay et al.*,[15] and the *Vickers* case.[16] In the first case one local of the Longshoremen's union was certified for the plaintiff warehouse company. The defendant local was certified for members of the British Columbia Shipping Federation, an organization of stevedoring firms. The defendant local lawfully struck the Federation, and picketed the plaintiff's dock where the members of that local worked from time to time. At the outset the plaintiff company acceded to the issuance of permits to its employees to cross the picket line; but later the defendant local stated it would grant permits only for handling "non-controversial" cargo. An injunction against interfering with the plaintiff's business as warehouseman was obtained, and the defendant union appealed the order. Citing with approval the *Pacific Western Planing Mills* case,[17] the British Columbia Court of Appeal found the picketing was conducted by unlawful means:[18]

> When the employees of the plaintiff were in effect permitted to continue their employment with the plaintiff only if they secured a permit from the picketing committee or the union, then the picketing in that respect became unlawful and constituted an unlawful interference with the plaintiff's business and *prima facie* a besetting of the plaintiff's premises, and therefore actionable.

In the *Ellsay* case the British Columbia Government Employees

[14] *International Longshoremen's Union* v. *Pacific Coast Terminals Ltd.* (1960), 21 D.L.R. (2d) 249 (B.C.S.C.).
[15] *A.-G. B.C.* v. *Ellsay et al.* (1959), 19 D.L.R. (2d) 453 (B.C.S.C.).
[16] [1959] CCH Canadian Labour Law Reporter, para. 15, 187.
[17] [1955] 1 D.L.R. 652, reprinted in (1958), 14 D.L.R. (2d) 684 (B.C.S.C.). The union picketed a plant in which a majority of the employees voted against a strike.
[18] *Supra*, footnote 14, at p. 252.

Association went on strike and set up a permit system relating to the performance of "essential" work. There was no evidence of physical obstruction, intimidation or coercion. But it was found that the picketing,[19]

> . . . amounts to a virtual blockade. The only conclusion I can draw from consideration of all the materials presented on this motion is that the overall purpose was nothing less than complete control of the movement of persons and supplies to and from government premises. Such persons included employees being members and non-members of the defendant association and members of the general public having business to transact on government premises. Such actions constitute an unlawful picket and must be enjoined: *Southam* v. *Gouthro*, [1948] 3 D.L.R. 178, at 195.

In the *Vickers* case[20] the defendant union picketed the employer's plant in support of a lawful strike. A pass system was administered in respect of salaried employees, but not for hourly paid employees who were not on strike. Although the court found that the latter employees probably would not have worked in any event, the pass system contributed to the conclusion that the union attempted to impede the hourly paid employees from entering the plant.

A confusing passage in the case is the statement of Hyde J. that the picketing "went considerably beyond the 'watching and besetting' permitted by section 501, paragraph (g) of the old Criminal Code".[21] The Code does not permit watching and besetting; to the contrary, the proviso to section 501 specifies that attending at or near premises to communicate information is not a watching and besetting. The problem may basically be one of terminology, but it is a lingering one.

"Watching and besetting" is an expression borrowed from the criminal law;[22] the term originated in statutory form in the English Conspiracy and Protection of Property Act[23] and remains undefined. Kerwin J. in the *Aristocratic* case[24] stated that "picketing is a form of watching and besetting . . .", and Locke J. in dissent stated that watching is something more than mere attending, and that the legal meaning of besetting "appears to me to be un-

[19] *Supra*, footnote 15, at p. 459.

[20] *Supra*, footnote 16. See also *Griffin Steel Foundries Ltd.* v. *Syndicat des Metallurgistes Inc. et autres*, [1959] S.C. 566 (Que.).

[21] *Supra*, footnote 16, at p. 11,552.

[22] Criminal Code, S.C., 1953-54, c. 51, s. 366.

[23] (1875), 38 & 39 Vict., c. 86.

[24] *Williams et al.* v. *Aristocratic Restaurants (1947) Ltd.*, [1951] 3 D.L.R. 769, at p. 786. The union picketed operations of the plaintiff after it rejected the report of a board of conciliation but before a strike vote was taken.

settled."[25] If the cases do not settle the meaning of the word any further, they at least point out the risks of soiling with a permit system the persuasive and lawful quality of picketing.

The second recent development in the law of picketing is the expression of the view that the prohibition in the Labour Relations Act against the use of "coercion or intimidation of any kind" to induce or discourage union membership is not limited to conduct that is coercive or intimidatory at common law. This proposition is developed by Davey J.A. in the *Therien* case:[26]

> In my opinion, any form of pressure, including economic or perhaps some forms of social pressure, is included in "coercion" and "intimidation" under section 6, even though the conduct be not otherwise wrongful. The difference between what is coercion and intimidation under section 6 and what is not may be stated in general terms by adopting language which Rand J. used in another context in *Williams* v. *Aristocratic Restaurants:* an attempt to merely persuade by the force of rational argument is permitted under section 6; an attempt to compel by any force of pressure, including "argumentation and rancorous badgering or importunity", but possessing no other element of wrongfulness, is forbidden.

This view of section 6 was not commented on by any of the eight other judges who heard the case, none of whom disagreed in the result.[27] But if the view should prevail, the restraint of section 6, although limited to the circumstances of inducing or discouraging union membership, may place a marked limitation on the use of the economic sanction of the picket line.

There has been a revival of the view that a threat to interfere, or an actual interference, with favourable business relationships by unlawful means or "without justification" is actionable. This aspect of "intimidation" or unlawful threat is considered under the heading of *Result of Picketing;* it bears on the effect of the picketing more than on its form, and is closely related to the tort of inducing breach of contract, which is considered under the same heading.

The potency of the law of nuisance has been demonstrated, since *Hammer* v. *Kemmis*,[28] in the *Patchett* case. The pickets along the railway right-of-way were regarded by Rand J. as "trespassers

[25] *Ibid.*, at p. 778.

[26] (1959), 16 D.L.R. (2d) 646, at p. 661. The facts of the case are set out later. See *infra*, text to footnote 114.

[27] Clyne J. found at the trial that the union, by trying to force the plaintiff into the union in violation of s. 4 of the Labour Relations Act, committed an act of coercion and intimidation within the meaning of s. 6 of the Act: see (1958), 13 D.L.R. (2d) 347, at p. 351.

[28] (1956), 3 D.L.R. (2d) 565 (trial), (1957), 7 D.L.R. (2d) 684 (B.C.C.A.). This was a case of organizational picketing.

whose presence was, falsely, a sign of a labour clash, and constituted a virtual nuisance vis-à-vis the employees of the railway"[29] — nuisance unrelated to the use of land by the holder of an interest in it. Again, in the *Evergreen Press* case,[30] Macfarlane J. considered the picketing constituted both a trespass and a nuisance.

The torts of intimidation, trespass and nuisance may be found in what has come to be called mass picketing. This is in many cases a form of coercion, and may result in bodily harm. It may easily involve trespass to the employer's property, as the men in the group may be indifferent to where they set their feet. If the mass picketing involves the blocking of entrances or accesses, as it often does, it involves nuisance. These torts are demonstrated in a number of recent injunction cases in British Columbia.[31] For instance, during the strike in the coast lumber industry in 1959, the union sought to take over fire-watch duties in a number of mills; each case involved allegations of mass picketing and consequent intimidation, nuisance and trespass. Another dispute involved allegations of interference with customers, conduct which was held to be enjoinable in the *Aristocratic* case. In other disputes, access to premises was alleged to have been blocked. In another case, pickets, according to the affidavits, marched through the employer's premises.

Because the new Act prescribes that persuasion be conducted in a manner that does not involve acts which are otherwise unlawful, it would appear that the conduct in the foregoing cases is enjoinable as well after as before the enactment of the Trade-unions Act.

There is, however, one area of the tort law relating to the form of picketing which may be limited by the new Act: the tort of defamation. In a number of cases arising out of the lumber strike of 1959, the International Woodworkers of America caused "hot cargo" signs or stickers to be placed on logs and lumber. It is not clear whether at common law the term "hot cargo" is defamatory. In the *Coastwise Pier* case[32] the union picketed a handler of goods which would normally have been handled by a carrier whose employees were then on strike. The union was thus going further than seeking to boycott goods of the employer whose employees were

[29] *Supra*, footnote 5, at p. 454.

[30] *Evergreen Press Ltd.* v. *Vancouver Typographical Union Local 226 et al.* (1959), 18 D.L.R. (2d) 40, at p. 405 (B.C.S.C.). The union was lawfully on strike, but was motivated by a determined jurisdictional dispute.

[31] Where cases are not cited they are unreported.

[32] *Coastwise Pier Ltd.* v. *Cunningham*, 1655/55 Vancouver Registry (unreported); see The Labour Injunction in British Columbia (1956), p. 254.

on strike: the embargo was a form of secondary boycott. Describing the goods as "hot cargo" was enjoined, but the court permitted picketing of the employer whose employees were on strike. Coady J. said in part:

> . . . to designate this cargo as "hot cargo" is a conclusion or a matter of opinion, not a statement of fact. The term "hot cargo" has a sinister meaning. It implies an element of unfairness and thus to longshoremen particularly, who would handle this cargo, carries an implication that is not justified in the circumstances of this case . . . .

If statements of opinion are enjoinable, "hot cargo" signs are enjoinable. But not every statement of opinion is enjoinable: in the *Smith Brothers Construction Company* case[33] the court refused to enjoin the word "unfair". The term "hot cargo" may have a "sinister meaning", and may carry an implication that is not justified in the circumstances of the *Coastwise Pier* case; but that was an instance of a secondary boycott, and the court may have considered that the picketing was too remote from the legitimate interests of the picketers to justify the conduct. By contrast, in the recent "hot cargo" cases the tags were put, in the majority of cases, on logs owned or manufactured by an employer whose employees were on strike. Further, section 3 of the Trade-unions Act permits a union to persuade or endeavour to persuade anyone not to deal in or handle the products of the employer. At this point the tort of defamation seems to wear a little thin. On the other hand, the physical marking of the logs probably constituted a trespass. It may be within a union's lawful statutory right of persuasion to give goods a bad name; but the methods adopted must not run afoul of other nominate torts.

B. *The Object of Picketing.*

Under this heading are classified the two torts of civil conspiracy, the first involving a wrongful act, the second a wrongful objective. Where two or more persons in concert commit an unlawful act causing damage, they may be liable not only for the unlawful act, but also for the tort of civil conspiracy; where the unlawful act is itself actionable, the action in conspiracy may be useful only as an evidentiary technique; but where the unlawful act is not actionable, the injured party may rely for a remedy on his cause of action in civil conspiracy. Actions on this branch of conspiracy have arisen in a number of recent cases. But they cut across a number of torts, and consideration of them is therefore

[33] *Smith Bros. Construction Co.* v. *Jones et al.*, [1955] O.R. 362, at p. 371 (Ont. H.C.). This was a case of recognition picketing.

deferred to the part of this article discussing a number of typical circumstances of picketing, the common law relating thereto, and the impact of the Trade-unions Act thereon.

The second branch of civil conspiracy is the doctrine that "a combination of two or more persons wilfully to injure a man in his trade is unlawful, and if it results in damage to him, is actionable."[34] The doctrine has been repealed in section 5 of the Trade-unions Act. The repeal accords with legislation in the United Kingdom[35] and in a number of Canadian provinces.[36] The section relieves unions of a common-law doctrine on which many injunctions in the past have been based.[37] The section protects a union only where there is a labour dispute, but this term is defined so widely in section 2 as to cover almost anything a union would be interested in. However, the impact of the repeal may be narrowed by the general prohibition in section 3(2).

Conspiracy to injure was pleaded in a recent English case[38] in which the court concluded that, although there was a combination and resulting damage to the plaintiff, there was no unlawful purpose because the defendants were pursuing their "legitimate interests". The significant part of the judgment in the Court of Appeal was to the effect that it was not necessary that the defendants should have been pursuing a material advantage or seeking to protect a material interest; the opposition of the Musicians' Union to the colour bar imposed by the employer on patrons could therefore be acted on by the refusal of the union members to perform.

The doctrine was also applied in the Ontario case of *Dewar et al.* v. *Dwan et al.*,[39] although there seems to have been a brief confusion in the judgment between the tort of conspiracy to injure and the tort of inducing breach of contract. The case is considered presently.

C. *Result of Picketing.*

Under this heading are considered the tort of inducing breach

[34] *Sorrell* v. *Smith*, [1925] A.C. 700.

[35] Trade Disputes Act, (1906), 6 Edw. 7, c. 47, s. 1.

[36] Ontario Rights of Labour Act, R.S.O., 1950, c. 341, s. 3(1); Saskatchewan Trade Union Act, R.S.S., 1953, c. 259, s. 22; Newfoundland Trade Union Act, R.S.N., 1952, c. 262, s. 4. The only difference in the British Columbia Act appears to be that the combination is actionable if what is done is *wrongful*, not *actionable*, as the other statutes read.

[37] There is no Canadian interpretation of these sections: see *Dewar et al.* v. *Dwan et al.* (1957), 11 D.L.R. (2d) 130, at p. 140 (Ont. H.C.).

[38] *Scala Ballroom (Wolverhampton), Ltd.* v. *Ratcliffe et al.*, [1958] 3 All E.R. 220; see note in 22 Mod. L.R. 69. The proprietors of the ballroom had a policy of not admitting coloured persons. The union as a consequence would not permit its members to perform in the hall. An injunction against persuading musicians not to perform was refused.

[39] *Supra*, footnote 37. For the facts, see, *infra*, text to footnote 51.

of contract, the tort of interfering without justification with the right to earn a living or with favourable trade relationships, and the tort of inducing a result which offends the Labour Relations Act.

The tort of inducing breach of contract owes its modern exposition to the case of *D. C. Thomson Ltd.* v. *Deakin et al.*[40] In the language of labour relations, the tort may be committed where picketing causes a breach of contract by inducing employees to break contracts of employment and to picket illegally. But before the tort can be attributed to the pickets, it must be shown (1) that there was a breach of contract, (2) that damage was intended, (3) that damage resulted, (4) that the pickets had knowledge of the contract, (5) that the pickets not merely sought support which could lawfully be given but induced the employees to do an unlawful act such as breaking their contracts of employment or unlawfully striking, and (6) that the breach of contract was a necessary consequence of the inducement.

The tort has found application in a number of recent cases. However, the tort of conspiracy to injure, of interfering without justification with a person's "rights" and of inducing breach of contract seem to run in a pack, and it is not always easy or useful to separate them.

For instance, in the Quebec *Verdun Printing* case,[41] arising under the civil law of that province, a striking union (the legality of the strike was not determined) sought to persuade persons having business with the employer either not to furnish material to the employer or to stop giving their business to the employer. This conduct was held to be an interference which is not granted by the right to strike. This case was followed in *Sauvé Frères* v. *Amalgamated Clothing Workers of America et al.*,[42] in which an injunction was granted until trial against picketing (peaceful in form) a retailer of clothing manufactured by an employer against whom the defendant union was on strike. Again, in the *Canadian Overseas Shipping* case[43] the defendant sailing masters sought to oblige the ship owners to carry masters, or pay for them, on vessels between ports where the owners considered masters were not required. The method of persuasion was to picket at certain docks.

[40] [1952] Ch. 646, at p. 666, [1952] 2 All E.R. 361 (C.A.).

[41] *Verdun Printing and Publishing Inc.* v. *L'union Internationale des Clicheurs et Electrotypeurs de Montreal, Local 33, et autres*, [1957] S.C. 204 (Que.); Comment, Beaulieu, (1958), 18 R. du B. 161.

[42] [1959] CCH Canadian Labour Law Reporter, para. 15,243.

[43] *Canadian Overseas Shipping (1956) Ltd.* v. *Kake et al.* (1958), 15 D.L.R. (2d) 133 (Ont. H.C.).

On a motion for an interlocutory injunction against picketing, McRuer C.J.H.C. concluded that:[44]

> It is a tortious act to deprive anyone of his legal contractual rights with another person . . . the defendants should be restrained by a proper injunction from posting pickets on or in the vicinity of the dock so as in any way to interfere with the pilots performing their full duty under the provisions of the Canada Shipping Act and the common law as well.

In the *Pacific Coast Terminals*[45] case the courts recognized the conflicting interests of the union members and the employer warehouseman, but concluded that the conduct of the defendants constituted an interference with contracts of employment.

Similarly, in the Irish case of *British and Irish Steampacket Company Ltd.* v. *Branigan et al.*[46] the court found that the conduct of the union in ordering the crew not to work the vessel (the dispute was over the hiring of an allegedly unqualified person) was a violation of a legal right as enunciated in *Quinn* v. *Leathem*.[47] The added significance of this case is that the *quantum* of damages was not affected by the fact that the crew could have terminated their employment lawfully by giving notice, for the reason that it was the unlawful act that was the cause of action.

Other cases in which the tort of inducing breach of contract featured are the *Dewar* case,[48] the *Wilson Court* case,[49] and the *Fuller Construction* case.[50]

In the *Dewar* case the members of one union refused to work alongside members of a rival union, with the result that the plaintiff rivals were laid off. In denying a remedy to the plaintiffs McRuer C.J.H.C. stated that:[51]

> There was no evidence to bring home to the defendants a knowledge that the unemployment of the plaintiffs would be a necessary result, much less an intended result, of the threat to bring about the unlawful strike.

Apart from the threat to bring about a strike that would have been contrary to the Ontario Act, the defendants would seem to have been conducting themselves in a manner almost identical with that allowed in *Allen* v. *Flood*[52] and *Hay* v. *O.B.M.I.U.*[53] In

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[44] *Ibid.*, at p. 137.
[45] *Supra*, footnote 14.
[46] [1958] I.R. 128.
[47] [1901] A.C. 495.
[48] *Supra*, footnote 37.
[49] *Wilson Court Apartments Ltd.* v. *Genovese et al.* (1958), 14 D.L.R. (2d) 758 (Ont. H.C.).
[50] *Thomas Fuller Construction Co. Ltd.* v. *Rochon* (1957), 10 D.L.R. (2d) 670 (Ont. H.C.).
[51] *Supra*, footnote 37, at p. 139.
[52] [1898] A.C. 1.
[53] (1928), 63 D.L.R. 418 (Ont. A.D.).

contrast, the defendants' conduct would appear to be actionable under section 4 of the British Columbia Trade-unions Act.

In the *Wilson Court* case a union threatened to picket an apartment construction project on which were employed non-union men. The union had a collective agreement with the employers covering other kinds of construction. McRuer C.J.H.C., in continuing an injunction against picketing, approved[54] the statement in the headnote of the *Smith Brothers* case[55] that:

> If the pickets are placed at work on which a construction company is engaged, with the intended result that employees both of the company and of its subcontractors refuse to work because they are unwilling to cross the picket line, the action of the union officers responsible for placing the pickets constitute an unjustified interference with the contractual rights of the company, both with its employees and with the subcontractors, even if there is no violence, disturbance or persuasion of any kind by the pickets, other than the mere fact of their presence with signs.

In the *Fuller* case picketing was enjoined because the affidavits revealed that the picketing was advocating breach of contract, and leave to appeal was refused on the ground that the issue whether there can be a one-man strike[56] was not sufficiently significant.

The leading case in recent years relating to the illegality of picketing based on the result which it produces is the *Therien* case.[57]

The general proposition is stated by Clyne J. at the trial:[58]

> It appears to me that the conclusion to be drawn from *Quinn* v. *Leathem*[59] is that if a man's right to earn his living is interfered with by a wrongful act, he has an action against the wrongdoer at common law.

The wrongful acts perceived in the three courts that heard the case were: a repudiation of the arbitration clause in the collective agreement; a consequent violation of sections 20 and 21 of the Labour Relations Act which bind the parties to the collective agreement and oblige them to carry out its terms; violation of section 6 of the Labour Relations Act which prohibits coercion;

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[54] *Supra*, footnote 49, at p. 762. [55] *Supra*, footnote 33.

[56] See *Swansea* v. *Royal Trust* (1956), 2 D.L.R. (2d) 336 (Ont. H.C.), rev. (1956), 5 D.L.R. (2d) 687 (Ont. C.A.).

[57] (1957), 6 D.L.R. (2d) 746 (interlocutory motion), (1958), 13 D.L.R. (2d) 347 (trial), (1959), 16 D.L.R. (2d) 646 (B.C.C.A.), (1960), 22 D.L.R. (2d) 1 (S.C. Can.). This case is considered later and at length in the part dealing with the legal status of unions and the question of liability in damages.

[58] *Ibid.*, (1958), 13 D.L.R. (2d) 347, at p. 354. This view is reflected in the judgment of Locke J., (1960), 22 D.L.R. (2d) 1, at p. 13.

[59] *Supra*, footnote 47.

violation of section 5(2) which prohibits the restriction or limitation of production or services; violation of section 4 of the Act which prohibits employer participation in union affairs; and violation of section 46(2) which prohibits strikes except on compliance with the requirements of the Act. The importance of the case at this point lies in the fact that it declared picketing to be actionable by a person injured thereby even though the form of the picketing was lawful, even though conspiracy was not pleaded, and even though there was, strictly, no breach of a contract to which the injured person was party. The wrongful act consisted *inter alia* in a breach of the Labour Relations Act; it interfered with the plaintiff's "right to earn a living", and it was actionable. It should be borne in mind that this conclusion was reached on the law as it existed prior to the enactment of the British Columbia Trade-unions Act of 1959.

D. *Circumstances of Picketing.*

The impact of recent developments in the common and civil law of the right to picket and the significance of the Trade-unions Act may be observed by examining typical circumstances in which unions seek to exercise the freedom to picket.

(i) *Picketing in support of a lawful strike.* This is the most obvious circumstance of picketing, and was lawful prior to the enactment of the Trade-unions Act. In particular, the British Columbia Court of Appeal in the *Becker* case[60] concluded that a union that was locked out could picket a construction project even after the sub-contractor who had caused the lockout had terminated his contract with the master plumber:[61]

> The union's right to picket . . . cannot be defeated by any such procedure.

The decision was followed in a similar case after the new Act was passed. In the *Commonwealth* case[62] the Ironworkers' Union struck a construction project and picketed the premises, thereby causing a shutdown. In a short judgment, the Court of Appeal followed its decision in the *Becker* case, thereby carrying into the new Act the right to picket stated in the earlier case. The significance of this decision lies not in the fact that it allows picketing in support of a lawful strike, which the Trade-unions Act expressly permits,

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[60] *Becker Construction Ltd.* v. *Plumbers' Union* (1958), 26 W.W.R. 45 (trial), rev. (1958), 26 W.W.R. 231 (B.C.C.A.).

[61] *Ibid.*, (1958), 26 W.W.R. 231, at p. 235.

[62] *Commonwealth Construction Co. Ltd.* v. *Ironworkers' Union* (1960), 30 W.W.R. 624 (B.C.C.A.).

but that it allows the union to picket the whole construction project, resulting in a refusal to work by other trades, and that this picketing was by implication considered by the court to be authorized by the new Act.

In the *Evergreen Press* case,[63] which arose just prior to the passage of the new Act, an interlocutory injunction was dissolved for the reason that, although the injunction was justified when granted, it would now prejudice the defendant's right to strike.

(ii) *Picketing prior to the taking of a strike vote.* Picketing in these circumstances was held to be lawful under the *Aristocratic* decision and was extended slightly in *Todd* v. *Thomson,*[64] but is not permitted under the new Act.

(iii) *Picketing in support of an unlawful strike.* The authorities on this point are divided,[65] and the view that such picketing is necessarily unlawful was not accepted by Ruttan J. in the *Ellsay* case.[66] But in two recent New Brunswick cases, *Gagnon et al.* v. *Foundation Maritime Ltd.*[67] and *Acme Construction Co. Ltd.* v. *Merloni et al.*,[68] the view was taken that picketing in support of an unlawful strike was *ipso facto* unlawful. In the latter case Ritchie J. remarked:[69]

> The picketing cannot be divorced from the strike. In my view any form of picketing in furtherance of an unlawful strike is itself unlawful.

In any event, the new Act prohibits such picketing.

(iv) *Picketing against a person who is not party to the labour dispute: secondary picketing.* The object of this kind of picketing is to impose an embargo or boycott on the product of the employer whose employees are on strike. There is remarkably little case law dealing with the boycott as distinct from the actual conduct of picketing. However, the courts have tended, particularly where the picketing and boycotting are not in an area where the public is usually present, to find that the conduct constituted a conspiracy to injure or to cause an unlawful strike, or constituted inducing or conspiring to induce breach of contract. The *Patchett* case[70] is the clearest

[63] *Supra*, footnote 30.

[64] [1957] CCH Canadian Labour Law Reporter, para. 15,125. A strike vote was called under the Labour Relations Act but none of the three public house employees affected voted. The union then picketed the plaintiff's hotel.

[65] See The Labour Injunction in British Columbia (1956), pp. 48-61.

[66] *Supra*, footnote 14, at p. 456.

[67] [1959] CCH Canadian Labour Law Reporter, para. 15,213. The New Brunswick Court of Appeal refused to interfere with a blanket injunction against picketing, unlawful in form, in support of an unlawful strike.

[68] *Ibid.*, at para. 15,226.

[69] *Ibid.*, at p. 11,673.

[70] *Supra*, footnote 5 and 6.

recent condemnation of secondary picketing. One matter on which no division of opinion was registered in that case was on the legality of the picketing. The trial judge observed that:[71]

> Patchett's wasn't a union plant. They had no business in the world to picket it.

The Court of Appeal followed with like views. Coady J.A. observed:[72]

> As the respondent's employees were not members of the International Woodworkers of America and were not on strike the picketing would appear to have been illegal.

Sheppard J.A. expressed a similar opinion:[73]

> The picketing was illegal both as to purpose and method. There was no trade dispute with the plaintiff; the plaintiff's plant was not in the union.

In the Supreme Court of Canada Rand J. was equally blunt:[74]

> There was, in fact, no labour dispute between the I.W.A. and the appellant and the picketing was illegal.

and demonstrated in the following passage that his view was not *obiter*:[75]

> Had the picketing under the law of the province been legal, a different situation would have been presented . . . .

Other recent cases in which secondary picketing has been enjoined are the *Verdun* case,[76] the *Sauvé Frères* case[77] and the *Pacific Coast Terminals* case.[78]

Again, picketing in this circumstance is unlawful under the new Act.

(v) *Sympathetic picketing*. Picketing by agents of the employees who are on strike, against the employer party to the strike, was not enjoinable prior to the new Act. But picketing by persons who are not party to the strike, against an employer who is not party to the strike (secondary sympathetic picketing) has been held by the courts to be a conspiracy to injure and to cause an unlawful strike, and to constitute inducing and conspiring to induce breach of contract. However, this kind of picketing is comparatively rare.

Under the new Act, where the picketing is directed against the employer against whom there is a strike, the picketing is lawful if the sympathetic picketers can be classified as agents of the union

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[71] *Supra*, footnote 5, at p. 464.
[72] *Supra*, footnote 6, (1957), 23 W.W.R. 145, at p. 158.
[73] *Ibid.*, at p. 165.
[74] *Supra*, footnote 5, at p. 453.
[75] *Ibid.*, at p. 454.
[76] *Supra*, footnote 41.
[77] *Supra*, footnote 42.
[78] *Supra*, footnote 14.

on strike. Unauthorized sympathetic picketing, or sympathetic picketing against an employer whose employees are not on strike, are still unlawful.

(vi) *Token picketing.* By this term is meant picketing in circumstances in which everyone who sees the picketing already has the information, as a result of which it must be concluded that the object of the picketing is not merely to communicate information but is to persuade. Some cases in the past have said, unrealistically, that picketing for a purpose other than communicating information is a conspiracy to injure, thereby inciting unions into the deliberate fiction that a picket line is not a picket line if it is called an information line.[79] The element of persuasion, and the legality thereof, is clearly recognized by the new Act.

(vii) *Recognition picketing.* Courts have tended to regard picketing to induce an employer to bargain with the union as a nuisance, a conspiracy to injure, or as inducing breach of contract.[80] Recognition picketing has taken many forms in recent years. In the *Wilson Court* case[81] a union sought to have non-union men removed from the job. The court approved the earlier decision in the *Smith Brothers* case, basing the conclusion largely on the tort of inducing breach of contract. In the *Patchett* case the picketing of a non-union plant in the course of a strike was regarded by Rand J.[82] as:

> . . . an illegal *de facto* interference with [the employer's] rights in carrying on its business.

In the *Har-a-Mac* case[83] the union picketed the employer after it tried to organize the employees, and failed.[84] The court again quoted with approval the decision in the *Smith Brothers* case, indicating that it was influenced by the fact that there was a lawful way for the union's achieving its objective under the Ontario Labour Relations Act:[85]

> . . . if the development of the trade union movement has reached the point where workers will not cross a picket line to go to work, that is

[79] *Cf.* the *Acme Construction* case, *supra*, footnote 68, at p. 11,670: "The picketing was in no way an exercise of free speech or free expression. Its primary purpose was not to obtain or communicate information to anyone."

[80] See Recent Developments in the Tort Law of Picketing, *supra*, footnote 2; and see esp. *Hammer* v. *Kemmis*, *supra*, footnote 28.

[81] *Supra*, footnote 49.

[82] *Supra*, footnote 5, at p. 453.

[83] *Har-a-Mac Construction Co. Ltd.* v. *Harkness*, [1958] O.W.N. 366 (Ont. H.C.).

[84] *Cf. Bennett & White Ltd.* v. *Van Reeder et al.* (1957), 6 D.L.R. (2d) 326 (Alta. A.D.).

[85] *Supra*, footnote 83, at p. 367.

> just as effective an interference with contractual relations as any other form of restraint might be.

Much the same view was taken in two recent New Brunswick cases, in which the picketing was supporting an illegal strike called after the employers refused to bargain with an uncertified union.[86] In the *Acme Construction* case[87] the court found that the purpose of the picketing was to circumvent the Labour Relations Act and to induce breaches of contracts. At one point the court said:[88]

> Trade union officers, organizers or members, on the pretext of advancing the interests of trade union members cannot lawfully, by picketing or by other means, bring external pressure to bear on the employees of the employer or on persons doing business with him for the purpose of so injuring his business that he will be compelled either to abandon his rights under the Labour Relations Act, waive certification, recognize the union and negotiate a collective agreement or . . . be driven out of business. Those who embark on such an undertaking engage in an unlawful combination.

Similarly, in the *Canadian Overseas Shipping* case, the decision turned on interference with contractual rights as well as statutory obligations.[89] And in the jurisdictional dispute in the *Evergreen Press* case, the view was expressed that if the object of the strike was to win jurisdiction over the job, the strike and presumably the picketing would be unlawful.[90]

There appears, therefore, to be a trend in the cases to the effect that, inasmuch as there is available to the union a method of gaining bargaining rights under the collective bargaining legislation, picketing to shortcut the machinery runs the risk of being found unlawful. The new Trade-unions Act clearly makes such picketing unlawful.

(viii) *Grievance picketing.* Picketing to settle a grievance is unlawful, for the reason that the Labour Relations Act requires grievances to go to arbitration. This point has been brought out in the *Dewar*, *Wilson Court*, and *Therien* cases, and the law is not changed by the new Act.

E. *Special Problems in the Interpretation of Section 3.*

Although the language of section 3 makes grammatical sense (this is more than could be said for the Act which it repeals), there are a number of problems connected with interpreting the provisions, some of which have already received judicial attention.

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[86] *Supra*, footnotes 67 and 68.
[87] *Supra*, footnote 68.
[88] *Ibid.*, at p. 11,672.
[89] See *supra*, text to footnote 44.
[90] There was, however, an injunction outstanding, limiting the demands of the union.

Section 3(1) refers to a strike "that is not illegal under the Labour Relations Act". The latter Act does not expressly make strikes lawful, but merely postpones until after a period of conciliation the common law "right" to strike, whatever that may be. It would therefore be accurate, strictly, to speak not of a strike that is legal under the Labour Relations Act, but of one that is not illegal under the Act.

Section 3(1) speaks of "a trade union, members of which are on strike or locked out, and anyone authorized by the trade union". This gives the right to picket only to the union that is directly concerned in the strike or lockout, and to anyone whom the union may authorize for that purpose.

The copula in the legislative sentence is "may". The word is permissive, and grants a statutory power (or right) to the subject of the sentence, namely, the trade union and anyone authorized by it. The sentence gives a right or power which did not exist without qualification before the passage of the Act. The language of a number of injunctions granted since the Act was passed reflects this statutory right. In each case the injunction sets out the right of the union to picket peacefully, and in some cases the injunction specifies the number of persons which the union may station at the entrances of the employer's property.

Section 3(1) speaks of "the employer's place of business, operations, or employment". This expression appears to permit picketing at places other than the place where the employees were engaged in employment prior to their going on strike. The place of business could include the employer's head office; the place of operations embraces the place where the employees were working and might well include other operations of the employer; the place of employment could include the employer's employment office. They are all part of the employer's enterprise. But a number of cases arising since the passage of the Act illustrate difficulties in interpreting this phrase. In one case the union was picketing a subcontractor. The subcontractor terminated his relationship with the general contractor, and an undertaking was given not to complete the work formerly being done by the subcontractor. On this basis an injunction was granted. It is submitted that the injunction ought not to have been granted on these facts.[91] In another case the union picketed the only access road to the plant of the employer against whom it was on strike. It was also the only access

[91] This is similar to what happened in the *Becker* case; the British Columbia Court of Appeal held the picketing to be lawful: *supra*, footnote 60.

road to the property of another employer, and the picketing was enjoined. However, the union could have picketed in the vicinity of the plant of the employer against whom it was on strike without picketing the access road. In a third case the union tagged logs which were headed to the company's pulp mill. In light of the fact that the mill belonged to the employer against whom the union was on strike, it is submitted that picketing which was not unlawful in form (in this case there was trespass) would not have been enjoinable. The mill, although organized by another union, was nonetheless part of the employer's business and operations. In a fourth case there was picketing in a like manner, but the mill at which the union was seeking to induce a boycott of the logs was not owned by the employer against whom the union was striking. Here the union could not claim the booming grounds and mill of the second employer were within the first employer's place of business, operations or employment.[92] As stated by Ruttan J. in the *Blue Star Line* case:[93]

> . . . the Act clearly distinguishes between picketing an employer with whom you are at work, and an employer with whom you are not involved . . . .

The next phrase which has presented some difficulty reads "without acts that are otherwise unlawful". It is submitted that this expression should be read as referring to nominate torts in the form of picketing. *Prima facie*, the word "acts" refers to conduct, not to the mental processes of the persons concerned. On this interpretation, the word would not refer to the torts of conspiracy to injure and inducing breach of contract, as both these torts involve a determination of the state of mind of the alleged tortfeasors. Interpreting the phrase to eliminate the tort of civil conspiracy is justified because of the language of section 5 which in effect repeals the doctrine. However, if a strict interpretation of the word "acts" is not adhered to, the question remains whether the phrase keeps alive the tort of inducing breach of contract. When the legislative sentence is read as a whole, it would appear that if a union cannot pursue its statutory right to persuade or endeavour to persuade anyone not to do the three things set out

[92] This is not the first, nor, presumably, the last instance of the utility of the corporate veil: see *Producers Sand and Gravel Company (1929) Ltd.* v. *C.B.R.E.* (unreported; see The Labour Injunction in British Columbia (1956), p. 242).

[93] (1959), 29 W.W.R. 337, at p. 343 (B.C.S.C.). The I.W.A. was on strike against a lumber mill situated on the Government Assembly wharf at Nanaimo, B.C. It placed pickets on the bridgehead which provided the only access to the wharf. Longshoremen refused to cross the bridge to handle cargo for the plaintiff's vessel.

in clauses (a), (b) and (c) of section 3(1) without committing the tort of inducing breach of contract, the statute protects the union from liability. This would apply equally to nuisance. However, if the union could pursue the statutory right granted by section 3(1) in a manner which would not constitute a common law tort, it is submitted that a court would be justified in enjoining the picketing, provided the injunction allowed the union to exercise its statutory right (and without making a sham of that right) in some other way. This is precisely what happened in the *Blue Star Line* case. The significant passage from the judgment reads:[94]

> . . . it would not injure the members of the I.W.A. [I interpret this to mean that it would not deprive them of their statutory right] if they placed their picket line in a different manner, they would still be exercising the same right as given to them under the Act. . . .

This interpretation of section 3(1) becomes even more imperative when one examines the prohibition of section 3(2), a consideration which weighed heavily in the judgment. The injunction in that case spelled out in some detail the right of the union to picket the plant of the employer against whom the union was on strike. In further support of this interpretation of section 3(1), if the picketing of the plant in the manner prescribed in the injunction were to result in a breach of contract, as it could easily do, it would seem to follow that the union would still be protected from liability by section 3(1) of the new Trade-unions Act. This is a protection which a union could not claim with any assurance at common law or even under the obscure provisions of the old Trade-unions Act.

In an unreported case, the section appears to have been interpreted to mean that if any unlawful acts occur, the union cannot claim the protection of section 3(1) and the picketing may be enjoined *in toto* under the proscription of section 3(2).[95] This is quite a different approach to the basis on which a blanket injunction may be granted from that set out by Wilson J. in *Mostrenko* v. *Groves*,[96] and does not accord with the reasoning in the *Blue Star Line* case; the latter, it is submitted, is the better view.

In summary, it is submitted that the latter part of section 3(1)

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[94] *Ibid.*, at p. 342. There appears to be a misprint in the twenty fourth line on page 342 of the report; the quotation is taken from the transcript on file in the Supreme Court registry.

[95] *MacMillan and Bloedel (Alberni) Ltd.* v. *Allen et al.*, 1408/59 Vancouver Registry.

[96] [1953] 3 D.L.R. 400 (B.C.S.C.). This was a case of recognition picketing. It does not appear to have influenced subsequent recognition picketing cases.

should be interpreted as follows: if pursuit of the right to persuade necessarily involves conduct that is tortious at common law, section 3(1) relieves the union of liability; if, on the other hand, the objective can be sought in a manner that is not tortious, the tortious method is subject to injunction.

One of the principal criticisms of the Act, and one which has not been alluded to in the preceding considerations of the changes in the law effected by the Act respecting the economic sanction of persuasion, is the extensiveness of the prohibition of section 3(2). The restraints most frequently referred to are in the use of the "unfair list", and in the use of the "information line" to inform those who see the pickets that an employer is operating without a collective agreement, and, presumably, with sub-standard terms of employment. The prohibition may embrace other limitations as well, and involves issues of freedom of speech and freedom of association. Inasmuch as these criticisms embrace a consideration of the nature of liability imposed by the Act as a whole, they are discussed in a separate and concluding part of this article.

II. *Liability in Damages.*

Section 4(1) establishes that breaches of the Labour Relations Act and section 3 of the Trade-unions Act give rise to an action in damages. Combined with this, section 7 declares unions (and employers' organizations) to be legal entities for such suits and for prosecutions under the Labour Relations Act. These propositions do little more than confirm the trend of the case law.

It is suggested that there are four degrees in which a union may be declared liable to legal proceedings in its own name: (1) for being prosecuted for breach of the Labour Relations Act; (2) for being sued in damages for breach of the Labour Relations Act in an action arising by implication of that Act; (3) for being sued for a civil wrong at common law, the unlawful ingredient of which is breach of a statute such as the Labour Relations Act; and (4) for being sued generally in contract and tort. The cases have moved steadily toward imposing the fourth degree of liability.

The first step in the progression of litigation started sixty years ago in another country. In the famous *Taff Vale* case[97] Farwell J. determined, in September, 1900, that the defendant union was suable in its own name for the torts of its members. The judgments in the House of Lords confirming this view contained two rationales for the conclusion: that Parliament, in enacting the Trade Union

[97] *Taff Vale Ry. Co.* v. *A.S.R.S.*, [1901] A.C. 426.

Act of 1871 (amended in 1876), clothed registered unions with corporate personality and rendered them liable generally in contract and tort; and that the naming of the union was a specialized form of representative action.[98] But in either event the result was the same: the union could be named as defendant in tort and contract actions, and its funds were liable to satisfy the judgments. This conclusion was based not only on the Act of 1871 but also on registration under that Act. In the same year as the House of Lords decided the *Taff Vale* case, an employer in British Columbia obtained an injunction against the Rossland Miners' Union of the Western Federation of Miners. The injunction ran against the union in its own name, and the substance of the injunction was in precisely the terms of the *Taff Vale* injunction. There was no statutory basis in British Columbia for naming the union as defendant. The courts persisted in the error of treating the union as an entity by ordering it to make discovery. (Judgment eventually was given against the union for $12,500 damages). At that point the member of the Legislative Assembly for Rossland introduced in the 1901 session of the legislature a bill which would have negatived corporate responsibility. The bill was defeated. But another member introduced a bill, borrowed from the British House of Commons, which would have relieved unions from proceedings at law or in equity. Either in committee or in committee of the whole House, the wording of the bill was changed to relieve unions from liability in damages and to impose liability for wrongful acts authorized or concurred in by a union; the legislators also tacked onto this bill two clauses from the bill which previously had been defeated.

I am satisfied from an examination of the legislative history of the Trade-unions Act of 1902[99] that the object of the Act was to relieve unions from liability, not to impose liability. The legislators acted on the assumption that the courts in the *Rossland Miners'* case were correct in their law. In seeking to limit the scope of liability as enunciated in that case, the legislators passed a statute which refers to unions as such; and the Act, in relieving unions of certain liabilities, bears the not illogical implication that unions are otherwise liable in tort as entities separate from the membership. This inference was made, *obiter*, by the British Col-

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[98] See also *Bonsor* v. *Musicians' Union*, [1955] 3 All E.R. 518, [1956] A.C. 104; this case does not, unfortunately, resolve the issue.

[99] See The Labour Injunction in British Columbia (1956), Appendix B, pp. 219-227.

umbia Court of Appeal in the *Hollywood Theatres* case[100] and was concurred in by Wilson J., again *obiter*, in *Walker* v. *Billingsley*.[101] The view remained *obiter* until the *Therien* case, in which the judgment of the Supeme Court of Canada was delivered ten months after the Act of 1902 was repealed. At one point in the *Therien* case Cartwright J. stated:[102]

> . . . it would be surprising if a section should be passed to provide that a trade union should not be liable in damages for a wrongful act in connection with certain matters unless certain conditions existed if it were not the view of the legislature, as the appellant contends, that a trade union cannot be sued in tort under any circumstances.

And Locke J. stated:[103]

> . . . the British Columbia [Trade-unions] Act . . . recognized the fact that a trade union was an entity which might be enjoined and become liable in damages for tort.

But the British Columbia legislature appears to have assumed that the British Columbia courts had correctly informed themselves of the law; the legislators sought to superimpose a statute on a misapprehension of the law of union liability. Subsequent courts have drawn from the plain language of the Act a conclusion which, it is submitted, does not fairly represent the intent of the legislature. The result appears to be a macabre illustration of the proposition that *communis error facit jus*.

In 1947 the British Columbia legislature enacted the Industrial Conciliation and Arbitration Act, the province's postwar collective bargaining code. That year the British Columbia Court of Appeal declared unions to be legal entities for purposes of being prosecuted for breach of the Act,[104] and although in some provinces the relevant section of the labour code by implication does not acknowledge that unions are legal entities for initiating prosecutions,[105] the implication is not present in the British Columbia Labour Relations Act.[106] On the civil side, Wilson J. in *Southam Company Limited* v. *Gouthro et al.*[107] was of the view that breach of P.C.

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[100] *Hollywood Theatres Ltd.* v. *Tenney*, [1940] 1 D.L.R. 452 (B.C.C.A.). This was a case of grievance picketing.

[101] [1952] 4 D.L.R. 490 (B.C.S.C.).

[102] *Supra*, footnote 57 at pp. 14-15.

[103] *Ibid.*, at p. 9.

[104] *Re Patterson and Nanaimo Dry Cleaning and Laundry Workers' Union, Local No. 1*, [1947] 4 D.L.R. 159.

[105] *Cf. Re Walterson and Laundry and Dry Cleaning Workers' Union* (1954), 11 W.W.R. (N.S.) 645, 14 W.W.R. (N.S.) 541 (Manitoba); *R.* v. *N.B. Labour Relations Board, re Steeves* (1954), 42 M.P.R. 130 (N.B.).

[106] S.B.C., 1954, c. 17, replacing the Industrial Conciliation and Arbitration Act.

[107] [1948] 3 D.L.R. 178. This was a case of a sympathetic strike, picketing, and violence.

1003[108] did not give rise to a civil cause of action. Macfarlane J. in *Vancouver Machinery Depot Limited* v. *United Steelworkers of America*[109] was of the opposite opinion respecting the Industrial Conciliation and Arbitration Act, and the British Columbia Court of Appeal stated that the international union in that case was a juridical person for the purpose of implementing the Act,[110]

> . . . and for causes of action that may possibly be founded directly upon its provisions or a breach thereof.

The view was expressed that the union was a legal entity whether certified or not, thereby carrying the implication of the Act a step further than was done in the *Taff Vale* case; the latter case applied the concept of corporate personality only to unions registered under the Act of 1871. The British Columbia Court of Appeal, however, made it abundantly clear that it was not deciding the general question of the status of unions "to be sued in contract or tort".[111]

These tentative steps were given effect to in a series of subsequent cases. Farris C.J.S.C. in *Machinists, Fitters and Helpers' Union Local No. 3* v. *Victoria Machinery Depot Company Limited et al.*[112] regarded unions as legal entities for actions involving the enforcement of the collective agreement. Then in *G. H. Wheaton Limited* v. *United Brotherhood of Carpenters and Joiners*[113] Clyne J. held two locals of the Carpenters' Union liable in damages, one for breach of the collective agreement and the other for inducing breach of the collective agreement.

That is where the matter stood at the time the cause of action in the *Therien* case arose in 1956.

The Teamsters' Union signed a collective agreement with City Construction Company in 1955. The company agreed to employ truck drivers who were members of Local 213. City Construction entered into a form of subcontract with the plaintiff for the supply of trucks. The plaintiff had a fleet of five vehicles on the project, four driven by his employees and one by himself. Union officials told the plaintiff that he must put union drivers on the trucks and

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[108] (1944), 44 Labour Gazette 136—the wartime antecedent to the postwar collective bargaining statutes.

[109] [1948] 1 D.L.R. 114. This was a case of picketing in support of a strike that was called before the conciliation machinery of the current legislation was exhausted.

[110] [1948] 4 D.L.R. 518, at p. 521. [111] [1948] 4 D.L.R. 522, at p. 524.

[112] [1953] 3 D.L.R. 414 (B.C.S.C.). This case involved a jurisdictional dispute between two shipyard unions.

[113] (1956), 6 D.L.R. (2d) 500 (B.C.S.C.). This case involved the jurisdiction of two locals (piledrivers and carpenters) of the Carpenters' Union.

must either join the union himself or stop driving on the project. An officer of the union told an official of City Construction that unless the plaintiff joined the union or ceased driving on the project, the union would "placard" the company's jobs. The trial judge found that this expression meant that the union would[114]

> . . . take such steps as would have the effect of interfering with and obstructing the operations of the company and of making it appear to the public and other labour unions that the company had broken its contract with the defendant union or was indulging in unfair labour practices.

This finding was accepted and remarked upon both in the British Columbia Court of Appeal and the Supreme Court of Canada. City Construction terminated its arrangement with the plaintiff by "refraining from hiring" him. It would appear that there was, technically, no breach of contract between the plaintiff and City Construction, but there was an interference with what the older cases call a favourable trade relationship.

Therien then brought action for damages for unlawful interference with his occupation and livelihood. The action was against the local of the union in its own name. The plaintiff alleged, *inter alia*, breaches of the Labour Relations Act. The union moved to have the writ and the service of the writ set aside on the ground that the union was not a legal entity. Wilson J. held that since the plaintiff pleaded breaches of the Labour Relations Act which could give rise to a cause of action, and since the union could be found to be a *persona juridica* under the Labour Relations Act, the union was called upon to plead to the action as a *persona juridica*. This decision appears to go no further than the decision of the British Columbia Court of Appeal in the *Vancouver Machinery Depot* case.

At the trial it was found that the action of the union was an attempt to force an employer into the union, and as such was a violation of section 4(1) of the Labour Relations Act. This in turn was held to be a violation of the prohibition against coercion in section 6, and the attempt to prevent the plaintiff from driving to be a violation of section 5(2). It was then concluded that the cause of action arose both under the statute and at common law,[115]

[114] *Supra*, footnote 57, (1958), 13 D.L.R. (2d) 347, at p. 350.

[115] *Ibid.*, at p. 361. See also *Re Canadian Gypsum Company Limited and Nova Scotia Quarry Workers' Union Local 294, C.L.C.* (1959), 20 D.L.R. (2d) 319 (N.S.) in which Parker J. found that unlawful conduct which impeded rail service to a strike-bound operation (the strike was lawful) was a violation of s. 5(2) of the Nova Scotia Trade Union Act and therefore a justification for the employer to refuse to rehire tortfeasors upon the settlement of the strike.

the former conclusion being founded on the view that "a violation . . . of the statute itself creates a civil liability on the part of the defendant",[116] and the latter being founded on the interference by a wrongful act with the plaintiff's right to earn his living.[117] For the common-law cause of action the union was held to be a legal entity, inasmuch as a breach of the Act was an essential ingredient of the wrong.[118] This finding advances the liability of a union as a legal entity to the third degree suggested earlier.

Although the members of the British Columbia Court of Appeal agreed in dismissing the appeal, there is variation in the reasoning.

The chief justice found that the union's conduct violated the collective agreement and sections 4, 6, 21, 22, and 46 of the Labour Relations Act, and concluded that the union was a legal entity in respect of liability for breaches of the Act.[119] This, it is submitted, is the second degree of liability suggested above.

Because of certain conclusions reached respecting the Labour Relations Act, Davey J.A. found it necessary to go further. First, his lordship saw no breach of section 4(1), since the union was seeking not to force the plaintiff into the union, but to oblige him to put a union driver on all the trucks. This, it is submitted, is a legitimate interpretation of the evidence.[120] Second, Davey J.A. found that there was no breach of section 5(2)—that there was no limitation on production or services.[121] But he did find coercion under section 6, interpreting the language of the section to prohibit conduct that might not be actionable at common law.[122] Further, the threat to picket was held to be a violation of the arbitration clause of the collective agreement, and was therefore coercive. His lordship concluded that[123] "the plaintiff succeeds on a common law cause of action." But the judgment does not stop there. Davey J.A. then reviewed the Court of Appeal decision in the *Vancouver Machinery Depot* case, noted that the court reserved the question of the status of trade unions to be sued in contract or tort, and expressed the view that this appeal raised the question directly.[124] On this issue, he concluded that:[125]

> . . . the union may sue or be sued in its own name in respect of all rights and liabilities arising out of its acts or omissions, within the scope of the objects for which it was made a legal entity.

I read this to mean that a union is a legal entity only for the purposes of the Labour Relations Act: obviously for prosecutions,

[116] *Ibid.*, at p. 359. [117] *Ibid.*, at p. 354. [118] *Ibid.*, at p. 363.
[119] *Ibid.*, (1959), 16 D.L.R. (2d) 646, at p. 655.
[120] *Ibid.*, at p. 658. [121] *Ibid.*, at p. 659. [122] *Ibid.*, at p. 661.
[123] *Ibid.*, at p. 666. [124] *Ibid.*, at pp. 666-7. [125] *Ibid.*, at p. 669.

and impliedly for civil suits founded not on the common law, but, to quote *Comyn* as cited in the judgment of Clyne J., to provide an injured person with "a remedy upon the same statute"[126] by implication of the Act. This is the second degree of liability suggested above.

Sheppard J.A.'s judgment takes quite another tack. His lordship considered that[127] "the union being an unincorporated association is not a suable entity", but avoided difficulties "by construing the action as properly constituted as a representative action"[128] and restricting the judgment to union funds.[129] His lordship would recognize the action at common law, inquiry being made both at common law and by statute to determine whether the means were illegal.[130] This appears to be the third degree of liability suggested above.

The judgments in the Supreme Court of Canada were addressed to two principal issues: whether the union was an entity which could be sued, and whether the conduct of the union constituted an actionable wrong. Locke J.[131] found, following the reasoning of Farwell J. in the *Taff Vale* case, that the Labour Relations Act treated unions as legal entities, and stated the opinion that:[132]

> ... the appellant is a legal entity which may be made liable in name for damages either for breach of a provision of the Labour Relations Act *or under the common law.*

The words preceding the italicized words appear to indicate liability in the second degree: that the statute implies an action in damages. But the italicized words, given an independent significance by the disjunctive "or", are capable of two meanings: that there is a common-law cause of action of the kind suggested in the judgments of Clyne J. and Sheppard J.A.; or that a union is a legal entity for actions in contract and tort in the general sense set out in the *Taff Vale* case. Considering the extent to which the judgment considers with approval the reasons for judgment in the *Taff Vale* case, culminating in the following passage:[133]

> The legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort . . . ,

it would appear that it is the latter meaning which his lordship

[126] *Ibid.*, at p. 359. [127] *Ibid.*, at p. 675. [128] *Ibid.*, at p. 678.
[129] *Ibid.*, at p. 680. [130] *Ibid.*
[131] Taschereau J. concurred in the reasons; Martland J. agreed with the reasons; the Chief Justice and Cartwright J. were in substantial agreement with the reasons.
[132] *Supra*, footnote 57, (1960) 22 D.L.R. (2d) 1, at p. 11. Italics added.
[133] *Ibid.*

intended. In that event the words are *obiter*, for the determination is not essential to the dismissal of the appeal; but they bear no marks of inadvertence. Further, the reasons contain extensive reference to the Trade-unions Act of 1902, but the opinion expressed in the quoted passage appears to be founded only on the Labour Relations Act. If this is the correct construction of the judgment, the decision would appear to impose liability in the fourth degree.[134] It must be remembered that this judgment was based on the law as it existed prior to the enactment of the Trade-unions Act of 1959.

It now becomes necessary to consider the scope of sections 4 and 7 of the new Trade-unions Act. Between them, they make a trade union liable as a legal entity to anyone damaged by a breach by the union of the Labour Relations Act or section 3 of the Trade-unions Act. This appears to impose liability in the third degree suggested above. Does it by implication limit general liability in contract and tort at common law? Section 7 does not expressly state that unions (and employers' organizations) are not otherwise legal entities. Unless the *expressio unius* rule is applied—and such intent could hardly be ascribed to the legislature, in light of the fact that the Act was passed more than ten months prior to the delivery of the Supreme Court of Canada judgments in the *Therien* case—the answer would appear to be no. Thus the prevailing case law appears to impose a greater responsibility on unions than that declared by sections 4 and 7 of the Trade-unions Act.

Section 7 also makes employers' associations legal entities, and places on them, through section 4, all the liabilities and disabilities which are placed on trade unions. However, as these organizations are not so prone to overt action as are trade unions, the reciprocal state of the law may not be of immediate importance. Most employers, as distinct from employers' associations, are legal entities irrespective of section 7 of the new Act.

It should not be concluded that the *Therien* case necessarily has application throughout Canada. The conclusion in the judgment

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[134] But *cf.* Manson J. in *MacMillan & Bloedel (Alberni) Ltd.* v. *Plumbers' Union* (1958), 26 W.W.R. 276: "Unions are not legal entities for all purposes." In *Jurak* v. *Cunningham* (1959), 21 D.L.R. (2d) 58, a case involving expulsion from union membership and brought against representative defendants, Wilson J. observed at p. 59: "It is, I think, notable and regrettable that the Trade-unions Act, 1959 (B.C.), c. 90, which, very properly, as I think, eliminated the former cumbersome and unrealistic process of the representative action in suits between an employer and a trade union, did not decree the same simplification in actions brought against a union by a member or by a person who claims to be a member of a trade union."

flows not only from breaches of the Labour Relations Act but from an implication based on the manner in which the legislature was found to have perceived trade unions. Different statutes may give rise to different implications. Reference has been made earlier to some collective bargaining statutes in Canada which specify that a union is a legal entity for limited purposes. And it should be noted that section 3 of the Ontario Rights of Labour Act provides that a collective agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of the provisions of that Act or the Labour Relations Act. However, a breach of the Ontario Labour Relations Act, as distinct from a breach of a collective agreement, might well produce the result arrived at in the *Therien* case.[135]

An anomalous situation appears to have developed in Newfoundland. In 1910, the colonial legislature of Newfoundland enacted a statute which established a system of registration of unions, and adopted English legislation of 1871 and 1906 which was designed to protect unions from legal proceedings. A new Trade Union Act was passed in 1950,[136] along with the enactment of the Newfoundland Labour Relations Act[137] regulating collective bargaining. The Trade Union Act was amended slightly in 1951 and 1957.[138] The Labour Relations Act received significant amendment in 1959.[139]

Under the Newfoundland Trade Union Act of 1950 as amended, unions were protected from the law of civil conspiracy, from liability for inducing breach of contract in the course of a trade dispute, and from suit for civil wrongs. However, a number of provisions regulate internal affairs. A union is required to make annual returns to the Minister of Labour, including the filing of a copy of its constitution and such other information as the minister may require. In addition, members must be given annual financial statements. In return for such compliance, the Minister of Labour issues a certificate. An uncertified or decertified union cannot claim the protection of the Act. Furthermore, the statute prescribes what the union constitution must contain, including such matters as its objects, power to levy fines, provision for amendment and dissolution, appointment and removal of officers, and investment of funds.

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[135] See the *Dewar* case, *supra*, footnote 37, at p. 140.
[136] R.S.N., 1952, c. 262 (in force December 31st, 1955).
[137] R.S.N., 1952, c. 258 (in force December 31st, 1953).
[138] S.N., 1957, c. 2.
[139] S.N., 1959, c. 1. See also the Trade Union (Emergency Provisions) Act, S.N., 1959, c. 2, decertifying two locals of the I.W.A. under the Labour Relations Act.

In March, 1959, there was passed an amendment to the Labour Relations Act which empowers the Lieutenant-Governor to dissolve a union in which a substantial number of its officers, including those of the international union, have been convicted of any "heinous" crime, including narcotics trafficking, manslaughter, extortion, embezzlement, and perjury. Further, the Labour Relations Board may decertify a union under the Labour Relations Act — a certification different from that provided for in the Trade Union Act — if an officer commits a crime in the course of a labour dispute.

In the *Anglo-Newfoundland Development Company* case,[140] it was held that the immunity to unions extended by the Act of 1910 was available only to unions holding a certificate under that Act. But as noted by the Editor of the Dominion Law Reports, the English Trade Disputes Act of 1906 does not limit immunity to unions registered under the Act of 1871. However, section 19 of the Newfoundland Act provides that any union which does not comply with the Act may not enjoy the benefits of the Act, and on this basis the conclusion may be justified that the union in that case was without status.

Section 4 of the British Columbia Trade-unions Act raises certain questions respecting burden of proof. By subsection (1) a person (including a union) is liable in damages for committing, authorizing or concurring in a breach of the Labour Relations Act or section 3 of the Trade-unions Act; and by subsection (2) the burden is shifted to the union to show that it did not do, authorize or concur in the breach. The burden is still on the aggrieved person to establish the wrongfulness of the conduct.

The shift in the burden of proof is analogous to certain presumptions in criminal legislation, but analogous only. The section establishes a *prima facie* doctrine of vicarious liability in unions for wrongful acts of their members, similar to that in the common law of master and servant and the general law of agency. But the shift in burden of proof seems to carry the doctrine further than its common law counterpart. It does, however, place the burden of proof on the party which in most cases is probably best equipped to adduce the relevant evidence on the question whether there was participation, authorization, or concurrence by the union in a breach of the Labour Relations Act or section 3 of the Trade-unions Act. Further, the burden is in respect of "any act" which,

[140] *Anglo-Newfoundland Development Co.* v. *I.W.A.* (1959), 17 D.L.R. (2d) 766 (Nfld. S.C.). Representatives of the union were found to have broken into a camp of the plaintiff in order to hold a meeting and take a strike vote.

in the context of the whole section, appears to refer only to acts of commission, not to acts of omission.

An interesting passage in the *Dewar* case is the observation that:[141]

> It is suggested that when a dispute arises when a collective agreement is in force the parties must all resort to arbitration. Well, it is a little difficult for me to see.

Yet arbitration was the solution favoured by the same judge in different circumstances in the *Wilson Court* case[142] and by Davey J.A. in the *Therien* case:[143]

> The union's remedy was not to picket but to invoke arbitration to determine whether or not the company was observing clause 10.

In light of section 4 of the British Columbia Trade-unions Act, which imposes liability in damages for breach of the Labour Relations Act to anyone injured thereby, the arbitration of such disputes would appear advisable, in British Columbia at least.

The general subject of damages has been considered in a number of recent cases. Reference has already been made to the *British and Irish Steampacket* case[144] in which it was held that the quantum of damages was not affected by the fact that the employees could have terminated their employment lawfully. The *Evergreen Press* case confirms that damages may be sought in a representative action;[145] but the interlocutory injunction was dissolved in that case for the reason, *inter alia*, that the damage which the employer was suffering by reason of the picketing was a *fait accompli* when the motion to dissolve was heard.[146] In the *Becker* case the effective cause of the loss to the plaintiff was held not to be the picketing of the defendant union but the refusal of other trades to cross the picket line;[147] a clause in a collective agreement that refusal to cross a picket line did not constitute a violation of the agreement was considered valid in the *Blue Star* case.[148]

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[141] *Supra*, footnote 37, at p. 138.

[142] *Supra*, footnote 49, at p. 760.

[143] *Supra*, footnote 26, at p. 665.

[144] *Supra*, footnote 46.

[145] *Supra*, footnote 30, at p. 403; see also Sherbaniuk, Actions by and against Trade Unions in Contract and Tort (1958), 12 U. of T.L.J. 151.

[146] *Supra*, footnote 30, at p. 405. The employer was printing a telephone directory which had to be published by a certain date; in the event, it was published elsewhere.

[147] *Supra*, footnote 60, at p. 234. On the remoteness of damage see also the *Dewar* case, *supra*, footnote 37, at p. 139.

[148] *Supra*, footnote 93, at p. 337. But *cf.* the judgment of Clyne J. in the *Therien* case, *supra*, footnote 57, (1958), 13 D.L.R. (2d) 347, at p. 352, in which it was stated that a clause in a collective agreement that is inconsistent with the Labour Relations Act—in that case a union shop clause—is unenforceable.

Damages were in fact awarded in two recent instances: the Quebec *Vickers* case[149] and the New Brunswick *Acme Construction*[150] case.

Apart from civil liability imposed for breach of the Trade-unions Act, and the form of liability to prosecution for breach of the Labour Relations Act, there would appear to be liability to prosecution for breach of the Trade-unions Act by virtue of section 5 of the Summary Convictions Act.[151] This section provides that:

> Every person who, without lawful excuse, disobeys any statute or any enactment made thereunder by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, shall, unless some penalty or other mode of punishment is expressly provided by the Statute or enactment, or by some other Statute or enactment, be guilty of an offence against this Act, and shall be liable, on summary conviction, to a fine not exceeding five hundred dollars.

The Trade-unions Act establishes a remedy in damages to anyone injured by breach of its provisions; but a civil remedy in damages is not a "penalty or other mode of punishment". It therefore appears that a breach of the Trade-unions Act also exposes the wrongdoer to prosecution under the Summary Convictions Act.

III. *The Ex Parte Injunction.*

Section 6 places limitations on the granting of injunctions *ex parte*, but the operation of the section is restricted to the situation in which there is a strike or lockout that is not illegal under the Labour Relations Act. The section contains two limitations, one respecting the purpose of the injunction and the other respecting its duration. As to the former, the injunction may be granted to safeguard public order or to prevent substantial or irreparable injury to property. I read the term "injury" to mean actionable injury—not merely *damnum*, but *injuria*. Although the provision for the most part reflects the rules of equity respecting *ex parte* injunctions, Wilson J. points out in the *Gulf Islands* case[152] that breach of a negative covenant (in that case against strikes) is enjoinable irrespective of proof of irreparable harm. The provisions of section 6(1) would appear on their face to override this rule of

[149] *Supra*, footnote 16. Unions are legal entities under the Quebec law. Damages were reduced to $500.

[150] *Supra*, footnote 68. Damages were awarded in the amount of $6,344.72.

[151] S.B.C., 1955, c. 71, and 1956, c. 42.

[152] (1959) 18 D.L.R. (2d) 216, varied on another point by the B.C.C.A., at p. 625. Referred to in *McLaughlin et al.* v. *Westward Shipping Ltd. et al.* (1960), 21 D.L.R. (2d) 770 (S.C.B.C.).

equity, unless the application is founded on the safeguarding of public order. Even in this latter circumstance, however, it would appear that the plaintiff must otherwise bring himself within the rules of equity governing the granting of injunctions. The section does not restate or replace the whole body of equitable principles relating to injunctions, nor does it create any new cause of action. Any other interpretation would lead to incongruities which are not called for by the plain language of the section.

The duration of the injunction is limited to a maximum of four clear days. Under the rules of the Supreme Court, the injunction could run until after the trial of the action or until further order,[153] the defendant having power to move the court at any time to vary or dissolve the injunction. The four day limitation is similar to the law in Ontario and Saskatchewan.[154]

If, after the four day period has elapsed, the employer should move on notice for a continuation of the injunction, section 6 has no application to the proceedings, inasmuch as the section is directed only to the granting of injunctions *ex parte*.

Section 6 appears to have caused some difficulty in the *Dominion Bridge* cases.[155] The Dominion Bridge Company was in the process of constructing a bridge over Burrard Inlet at Second Narrows. On the 23rd of June, 1959, the Ironworkers' Union struck the project after having complied with the requirements of the Labour Relations Act. At that time the south end of the bridge was cantilevered toward a permanent footing, and was supported by falsework. On the day of the strike the employer filed a *praecepe* "to set down application for immediate injunction". In support there were filed affidavits of two engineers, one a consulting engineer, the other an employee of the plaintiff. The affidavits deposed that although the falsework was protected, it was possible that the two legs of the falsework could be damaged by an accident on the road or the railway adjacent to it. The affidavits further deposed that the cessation of work created a serious hazard, and that it was necessary to continue the construction of the southern portion of the bridge to safeguard public order and prevent substantial or irreparable injury to property.[156] It was averred that co-operation of the business agent of the union was

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[153] Supreme Court Rules, 1943, Appendix K, 26 F.

[154] Ontario Judicature Act, R.S.O., 1950, c. 190, s. 17(2); Saskatchewan Queen's Bench Act, R.S.S., 1953, c. 67, s. 44, rule 120.

[155] Unreported; 486/59 and 1319/59 Vancouver Registry.

[156] The language of the affidavits adheres to the wording of s. 6 of the new Act.

sought and was refused. That day an injunction was granted *ex parte* in the following terms:

> This Court doth order and direct that [the union] . . . be enjoined . . . from striking and/or calling members of the said Local 97 on strike and/or holding members of the said Local from their employment insofar as such strike affects the southern portion of the structure . . . until such time as the said southern portion . . . is rendered entirely safe . . . but not for a longer period than four clear days . . . .

The following day the union filed notice of motion to set aside, dissolve or modify the injunction on the grounds that no action was started by Dominion Bridge, that the affidavits misrepresented or concealed facts, and that the strike was a lawful strike. An affidavit filed by the union gave a different version of the conversation in which the business agent's assistance had been sought. That day the company filed an affidavit to the effect that it would take about ten days to complete the work to the pier.

On the third day of the strike, the union filed an affidavit to the effect that the business agent of the local, on being served with the injunction, ordered an officer of the union to advise the members that the strike had been ended by court order in respect of the southern portion of the bridge, and to remove the placards on the job; that the business agent notified as many members of the union as was possible that the strike on the southern portion of the bridge was ended; and that upon reading affidavits filed by the employer, he became alarmed and issued a press report about the safety of the bridge, in which he clearly advised employees that the engineer said the bridge was unsafe.[157] The union also filed affidavits to the effect that a representative of the company said the only danger to the southern end of the bridge was in the event of an earthquake, that an employee refused to go to work upon reading the news of the public statement of the business agent, and that another employee refused to go to work because he did not know whether the bridge was safe or not.

The proceedings were continued in the second action.

A writ in the second action was issued on the third day of the strike, claiming an injunction against striking, specific performance of a collective agreement, a mandatory order that the defendant union order its members to return to their employment on the southern portion of the Second Narrows bridge until completed to Pier 16, and damages. That day the plaintiff filed a notice of motion for an order continuing the injunction granted on the

[157] A portion of the northern end of the bridge collapsed in the spring of 1958, killing a number of members of the Ironworkers' Union.

23rd of June. The plaintiff also filed three affidavits, the same as in the preceding case, bearing the import that the bridge was unsafe, that an officer of the union would not cooperate in making it safe, and that it would take approximately ten days to make the bridge safe.

On June 26th the defendant issued a chamber summons, later dismissed, for an order that the writ of summons be struck out on the ground that it disclosed no cause of action and constituted an abuse of the process of the court. That day an injunction was granted in the same terms as the earlier order, to run until the consulting engineers of the British Columbia Toll, Highways and Bridges Authority should certify that the structure had been completed to Pier 16.

On July 6th the plaintiff gave notice of motion for a writ of sequestration against the property of the defendant for contempt of court for wilful disobedience of the order of June 26th. In support of this motion were filed a number of affidavits which set out that the plaintiff requested men from the union for work on the bridge and that no members of the union reported, although members of allied trades did so. The affidavits also indicated that on June 28th the Premier of the province wired the business agent of the union that independent engineers found that the risks on the bridge did not extend beyond normal and recommending that construction be continued. On June 25th the director of the accident prevention department of the Workmen's Compensation Board also stated in writing that there was no undue risk other than the normal hazard of such employment. Employees were served with copies of these two notifications.

On July 30th the union and three officials were found to be in contempt of court. The union was fined $10,000 and each of the three officials $3,000. Appeals from the convictions were allowed. An appeal was taken respecting the injunction itself, but by the time it was heard the strike had been settled and the men were back to work; the British Columbia Court of Appeal refused to hear the appeal for the reason that the issue was academic.[158]

The file does not contain a transcript of all the proceedings, but it appears that on the second day of the hearings, when the parties were before the court on notice, the judge considered an injunction could go forward under section 6. It is respectfully submitted that this conclusion involves two errors. First, the proceed-

[158] A sequel to this litigation was the conviction of a union newspaper, *The Fisherman*, and its editor for contempt of court for publishing a certain editorial relating to injunctions in this and other cases.

ings were no longer *ex parte*, and second, the employer did not disclose a cause of action. Section 6 appears to be a procedural section only, regulating the granting of injunctions *ex parte*. It does not grant a cause of action where none existed at common law, but merely reflects or limits certain equitable principles on which an *ex parte* injunction may be granted, provided the plaintiff can otherwise demonstrate that he has a basis for an injunction. The basis for an injunction in the overwhelming number of cases is that the plaintiff has a cause of action against the defendant. There may be the rare case where the person seeking an injunction has no cause of action, but at least the person against whom he is seeking the order is alleged to be committing a wrongful act of some kind. An injunction, it is submitted, must be founded on the commission of an actionable wrong or some other illegal act. The special remedy of injunction, as distinct from damages, before the trial of the action or other proceedings is, within the confines of section 6, to safeguard public order or to prevent substantial or irreparable injury to property. If the section were interpreted to give a cause of action or some other basis for an injunction where none existed prior to the enactment of the Trade-unions Act, the law would be in the anomalous position of granting to an employer (or other person) a higher right and a higher remedy on an *ex parte* application for an injunction than would be available if the application were on notice; further, the cause of action would not arise should the strike or lockout be illegal under the Labour Relations Act. It is inconceivable that this was the intent of the legislature. Nor does the plain language of the section commend itself to such an interpretation. The whole of section 6 appears, on the contrary, to set out a special restrictive basis for the granting of an *ex parte* injunction relating to lawful strikes and lockouts, and to limit the duration of such an injunction to four clear days.

A considerable amount has been said in the cases recently about labour injunctions generally, affecting matters of both procedure and substance.

In a number of instances the courts have urged that the case be brought to trial at an early date;[159] and in one case the court set up a rigid schedule for securing this result.[160] However, in none of these cases did the issue go to trial.

[159] The *MacMillan & Bloedel* case, *supra*, footnote 134; the *Becker* case, *supra*, footnote 60; and the *Anglo-Newfoundland* case, *supra*, footnote 140.

[160] The *MacMillan & Bloedel* case, *ibid.* In the event, the injunction was dissolved and the claim for a permanent injunction dismissed by consent.

The need for demonstrating irreparable harm in the original application for an injunction has been emphasized. A specific finding to that effect is contained in the judgment of the *Pacific Coast Terminals* case;[161] and the appeal was allowed in the *Goloff* case[162] for the reason that the plaintiff failed to prove irreparable harm. However, as indicated earlier, the *Gulf Islands* case is authority that, but for the new Act, irreparable harm need not be shown to enjoin breach of a negative covenant.

Similarly, the judges have stressed the need for care in applications for *ex parte* injunctions. This is clearly indicated in the judgments of both Wilson J. and Smith J.A. in the *Gulf Islands* case. Wilson J.[163] suggests certain precautionary inquiries which should be taken in the granting of *ex parte* labour injunctions:

> A great many interlocutory injunctions are applied for, particularly in actions relating to labour disputes. Where the application is made *ex parte* the utmost scrupulosity and care must be exercised by the Judge. In the course of trying to restrain "irreparable" damage to one litigant, he may cause it to another. The first inquiry to be made in all cases is, "Why did you not give notice?"; and if the answer elicited does not reveal extraordinary urgency, the application must be refused.

Even if this precaution is adhered to, however, injunction proceedings tend to be prejudicial to unions, for, generally speaking, time acts against them. As Rand J. remarked in the *Patchett* case,[164] the settlement of industrial disputes is effected by the pressure of interests, and "time is frequently the arbiter of these decisions". But once an injunction is issued, a union's bargaining power may be attenuated, strikes may be broken and claims may be lost. Yet if the injunction should ultimately be found to have been granted on inadequate grounds, the union may be without an effective remedy in damages, for the loss to the union occasioned by the injunction may be virtually impossible to establish or calculate. Furthermore, when an injunction is granted *ex parte* and the employer moves after four days to continue the order, the deponents to the affidavits sometimes appear as witnesses; not infrequently evidence is adduced which was not in the affidavits. As a result, counsel for the defendant cannot rely on the affidavits to determine the case he must meet.

Although contempt proceedings are regarded as *strictissimi juris*,[165] the test for the granting of the injunction is the balance of

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[161] *Supra*, footnote 14, at p. 235.
[162] *Goloff* v. *I.W.A.* (1959), 29 W.W.R. 511 (B.C.C.A.).
[163] *Supra*, footnote 152, at p. 653.
[164] *Supra*, footnote 5, at pp. 451, 452.
[165] See *Northland Navigation Co. Ltd.* v. *Longshoremen's Union* (1959),

convenience. The following passage from the judgment of Macfarlane J. in the *Evergreen Press* case is apposite:[166]

> I would like before closing to mention the argument that the injunction should not have been granted *ex parte* because these parties having been engaged in the litigation to which I have referred, could have been given notice; I am quite conscious also, of the criticism that has been conducted against the issue of *ex parte* injunctions generally but if the situation is such at the time that the damage will be done immediately and that it will be irreparable if the injunction is not issued immediately, then the case becomes difficult. I quite agree that one may be overpowered in these applications by contemplation of the seriousness of the damage that might occur even in the time taken to serve the parties and hear argument and I have considered that it was a matter of balance, taking into consideration the fact that inherent in the right to strike which cannot be denied, and to what is described as peaceful picketing which the law allows in disputes between employees and employers and the need if it is to be an effective weapon in the struggle between these two to allow it to be used, and the damage that may be done if the *status quo* is maintained [sic]. In circumstances such as we have had here following this extended litigation over the jurisdictional dispute and the vital situation as affecting the employers, I considered that the probability was that lesser damage would be likely to result by granting the injunction . . . .

The requirement of strictest care does not preclude reliance on affidavits based on information and belief.[167] Reference is made to non-disclosure of facts in the *Becker* case.

Law on a new point has been set out in the *Gulf Islands* case: where a judge is moved to discharge or dissolve an *ex parte* injunction granted by another judge, he should consider the case *de novo* as to both the law and the facts, but should not hear the motion unless the first judge consents thereto or is unavailable.

An application to dissolve or vary an injunction on behalf of defendants who have not been served with the writ when an identical application has been made and refused, was held to be an abuse of the process of the court, in the *Bridgeview Developments* case.[168]

In the *MacMillan and Bloedel* case the court spoke out against compromising injunction orders:[169]

> . . . there should be no bargaining as between the parties in disposing

29 W.W.R. 272, at p. 274 (B.C.S.C.); *Dominion Bridge Co. Ltd.* v. *Ironworkers' Union* (1960), 20 D.L.R. (2d) 621 (B.C.C.A.).

[166] *Supra*, footnote 30, at p. 407. The court would not enjoin persons who were not defendants in the action.

[167] See the *Pacific Coast Terminals* case, *supra*, footnote 14, at p. 253.

[168] *Bridgeview Developments Ltd.* v. *Beck et al.* (1958-59), 27 W.W.R. 700 (B.C.S.C.).

[169] *Supra*, footnote 134, at p. 277.

> of injunctions . . . . If there are legal grounds for dissolution, well and good.

The motivation for the observation undoubtedly is the view that litigation ought not to be used by employers as a lever in the negotiation of collective agreements, whereby the courts appear to be cast in the role of serving the economic interests of employers at the expense of unions. However, it is submitted that if a plaintiff employer has a legitimate claim to an injunction, that right may be compromised in the discretion of the employer. One of the terms of settlement in the lumber strike of 1959 was that all litigation be discontinued. This has been the overwhelming pattern in labour injunction cases in British Columbia in the last fifteen years. Assuming that the injunctions were granted on proper grounds, the orders appear to have had the effect of preventing unlawful conduct during the period of negotiating settlements of the industrial disputes. Any fault would lie, it is submitted, in obtaining an injunction on inadequate grounds, not in compromising a legitimate cause of action.

IV. *The Act in Retrospect: The Record.*

This part contains an analysis of labour injunction litigation in British Columbia, with particular reference to events from the enactment of the Trade-unions Act on March 20th, 1959 to the end of that year. Litigation should not be relied on as an accurate measure of industrial conflict. There were probably many instances in previous years in which conduct by unions could have been enjoined, but in respect of which no writ was issued. This cannot be said to the same extent of 1959: one gets the impression that there is, generally speaking, a greater awareness of legal rights and obligations in industrial disputes since the enactment of the Trade-unions Act than in the immediately preceding period. Therefore the litigation record in 1959 may be a more accurate reflection of a certain kind of industrial conflict than would be the record of previous years.

There are, of course, other gauges of industrial conflict, such as the number of conciliation boards appointed, the number of strike votes taken, the number of strikes that occur, the per cent of time loss through work stoppage, or the level of productivity in relation to capital investment. But nearly all these *indicia*, like the litigation record, are unreliable at face value, and, when qualified, may not tell very much. The record of litigation is, however, worth examination.

The following table records the number of writs issued and injunctions granted in industrial disputes in British Columbia for the years 1956-1959.[170]

TABLE 1

Writs issued and injunctions granted in industrial disputes in British Columbia—1956-1959.

	1956	1957	1958	1959	Total
Total number of writs issued.....	14	10	31	36	91
Injunctions granted					
—*ex parte*.....	12	8	27	25	72
—on notice (including after trial).	1	1	—	10	12
Total injunctions granted.....	13	9	27	35	84
Injunctions not obtained.....	1	1	4	1	7

For the period 1956-1959 sixteen other writs were located in which unions were litigants. However, these actions are not included in the above compilation for the reason either that the litigation did not involve an employer or that the employer was made party to an action which principally involved a dispute between unions. Six of the excluded cases were intra-union in nature, concerning for the most part the issue of expulsion from membership; five were principally jurisdictional disputes between unions; two were contempt proceedings; one involved the Combines Investigation Act; one concerned a municipal corporation and the Firefighters' Union over the assignment of duties; and in one case the writ was withdrawn within a very short period after it was issued.

Of the ninety-one cases in which writs were issued, the cause of action went to trial in three instances. In all other cases proceedings stopped short of trial.

In comparison with this four year period, the total litigation of the preceding decade was markedly lower. In this latter period seventy-five writs were issued and sixty-eight injunctions were granted, sixty-three of which were *ex parte*.

[170] Statistics for the period 1946-1955 may be found in The Labour Injunction in British Columbia (1956), p. 194.

A significant variable is the industry in which disputes arise. The following table records the incidence of writs for injunctions in British Columbia according to industry and year for the period 1956-1959.[171]

TABLE 2

Incidence of writs for injunctions in British Columbia according to industry and year—1956-1959.

INDUSTRY	1956	1957	1958	1959	Total
Construction	9	4[a]	9[b]	6	28
Shipping and longshoring	—	3	13	9	25
Logging and forest products	—	1	3	16	20
Merchandizing	1	1	2[a]	2	6
Transportation	3[a]	1	2	—	6
Fishing and fish-packing	—	—	1[a]	1	2
Bakery	1	—	—	—	1
Hotel and restaurant	—	—	1	—	1
Printing	—	—	—	1	1
Civil Service	—	—	—	1	1
TOTAL	14	10	31	36	91

[a] In one case no injunction was granted.
[b] In two cases no injunction was granted.

[171] For the period 1946-1955 see *ibid.*, p. 191.

The third table records the incidence of writs for injunctions in British Columbia according to union and year for the period 1956-1959.[172]

TABLE 3

Incidence of writs for injunctions in British Columbia according to union and year—1956-1959.

UNION	1956	1957	1958	1959	Total
Bakery workers	1	—	—	—	1
B.C. Federation of Labour	—	—	—	1	1
Building Trades Council	1	—	—	1	2
Carpenters	1	4[a]	2	1	8
Cement masons	—	—	—	1	1
Civil servants	—	—	—	1	1
Locomotive firemen	—	—	1	—	1
Fishermen	—	—	1[a]	1	2
Hotel and restaurant workers	—	—	1	—	1
Ironworkers	—	—	—	2	2
Labourers (hod carriers, *etc.*)	5	—	1[a]	1	7
Longshoremen	—	1	8	2	11
Machinists	—	—	1	1	2
Marine engineers	—	—	1	1	2
Painters, etc.	—	1	1	—	2
Papermakers	—	1	—	—	1
Plumbers	—	—	6[a][b]	—	6
Railway employees	—	1	—	—	1
Retail, wholesale, *etc.*	1	1	2[a]	1	5
Sawmill workers	—	—	—	1	1
Seafarers	—	1	4	1	6
Teamsters	5[a]	—	1	1	7
Typographical	—	—	—	1	1
Woodworkers	—	—	1	18[a]	19
TOTAL	14	10	31	36	91
Number of unions involved each year	6	7	14	17	

[a] In one case no injunction was granted.

[b] In one case the injunction also ran against the Carpenters' and the Teamsters' unions; the case is listed only once under the Plumbers' union as being the first one named in the style of cause.

Apart from the International Woodworkers of America injunctions, there was a balance of eighteen injunctions in 1959. This latter figure may be more meaningful for comparison with

[172] For the period 1946-1955 see *ibid.*, p. 104.

other years, because of the magnitude of the lumber strike in 1959 and the absence of a strike in that industry since 1953.[173]

In 1958 thirteen of the thirty-one cases involved the maritime industry (shipping and longshoring), and six cases involved the Plumbers' Union. Thus, nineteen of thirty-one cases accounted for two major areas of dispute in that year.[174] In 1959, nineteen of the thirty-six cases involved the lumber industry (eighteen the International Woodworkers of America, one a Sawmill Workers' Union). There was a total of thirty-six injunction cases in 1959 (including four prior to March 20) compared with thirty-one in 1958, ten in 1957, and fourteen in 1956.

The impact of disputes in major industrial areas may be observed in previous years. Injunctions in the lumber industry accounted for six out of fifteen injunctions in 1952 and twenty-one of the thirty injunctions in 1953. Lumber injunctions in those two years accounted for over one-third of the labour injunctions granted in the province from 1946-1955 inclusive. The work stoppage in the lumber industry constituted the major strike of 1959. As has been seen, in 1953 the number of injunctions issued against this union raised the total for the year to a figure out of proportion to other years. The lumber industry apart, there has been a falling off in the use of the injunction since the enactment of the Trade-unions Act. Whether there is a causal relationship is a matter of speculation.

Because of the uncertainty of the law prior to the enactment of the Trade-unions Act, and because of nuances in techniques of picketing revealed in affidavits filed in connection with the recent cases, it would be foolish to say that an injunction definitely could or could not be granted in each case that has arisen since the enactment of the Trade-unions Act, either on the basis of the law that prevailed prior to that date or on the basis of the new Act. But, making allowances for uncertainties both in the law and in the inferences to be drawn from the allegations of fact in the affidavits, the following tentative conclusions are drawn.

On the basis of the materials filed in the course of the litigation, it is concluded that twenty-three of the thirty-two injunctions could have been issued prior to the enactment of the Trade-unions Act;

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[173] Table 2 records only sixteen writs issued in the logging and forest products industry. Some I.W.A. cases are recorded under the shipping and longshoring industry.

[174] The principal work stoppages were in the construction industry (plumbers and teamsters), water transport (C.P.R. and Black Ball), power (electricians' strike against the B.C. Electric) and pulp and paper (Powell River).

four, it is submitted, should not have been issued at all on the basis of the materials filed; and five depended on the new Act.

Of the thirty-two injunctions included in the above summary, ten were granted on notice, twenty-two *ex parte*. All the injunctions granted *ex parte* were, of course, subject to the four-day rule in section 6(2). In some cases the injunction was continued on motion to trial, in others no motion was made. In no case was a continuation denied. In a few cases the injunction was varied, dissolved or discharged.

In some cases since the enactment of the Trade-unions Act the action was brought against the union as a legal entity; in some against the union in a representative action; in some against individuals; and permutations of the above may be found. The affidavits filed by the plaintiffs almost as a matter of course alleged irreparable harm. This is not a noticeable variation from cases in previous years, but in some instances it is evident that the affidavits were cast in language to conform to the wording of the Trade-unions Act. Yet remarkably few injunctions, as distinct from affidavits, have followed the language of section 3 of the Trade-unions Act. The old precedents, full of watchings and besettings, inducings and attemptings to induce, and doings and conspirings to do, still seem to be in vogue. However, the terminology may make little difference to the efficacy of the injunction or to the impact of the injunction on the particular industrial dispute. The matter of liability in damages has not proven significant so far — at least in result; it may have had a deterrent effect, but that is not calculable from the litigation record.

A causal relationship between the frequency of injunctions and the new Act is impossible to establish. Some cases may have been brought to test the Act or even to demonstrate that the Act is a source of litigation. In some instances unions may have been constrained from pursuing lawful activity through fear of litigation. Again, unions may have curbed their activities, knowing that the Act prohibited certain things: this is particularly true of recognition picketing to organize a plant. And it may well be that employers feel more secure in their decision to litigate since the Act was passed.

There are two special observations which should be made about recent injunctions. First, in five cases the injunctions were partly mandatory. Four of these cases involved the use of "hot cargo" stickers by the International Woodworkers of America. The court ordered the stickers removed, and ordered the union to inform

interested parties that the logs and booms were not under embargo by the International Woodworkers of America. The other mandatory injunction was the order relating to the construction of the Second Narrows bridge. The second special feature of recent injunctions is that in five cases the orders state that the union has the right to picket under section 3(1) of the Trade-unions Act, and in some cases the injunctions state the number of pickets which the union may place at the various entrances to the employer's premises. Under the law that prevailed prior to the enactment of the Trade-unions Act, picketing was lawful only if it could pass a whole battery of tests of illegality. In some of these instances the injunction carried a notation to the effect that nothing in the order should be interpreted as restraining the rights of the defendants under the Trade-unions Act of 1902; but no one could be sure what those rights were. Section 3 of the new Act grants a statutory right the certainty of which did not prevail previously. These five injunctions, then, by setting out in clear terms the right of the unions to picket, in a real sense extend to unions protection in a course of conduct which they could not claim with assurance at common law or under the Act of 1902.

V. *The Act in Prospect: The Paradox of Freedoms.*

The principal criticisms of the British Columbia Trade-unions Act of 1959 centre on the view that the Act, in sum, places unconscionable restraints on freedom of speech and freedom of association. This criticism is founded mainly on the prohibitive provisions of section 3, coupled with the liability and burden of proof provisions of sections 4 and 7.

A consideration of these criticisms may be approached in two stages, to identify the scope of the prohibition and to consider the impact of the prohibition on the two freedoms.

The view is expressed that the prohibition against persuading and endeavouring to persuade in section 3(2) is stated in such broad language that it may be read to mean that anyone at any time who says anything that might induce another not to do business with anyone else is offending the Act. It is submitted that this is not a valid interpretation of the section. First, the section must not be taken out of the context of the whole Act, which, as its title states, is an Act relating to trade unions. Second, every section of the Act makes reference to some aspect of the employer-union relationship and to the element of conflict therein. Third, section 3(1), which precedes the prohibition and is therefore part of its

immediate context, is directed to a specific kind of labour dispute: the lawful strike. Fourth, the lettered clauses of section 3(2) are all concerned with conduct generally associated with industrial disputes. Fifth, although courts in this country will not look at the legislative history of a statute, commentators are not obliged to be so inhibited: the explanatory note of legislative counsel to clause 3 of the bill reads:

> This recognizes picketing in the listed circumstances in cases of a lawful strike or lockout, lawful or unlawful. It also restricts picketing to the trade union of which certain members are on strike or locked out and anyone authorized to picket by that trade union.

It is submitted that the prohibition of section 3 would have to be wrenched from its context to read it as a general prohibition against freedom of speech.

However, even confining the prohibition to the forum of industrial conflict, the prohibition is still extensive and, indeed, uncertain in its extent. The scope of the prohibition will depend largely on the manner in which it is interpreted in the courts.[175] In *Civil Liberties and Canadian Federalism*[176] Professor F. R. Scott states a singularly significant canon of statute interpretation:

> . . . there is the established rule that all statutes should be strictly interpreted if they limit or reduce the rights of the citizen. Parliament must always be presumed to have intended the least interference with our freedom, not the most. Hence if two views of what the statute means are possible, that one will be preferred which leaves the larger freedom to the individual . . . .

Professor Scott is speaking of the freedom of the individual. Herein lies the paradox of freedoms which is inherent in legislative control of human behaviour. Freedoms are secured to the individual by restricting the conduct of others. Freedom of association is undoubtedly an individual freedom. But what impact may the very association have on the individual freedom or group freedom of others, and how should one evaluate group action by the association where such action impinges upon the freedom of others? The person or group whose freedom is adversely affected may be the individual citizen, or that mass of individuals which we call "the public", or groups of individuals, or an employer who in turn may be an individual or an association of individuals. It is one thing to speak of freedom of association of the individual; it is quite an-

[175] Cartwright J. in the *Patchett* case, *supra*, footnote 5, at p. 480, observed that "There is . . . no presumption that everyone knows the law . . . ."

[176] Alan B. Plaunt Memorial Lectures, Carleton University (1959), p. 26.

other to speak of freedom of action of the resultant association. And where that association is by nature an interest group whose very interests come in conflict with the interests of others, freedom appears to be a highly relative thing. Freedoms are not absolute; they cannot be, and coexist. An art of good government, it is submitted, is to judge aright the measure of the limitation which should be placed on freedom where interests conflict, in order that there may be preserved the greatest totality of freedom in the circumstances. This measure is necessarily subjective: it depends on the exercise of judgments of value—on the determination of what kind of society we want, of what interests and values we wish to preserve (or expunge), and what interests and values must in the process be risked or sacrificed. The political issue inherent in the Trade-unions Act is one of reconciling conflicts of freedom; it is not merely a question whether one group in society is or should be deprived of freedom of speech or freedom of association.

Underlying this issue of freedom is a conflict among protagonists in labour disputes of economic—and to some extent political—power. The power relationship between employers and unions defies useful generalization. The nature of the powers, the myriad elements which compose the powers, the factors which influence the use of power, and the extent to which its use affects the interests of persons not party to the industrial dispute, are variables the consideration of which must enter into an evaluation of the limitations imposed by the Trade-unions Act on free action of potential protagonists. What the legitimate interests of the parties are, and what limitations on freedom of action in the pursuit of those interests are commanded by the public interest, may be expected to be subjects of extensive controversy. It would be surprising if views on the merits of the Act did not differ widely.

It is not the purpose of this article to tender an opinion on how these issues of freedom and power should be resolved, for this is intended to be an essay on law,[177] not politics. But perhaps a brief prognosis may be permitted. Employer-union relationships are governed far more by the economic forces at work within an industry than they are by law. The private law-making of the collective agreement affects the parties far more extensively than does the public law-making of a statute. For instance, we have seen in

[177] The essay does not attempt to deal with two complex matters of law: the enforcement of judgments against unions, and the constitutional issues of whether the Act is valid at all under the British North America Act and, if so, whether it is applicable, in whole or in part, to disputes falling within the compass of the federal Industrial Relations and Disputes Investigation Act R.S.C., 1952, c. 152.

recent years a significant growth in industry-wide bargaining beyond the framework of the statutes. Again, the contents of collective agreements have steadily expanded, and today they offer to employees a security—in the form of what are misdescribed as "fringe" benefits, and union rights clauses—which owes little or nothing to statutes. The status of the collective agreement has grown steadily in the eyes of the parties, as distinct from the growth of its status in law; and arbitration has become accepted as a suitable forum for settling disputes during the term of collective agreements, without resort to litigation or self-help. The principle of self-determination still governs the creation and administration of the collective agreement. The right to strike in the course of collective bargaining prevails. We may, as a consequence, well see emerging in collective agreements, clauses dealing with the very matters to which the Trade-unions Act is directed: perhaps a measure of "contracting out" of liabilities, and a further shift from litigation to arbitration for settling differences. I suspect the *de facto* will win over the *de jure*: whatever the conflict between employers and unions, their essential interdependence will prevail within the framework of the law.