SECONDARY PICKETING

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It is remarkable that in the welter of labour cases decided in Canada in the past decade and a half there has been no definitive pronouncement on the lawfulness of secondary action by unions. By secondary action I mean the exertion of economic pressure, either through picketing or some other medium, on an employer or other person, to induce him in turn to use his influence, usually of an economic kind (for instance, the maintenance or severance of trade relationships, contractual or otherwise), on an employer with whom the union is engaged in a labour dispute.

England has had its *Quinn* v. *Leathem*,[1] its Trade Disputes Act,[2] its *Sorrell* v. *Smith*,[3] its *Thomson* v. *Deakin*.[4]

In *Quinn* v. *Leathem* a union sought to oblige an employer to replace his employees with members of the union, by threatening to call a strike of employees of a customer with whom the employer enjoyed a favourable trade arrangement. The union's action, if successful, would have put the plaintiff's employees out of work. Exercised by what appeared to them as monstrous unreasonableness on the part of the unionists, and in part at the risk of judicial dignity (a sense of anger and impatience comes through the lines of Lord Macnaghten's opinion even after sixty-four years)[5] the law lords upheld a jury verdict and judgment against the defendants in a decision that sired the modern doctrine of civil conspiracy. This doctrine is stated in the headnote to *Sorrell* v. *Smith*[6] as follows:

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[1] [1901] A.C. 495. [2] (1906), 6 Edw. 7, c. 47. [3] [1925] A.C. 700.

[4] *D. C. Thomson & Co. Ltd.* v. *Deakin et al.*, [1952] Ch. 646, 666.

[5] *Supra*, footnote 1, esp. at p. 511. The denial by the union of a *locus poenitentiae* to those injured by the union's position in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch et al.*, [1942] A.C. 435, although deplored by Viscount Simon, did not affect the outcome of the litigation in favour of the unionists once the House of Lords concluded that the object of the boycott was the self-interest of the defendants: see pp. 440-1.

[6] *Supra*, footnote 3.

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.

Following upon a detailed study of the English, American and Canadian cases, Professors Kennedy and Finkelman concluded, in a monograph published in 1933,[7] that the law of three decades ago supported, *inter alia*, the following propositions:

iv. To injure another through a combination is unlawful, unless there exists just cause or excuse. In this connection "just cause or excuse" appears to mean some benefit to the combination and this apart from intent to injure.

v. Whatever may be the case in criminal law, a combination, whose "main or ulterior" purpose is to injure, is unlawful, and incidental benefit to the combination may be no excuse.

vi. The combined action of several individuals, doing what each might lawfully do in his individual capacity, will acquire a delictual character, if there is a common intent to injure. The courts seem to have feared that a number of persons in combination may coerce or annoy where one person might not.

The reaction in England against the decision in *Quinn* v. *Leathem*[8] and other labour cases of the period was immediate. It resulted in the appointment in 1903 of a Royal Commission on Trade Disputes and Trade Combinations, and the enactment by Parliament in 1906 of the Trade Disputes Act.[9] The statute declares, in brief, that where acts are done in contemplation of furtherance of a trade dispute, such acts are not actionable by reason only of their being done in combination; communicating information and persuading persons not to work are lawful; and acts that induce breaches of contracts of employment and interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills, are not actionable. In addition, the statute prohibits actions against unions and their members in respect of any tortious act alleged to have been committed by or on behalf of the trade union. The statute thus gives the green light to secondary economic action by unions in support of a trade dispute. This latter term is given a wide definition.

In examining the lawfulness of secondary boycotts in the newsvendors' war that resulted in *Sorrell* v. *Smith*,[10] the House of Lords found occasion to restate the doctrine of civil conspiracy. In so doing they gave emphasis to the fact that the doctrine requires a determination of the object or purpose which the combination

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[7] The Right to Trade (1933), pp. v and vi.
[8] *Supra*, footnote 1.
[9] *Supra*, footnote 2.
[10] *Supra*, footnote 3.

was pursuing.[11] The Lord Chancellor in *Sorrell's* case states the law thus:[12]

> I deduce as material for the decision of the present case two propositions of law, which may be stated as follows: (1) 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. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. The distinction between the two classes of cases is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken.

The latest major development in England on the question of secondary action is *D. C. Thomson & Co. Ltd.* v. *Deakin et al.*[13] The General Secretary of the Transport and General Workers' Union instructed a regional secretary in general terms to assist the strike of members of a printers' union employed at the Thomson Company. The strike resulted from the company's policy that its employees not accept union membership. Members of the Transport union employed at Bowaters indicated a reluctance to handle goods consigned under contract of supply to Thomson. Bowaters did not press its employees for performance; as a result the contract of supply was broken. Thomson failed in an action against Deakin for damages for inducing breach of contract, principally because it could not be brought home that the defendant advocated unlawful means in the assistance to be given the printers' union, or directly sought a breach of contract, or otherwise did anything he was not entitled to do.[14]

The foregoing constitute the leading juristic events reflecting attitudes to the status of secondary economic action by unions in England. They indicate a marked judicial aversion to secondary action at the end of the nineteenth century, a reversal of the law

[11] The clear recognition of problems attendant upon the presence of mixed objects had to await the *Crofter* case (*supra*, footnote 5), but that case is not quite an instance of secondary action.

[12] *Ibid.*, at p. 712.

[13] *Supra*, footnote 4.

[14] In *Temperton* v. *Russell et al.*, [1893] 1 Q.B. 715 a union was in dispute with an employer who was not adhering to a union rule with regard to building operations. The union sought to put pressure on the employer by inducing the plaintiff supplier to cut off supplies. When the plaintiff refused to cooperate the union induced persons to break their contracts of supply with the plaintiff. The Court of Appeal held that an action was maintainable for inducing breach of contract and for conspiracy to injure by preventing the creation of contracts. Seven years later the judgment was deprecated in the House of Lords in *Duke of Bedford* v. *Ellis et al.*, [1901] A.C. 1, at pp. 8, 10 and 18, but only on the ground that the *Temperton* case appeared to limit the applicability of the representative form of action under Order XVI, rule 9, to actions relating to proprietary rights.

by Parliament, and a subsequent refinement and tempering of the common law in cases to which the legislation did not apply.

The United States has had its Clayton Act,[15] its *Duplex* case,[16] its *Giboney* case,[17] its Taft-Hartley Act,[18] its Landrum-Griffin Act.[19]

In 1914, after a long history of labour strife, the United States Congress passed the Clayton Act. It was this statute that declared that "the labour of a human being is not a commodity or article of commerce"; the Act was designed to limit the use of the injunction to the protection of property, and to protect unions from the application of the Sherman Anti-trust Act[20] of 1890 as had occurred in the *Debs*[21] case of 1894. Section 20 in part prohibited injunctions against ceasing to patronize or to employ any party to a dispute concerning terms or conditions of employment, or from recommending, advising, or persuading others by peaceful and lawful means so to do. Subsequently, in *Duplex*,[22] the Machinists' union, in seeking among other things to establish a closed shop in the plaintiff's factory in Michigan, engaged in an abortive strike. The union then sought to put pressure on the plaintiff in New York, where the market for its machinery was high, by threatening customers in New York with loss and sympathetic strikes if they purchased or installed the plaintiff's machines. The Supreme Court of the United States allowed an injunction for the reason that "to instigate a sympathetic strike in aid of a secondary boycott cannot be deemed a 'peaceful and lawful' persuasion" within the meaning of those words as used in the Clayton Act.[23] The case did not pass without a strong dissent from Mr. Justice Brandeis (Holmes and Clarke JJ. concurring) on the ground that both the common law and the Clayton Act "declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest".

In the *Giboney* case[24] the Teamsters' union sought to organize ice pedlars in Kansas City, Missouri. The Empire Storage and Ice Company refused the union's request not to supply ice to non-union pedlars. As a result the union picketed the ice company, whose employees refused to cross the picket line. An injunction was granted and upheld in the Supreme Court of the United States

[15] (1914) 38 Stat. 731, 15 U.S.C., s. 17; 38 Stat. 738, 29 U.S.C., s. 52.
[16] *Duplex Printing Press Co.* v. *Deering* (1921), 254 U.S. 443.
[17] *Giboney* v. *Empire Storage and Ice Co.* (1949), 336 U.S. 490.
[18] (1947), c. 120, 80th Cong., 1st Sess., 61 Stat. 136.
[19] (1959), P.L. 86-257, 86th Cong., 1st Sess., 29 U.S.C., c. 7.
[20] (1890), 26 Stat. 209.
[21] *United States* v. *Debs* (1894), 64 Fed. 724.
[22] *Supra*, footnote 16.
[23] *Supra*, footnote 15.
[24] *Supra*, footnote 17.

for the reason that "the purpose of the picketing was to compel Empire to become a party to a combination in restraint of trade in violation of" a Missouri statute. Meanwhile, Congress enacted the Taft-Hartley Act[25] of 1947 which prohibits secondary picketing and secondary boycotts. The loophole of the "hot cargo" clause—a clause in a collective agreement providing that employees shall not be required to handle goods of other employers who are engaged in labour disputes or who have been declared "unfair to organized labour"—was closed in the Landrum-Griffin Act[26] of 1959 by a section that prohibits the execution of "hot cargo" agreements. There are, however, two exceptions. The construction industry is exempted from the prohibition against voluntary on-site "hot cargo" agreements; and the garment industry, because of integrated production processes, is exempted from the prohibition against "hot cargo" agreements generally as well as the secondary boycott and the secondary strike for recognition. Hence "hot cargo" agreements in the garment industry may lawfully be enforced, although not obtained, by strikes, threats and other coercion.[27]

Thus the judicial perception in the United States of the lawfulness of secondary action by unions hews closely in result to that in the United Kingdom at the end of the last century, albeit that the reasoning in the American decisions involves a consideration of provisions in the American constitution relating to freedom of speech and the declaration against the deprivation of property without due process of law. However, in sharp contrast to parliamentary policy, present congressional policy in the United States is, except in respect of two industries, the antithesis of that reflected in the English Act of 1906.

In light of the directness with which the subject has been considered by the highest courts and legislative bodies in England and the United States, it is all the more remarkable that Canada has had no case in which a court has considered the lawfulness of secondary action unrelated to facts which coloured the opinions in the judgments; nor, with the exception of the British Columbia Trade-unions Act of 1959,[28] is there any civil statute addressed to the subject. Further, most of the cases that have reached the law reports deal with secondary action in the form of picketing,[29] and

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[25] *Supra*, footnote 18. [26] *Supra*, footnote 19.

[27] National Labour Relations Act, s. 8(e). See CCH 1961 Guidebook to Labor Relations, pp. 239-240.

[28] R.S.B.C., 1960, c. 384.

[29] The major exception is *Verdun Printing and Publishing Inc.* v.

there is therefore no direct lead to what might be the view of the courts respecting other forms of secondary action.

Because the courts may very well view other forms of secondary action in a different light from that in which they view picketing, it may be useful at this point to set down the characteristics of picketing as I expect they appear to the courts. Ingredients common to the act of picketing appear to be the physical presence of persons called pickets, the conveying of information, and the object of persuasion. The presence may take many forms, from one or two persons, comparatively indifferent to the outcome of the dispute, in the vicinity of the entrance to the picketed premises, to large numbers calculated physically to prevent ingress and egress. The conveying of information also may take many forms, from the medium of handbills, armbands, placards and sandwich boards to sound trucks, and from the recitation of events to the conveying of exhortative messages. The object of persuasion appears to remain constant, to induce a boycott of the picketed operations by employees, customers, suppliers and others on whom the employer is dependent for the successful operation of his enterprise.

Picketing is ineffective if the persuasive element fails to induce the anticipated boycott. The trade union movement at large has therefore found it necessary and expedient to support the persuasion with sanctions. This is the element of picketing which is perhaps the most difficult to identify, and is the element which provides the greatest variable in forms and circumstances of picketing. It is also this element of sanction which, I suspect, has caught many instances of picketing, and to no mean extent secondary picketing, in the net of unlawful conduct.

Fundamentally, the trade union movement has over a long span of time developed among its members the ethic that entering picketed premises is a cardinal sin against organized labour; and it has sought to extend the acceptance of the ethic outside the labour movement to strengthen the boycott which the picketing signals. The ethic is recognized in a clause frequently to be found in collective agreements that refusal to cross a picket line (sometimes specified as lawful, sometimes not) will not be considered a breach of the collective agreement; this proposition is supported by a specific section of the Taft-Hartley Act.[30] But the ethic is by no means absolute. For instance, picketing in support of a union

L'Union Internationale des Clicheurs et Electrotypeurs de Montréal, Local 33, et autres, [1957] S.C. 204 (Que.).

[30] *Supra*, footnote 18; see s. 8(b)(4) of the National Labor Relations Act.

in a jurisdictional dispute with another union may well produce a confusion of attitude within organized labour; picketing by a union in disfavour with the national, provincial or local congress of labour unions is not likely to be respected by members of the congress; and the success or failure of certain instances of picketing may be determined by whether one union alone—the Teamsters'—will or will not refuse to transport goods to or from the premises which are being picketed. Probably in part at least because the justification of the ethic is not universally accepted—certainly not by those antipathetic and presumably not by those indifferent or apathetic to the cause which the picketing is invoked to support—and because once the effectiveness of the picketing is destroyed the cause may be lost, sanctions recognizable independently of the ethic have been developed in support of it. These sanctions may take many forms, depending on the ingenuity of the pickets and the opportunities or temptations that come their way. But by and large the sanctions seem to fall into two groups. First is the apprehension of ill repute, which such terms as "strikebreaker", "scab", "blackleg", "company fink", and others less suitable for publication, and such events as the noting of license numbers, the taking and publishing of photographs, and the publishing of "blacklists" (a deliberately evocative term in itself) are calculated to produce. Second is the threat or infliction of bodily harm or property damage. The concept of the picket "line" with its implication of "cross at your peril", in execution sometimes imaginary[31] and sometimes not,[32] the glaring at potential customers,[33] the stopping and warning of persons against entering the picketed premises,[34] threats of throwing stones and wielding clubs,[35] the stabbing of persons with needles,[36] the blocking of public highways,[37] and threats of physical violence to public officials,[38] are all events recorded in Canadian law reports within the past eleven years. This is by no means to suggest that all acts of picketing

[31] For instance, *Aristocratic Restaurants (1947) Ltd.* v. *Williams et al.*, [1950] 4 D.L.R. 548 (B.C.S.C., trial).

[32] For instance, *Poje* v. *A.-G. B.C.* (1952), 6 W.W.R. (N.S.) 473 (B.C.S.C., trial).

[33] For instance, *Hammer* v. *Kemmis et al.* (1956), 3 D.L.R. (2d) 565 (B.C.S.C.).

[34] For instance, *Mostrenko* v. *Groves*, [1953] 3 D.L.R. 400 (B.C.S.C.).

[35] For instance, *A. L. Patchett & Sons Ltd.* v. *P.G.E. Railway Co.* (1956), 2 D.L.R. (2d) 248.

[36] For instance, *General Dry Batteries of Canada Ltd.* v. *Brigenshaw et al.*, [1951] 4 D.L.R. 414 (Ont. H.C.).

[37] For instance, *Hallnor Mines Ltd.* v. *Behie et al.*, [1954] 1 D.L.R. 135 (Ont. H.C.).

[38] For instance, *Poje* v. *A.-G. B.C.*, *supra*, footnote 32.

involve the threat or the commission of bodily harm or property damage. But these events, and others falling within the memory of those who must adjudicate the legality of picketing, must make one realize that though there clearly is such a thing as peacetul picketing,[39] the line between order and disorder may require a calculation more sensitive than the machinery of the administration of justice can reasonably be expected to produce.[40] As in the expression "scratch a Cossack and you find a Tartar", so some may view peaceful picketing as a cultivated aberration from the real thing. I do not suggest that this is the present judicial view of picketing in general; but I do suggest that unlawful conduct in the manner in which picketing is executed has had and may be expected to have a marked effect on the determination of the legality of secondary picketing as such.

Indeed, in most of the recent cases involving secondary picketing there have been found elements of trespass, assault, nuisance and defamation, torts which are not inherent in the circumstances of secondary picketing, and which therefore should not be taken to have a permanent influence on the legal characterization of the conduct. This, however, cannot be said of the tort of inducing breach of contract in the *Thomson* v. *Deakin*[41] sense, or of civil conspiracy in the *Quinn* v. *Leathem*[42] sense. Further, there has recently been revived the notion that interference with a person's right to trade is wrong unless justified.[43] The element of justification has been expressed to be common also to the determination whether there has been committed the torts of civil conspiracy and inducing breach of contract.[44]

One of the elements that must be present in the tort of inducing breach of contract is that the defendant intend to do damage, not in the sense of malice or ill will, but in the sense of aim or purpose.[45]

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[39] *Aristocratic Restaurants (1947) Ltd.* v. *Williams et al.*, [1951] 3 D.L.R. 769 (S.C. Can.).

[40] Rand J. in *A. L. Patchett & Sons Ltd.* v. *P.G.E. Railway Co.* (1959), 17 D.L.R. (2d) 449, stated at p. 452: "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."

[41] *Supra*, footnote 4.

[42] *Supra*, footnote 1.

[43] *Dusessoy's Supermarkets St. James Ltd.* v. *Retail Clerks Union, Local 832, et al.* (1961), 30 D.L.R. (2d) 51 (Man. Q.B.). This case also contains an extremely interesting redetermination of the legal status of unions in Manitoba.

[44] The *Crofter* case, *supra*, footnote 5, and the *Thomson* case, *supra*, footnote 4.

[45] The *Thomson* case, *ibid.*, at p. 676.

It is trite law that a person must be taken as intending the direct consequences of his act.[46] Where all else is proven against a defendant, there may yet be justification for inducing breach of contract, based on exceptional circumstances in which the law will, on grounds of policy, give relief from liability.[47] The same kind of concept runs through the tort of civil conspiracy. In the *Crofter* case[48] the law lords recognized that the objects of a union in conflict with an employer may be mixed: to impose harm on the employer if necessary, but to use that threat or infliction as a means of improving the lot of those whom the union represents. The task before a court in these circumstances is to determine the predominant object; and although malice and unreasonableness of method may be evidence of wrongful object, a legitimate object will not be converted into an illegitimate one by elements of malevolence or unreasonableness.[49] As was pointed out by Davey J.A. in *Hammer* v. *Kemmis*,[50] in a dissenting judgment which, it is submitted, correctly states the law to be found in the English precedents,

> Unreasonable demands and infliction of disproportionate damage may be some evidence of bad faith and that the ostensible purpose of the combination was not its real purpose; but apart from its evidentiary value, it will not make a non-actionable conspiracy actionable; it is not for the courts to say whether a union's demands are reasonable or expedient; or whether they are well calculated to effect the proposed object. That is a matter for the union to determine. Nor, generally speaking, is a union required to consider the interests of the employer, and it is not likely to do so except so far as they coincide with its own interests . . . . Regrettable as the respondent's misfortune may be, there are ample legitimate reasons from the union's point of view for its policy, which prevent an inference of bad faith or ulterior purpose being drawn from it, harsh and unreasonable though some may think that policy to be.

The legitimacy of the object is said to provide justification, or just cause or excuse, for the harm inflicted by the combination. (It is assumed throughout that the combination does nothing that would be unlawful if done by a single individual.) Much the same concept of justification seems to apply to interference with freedom to trade: if the object is legitimate the harm is justified.

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[46] For instance, Viscount Simon in the *Crofter* case, *supra*, footnote 5, at p. 444.

[47] For instance, Viscount Simon *ibid.*, at p. 442 gives the illustration of the father who counsels his daughter not to carry out a promise of marriage to a rogue.

[48] *Supra*, footnote 5.

[49] Lord Wright in the *Crofter* case, *ibid.*, at p. 469.

[50] (1957), 7 D.L.R. (2d) 684, at pp. 692, 693.

Obstacles to the application of the concept of justification as an element in these torts are semantic, evidentiary and emotional. What does the word justification mean, what kind of evidence is really relevant to a determination of the object of the combination, and to what extent is the court's disapproval of the consequences of the action of the combination a probable or inevitable element in determining whether the action of the group is justified? If in the opinion of the viewer the object pursued by the combination is less important than the interest harmed by the combination, the action of the combination seems "unjustified". If the harm caused appears out of proportion to the gain, the conduct of the combination seems unreasonable and therefore "unjustified". If the combination pursues its object in a spirit of antagonism or in an atmosphere of discourtesy it appears malicious, and therefore wilful, and therefore unreasonable, and therefore "unjustified". If the conduct contains acts in themselves unlawful, those acts must be taken to be intentional; therefore the object appears to be unlawful, and hence "unjustified". These sequences of reasoning appear to be present in varying degrees in virtually all cases of secondary picketing in Canada in recent years. It is submitted that in the determination of the lawfulness of secondary picketing the concept of justification as stated in such cases as *Crofter*[51] and *Thomson*[52] has given way to a determination of the lawfulness of secondary picketing according to the evaluation of the courts as to whether the interests prejudiced by the picketing should prevail over the interests which the picketing is calculated to advance, and that this evaluation has been confused, disguised and complicated by the invocation of the common law relating to civil conspiracy, inducing breach of contract and interference with favourable trade relationships, by the attribution of motive stemming from the invocation of pejorative adjectives, and from inferences based on tortious elements in the manner in which the picketing was being carried out.

Picketing is necessarily calculated to cause harm. The object of the union fostering the picketing is to induce the employer to come to terms with it over those features of the employment relationship in dispute, as being preferable to the economic disadvantage to the employer which the picketing entails. That the lawfulness of this kind of group action by employees vis-à-vis their employer is well recognized is evidenced by the judgment of the Supreme Court of Canada in the *Aristocratic Restaurants* case.[53]

[51] *Supra*, footnote 5. [52] *Supra*, footnote 4. [53] *Supra*, footnote 39.

Indeed, that case also held that it was lawful for the union to picket other operations of the same employer.[54] The courts appear to regard this latter action as justified by the obvious pursuit of the union's self-interest which has come into conflict with the interest of the employer. That is, the economic pressure entailed in the picketing is so directly related to the interest of the union and the identity of the employer as to fall within the area of just cause or excuse for the harm which flows from the action. However, where the union applies that form of economic pressure against others, with a view to exerting pressure on the employer through those others, the harm (real or threatened) to those others does not appear to be viewed by the courts as being justified by the fact that the union is pursuing its self-interest. This view has also been taken of picketing against a subsidiary of the employer other than a wholly-owned subsidiary,[55] and presumably would be applicable in respect of a parent company other than an "exclusive" parent.

Evidence that Canadian courts are of the view that the interests of the union should subserve the interests of the person through whom the union seeks to place economic sanctions on the disputant employer may be extracted from comparatively recent decisions in the *General Dry Batteries* case,[56] the *Pacific Western Planing Mills* case,[57] the *Patchett* case,[58] the *Verdun* case,[59] the *Sauvé Frères* case,[60] the *Pacific Coast Terminals* case,[61] and *Dusessoy's* case.[62] None of these cases, however, is completely free of all unlawful

[54] This right was upheld under s. 3 of the British Columbia Trade-unions Act in *Taylor, Pearson & Carson (B.C.) Ltd.* v. *Retail, Wholesale & Department Store Union, A.F.L.-C.I.O. Local 535* (1961), 30 D.L.R. (2d) 367, and *F. W. Woolworth Co. Ltd.* v. *Retail Food & Drug Clerks Union, Local 1518* (1961), 30 D.L.R. (2d) 377. At the time of writing (January, 1962) the latter case is being appealed. This circumstance of picketing would seem to fall half-way between primary and secondary picketing. The right extended by the *Aristocratic* case could give a union a powerful economic lever, depending on the corporate organization of an industry.

[55] *Producers Sand & Gravel Co. (1929) Ltd.* v. *Vancouver Island Drivers Division of the Canadian Brotherhood of Railway Employees* (unreported), referred to in *Dusessoy's* case, *supra*, footnote 43, at p. 64.

[56] *Supra*, footnote 36.

[57] *Pacific Western Planing Mills Ltd.* v. *I.W.A. et al.*, [1955] 1 D.L.R. 652 (B.C.S.C.).

[58] *A. L. Patchett & Sons Ltd.* v. *P.G.E. Ry. Co.* (1956), 2 D.L.R. (2d) 248 (B.C.S.C.), (1957), 23 W.W.R. 145 (B.C.C.A.), (1959), 17 D.L.R. (2d) 449 (S.C. Can.).

[59] *Supra*, footnote 29.

[60] *Sauvé Frères* v. *Amalgamated Clothing Workers of America et al.* (1959) CCH Canadian Labour Law Reporter, para. 15,243 (Que.).

[61] *International Longshoremen's Union* v. *Pacific Coast Terminals Ltd.* (1960), 21 D.L.R. (2d) 249 (B.C.S.C.).

[62] *Supra*, footnote 43.

element apart from the circumstance that the union was engaged in secondary action. But they are the best available indication of the orientation of judicial opinion on the subject of secondary picketing.

In the *General Dry Batteries* case the union engaged in what appears to have been an unlawful strike. The picketing included threats of violence, acts of assault, and massing of pickets that prevented access to the premises. McRuer C.J.H.C. upheld the right of the union to picket in support of an unlawful strike (a proposition not universally accepted as good law)[63] and enjoined the unlawful elements in the manner in which the picketing was being conducted. The following passage from his lordship's judgment, so far as it is applicable to secondary picketing, is *obiter*:[64]

> I am not at all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so that he may capitulate in the dispute.

In the *Pacific Western Planing Mills* case the International Woodworkers of America went on strike against the lumber industry in the northern interior of British Columbia in 1953. The union held separate certifications throughout the industry, and at a number of plants, including Pacific Western, the employees voted against strike action. But the union picketed operations indiscriminately, the pickets wearing armbands or placards indicating, falsely in some cases, that the plants were on strike. One such plant was that of the Pacific Western Company. The picketing was peaceful in form. In denying a motion to dissolve an injunction against picketing, the trial court observed:[65]

> . . . the obvious purpose of establishing a picket line adjacent to the plaintiff's premises, under the circumstances here, was to induce or persuade the employees of the plaintiff to quit work. In other words to break their contracts of employment with the plaintiff, to refuse to work for the plaintiff and to leave its employment. To induce or persuade the plaintiff's employees to break their contract of employment is *per se* an unlawful act, a tortious act . . . . Clearly it would seem as matters now stand a strike on their part would be unlawful, and so is the attempt by the defendants to persuade or induce them to commit

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[63] The cases are collected in my book on The Labour Injunction in British Columbia (1956), pp. 48-61 and The British Columbia Trade-unions Act, 1959 (1960), 38 Can. Bar Rev. 311.

[64] *Supra*, footnote 36, at pp. 419-20.

[65] *Supra*, footnote 57, at pp. 655 and 656.

this unlawful act unlawful . . . . Further the information displayed on a placard by the defendants here was not true.

In distinguishing the *Aristocratic* case, his lordship stated:[66]

These other units were under the same control, operation and ownership as the unit where the trouble arose, and further the act of the defendants was not *per se* unlawful.

The *Patchett* case arose out of the same strike, and went through three courts. The Patchett company also was picketed by persons falsely alleging that the employees were on strike. One of the points on which the courts differed widely was over the form of the picketing, but there is a remarkable consistency of view respecting the nature of the secondary picketing. The trial judge observed:[67]

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

One member of the Court of Appeal remarked:[68]

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.

Another member of the Court of Appeal stated:[69]

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.

This view was confirmed in the Supreme Court of Canada:[70]

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

In the *Verdun* case, the union engaged in a strike against the plaintiff company and picketed the premises. The action was ineffective, and to intensify the pressure on the plaintiff, the union, by mail and orally, asked persons having business with the plaintiff, both suppliers and customers, to sever their business relationships. This action was effective, resulting, among other things, in curtailment of the publication of certain newspapers in the plaintiff's plant and the consequent loss of advertising to certain customers of the newspaper. The plaintiff moved for an interlocutory injunction. The court, after noting that the action of the union extended beyond mere striking to the imposition of a boycott, continued:[71]

The Court is prepared to admit that a certain type of boycott to promote the interests of a group can be legal, such as an agreement

[66] *Ibid.*, at p. 656.
[67] *Supra*, footnote 58, at p. 464, Locke J. quoting from the transcript of the trial.
[68] *Supra*, footnote 58, at p. 158. [69] *Ibid.*, at p. 165. [70] *Ibid.*, at p. 453.
[71] *Supra*, footnote 29, at p. 206 (unofficial translation).

> among members of a union to cease doing business with a person against whom concerted action is directed. That is what is called a "primary boycott". The actions of the respondents are not of this nature. They are of the nature of a "secondary boycott", action intended to harm someone by forcing others to harm him. It appears to the Court that this is exactly what the respondents have done in this case. Ascertaining that the strike of the printing shop was having no result, the union made recourse to shameful and harmful practices, in interfering with third persons in their business relations with the plaintiff in order to stop those relations. Some attempts were made to turn clients away from the plaintiff's printing shop. The plaintiff and certain of his customers were put on a blacklist. The interference with the advertising agents and the employers of other printing shops is a process of intimidation. Persons co-operated with the respondents, whether to help or to hinder the strike, from fear of seeing themselves harmed in their turn. As certain of those affected are national organizations, one can readily see the considerable harm they feared from failure to co-operate with the union. The plaintiff . . . has shown a sufficient *prima facie* case to warrant an interlocutory injunction.

The *Verdun* case became a precedent in the *Sauvé Frères* case in 1959. The union went on strike against a clothing manufacturer and sought to induce the plaintiff, an independent retail haberdasher, to discontinue selling the manufacturer's goods, a portion of which made up the plaintiff's trade, and to cancel contracts with the manufacturer. The method of inducement took the form of threats of reprisals, including picketing. When the plaintiff refused to co-operate, the union placed pickets at the plaintiff's premises, bearing signs which in size and colour of lettering were calculated to lead the public to believe there was a labour dispute at the plaintiff's operations.[72] The union was not certified for the manufacturer or for the retailer. The plaintiff applied for an interlocutory injunction. The court found that the primary object of the union's picket line was to interfere with the contractual relationships between the plaintiff and the manufacturer. His lordship then referred to the *Verdun* case as a general precedent, and allowed an interlocutory injunction to preserve the *status quo*, in part for the reason that the petitioner had established a *prima facie* right to the free exercise of its business, and in part for the reason that to accept the respondent's contentions would be to dispose of the case on its merits. In the course of judgment the court stated:[73]

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[72] This kind of misleading sign appeared in *Dusessoy's* case, *supra*, footnote 43, and in the *Woolworth* case, *supra*, footnote 54. In the former the signs contributed to the conclusion that the defendants were in a conspiracy to injure the plaintiff; in the latter the publishing of misleading signs was enjoined but the picketing was allowed to continue.

[73] *Supra*, footnote 60, at p. 11,706 (unofficial translation).

> After all, if this Court were to come to the conclusion that the petition should not be allowed, it would favour picketing that for reasons already stated is not fit for the attainment of the legitimate object which it seeks, namely, to dissuade the consumer public from purchasing a specific product.

In the *Pacific Coast Terminals* case the union entered upon a lawful strike against the British Columbia Shipping Federation. The plaintiff was not a member of the Federation, but its operation was adjacent to that of a Federation member. The union stationed pickets at the plaintiff's premises, and permitted employees of the plaintiff to enter if they carried permits issued by the union. The union then changed its policy to the issuing of permits only in respect of "non-controversial" cargo. The plaintiff obtained an injunction against picketing, and the union appealed. The judgment dismissing the appeal reads in part:[74]

> It is clear then the object of the defendants was to tie up on the plaintiff's warehouse operations in the hope that such tieup would assist in bringing about a settlement of the strike [a lawful strike against another employer] . . . . When the employees of the plaintiff were in effect permitted to continue in 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.

The latest reported instance of litigation relating to secondary picketing is *Dusessoy's* case.[75] The facts are complex, but I think their essentials may be stated as follows. The principal object of the Independent Grocers' Alliance Distributing Company, Canada, Limited, is to assist independent retail merchants to compete with others, principally chain stores. It's symbol is "IGA". The Codville Company, Limited, is the wholesale distributor of IGA products in Manitoba. Dusessoy's is an independent grocery, a franchise holder and sub-lessee of Codville, and in that sense is an IGA store; under the lease Dusessoy's is obliged to take IGA products, but is free to deal in other lines where IGA items are not available. About one-third of its products are IGA goods. Codville also supplies retail stores other than those in the IGA chain to about forty-five percent of its business. The Retail Clerks' Union was certified as the bargaining agent of certain Codville employees. It was not certified at Dusessoy's. On December 20th, 1960, the union went on strike against Codville. Codville at one time owned its own trucks; it subsequently hired trucks from an independent

[74] *Supra*, footnote 61, at p. 252. [75] *Supra*, footnote 43.

firm but employed its own drivers. When the strike occurred the trucking firm supplied drivers, under a new and apparently permanent arrangement. On the evening of the strike a union official urged a meeting of the Winnipeg and District Labour Council not to shop at IGA stores. At or about the same time a union business agent, one Desautels, in a telephone conversation, asked Dusessoy to urge Codville to settle the strike. This exchange ended on a note of sharp conflict, with the business agent threatening that pickets would appear at Dusessoy's premises and put him out of business. Within two days pickets appeared in the vicinity of stores in the IGA chain. Pickets at Dusessoy's bore a placard reading "Support Codville IGA Supply Depot Strikers Retail Clerks' Union Local 832". The placard was designed in size of letters and use of colours, similar to the placards in the *Sauvé Frères* case, to emphasize the words "Support IGA Strikers". Another placard read "Scab Labour Supplies IGA R.C.U. Local 832". Car stickers appeared, paid for by the union, reading "I Support The IGA Strike Codville", the last word being about one-eighth the height of the other words. The union published leaflets containing false statements indicating that IGA stores were under the direction of Codville and that they were being supplied with scab goods by strikebreakers. The trial judge found that the untrue statements were intended to deceive the public into believing that IGA employees were on strike, and, being calculated to inflict injury on the plaintiff in his trade relationships, were actionable. Pickets accosted car drivers approaching Dusessoy's parking lots and sought to induce them to move on; in doing so they blocked the entrance to the driveways and a public highway. This action was found at the trial to constitute a nuisance. There was also an incident constituting assault on Dusessoy, but nothing in the judgment respecting secondary picketing appears to turn on it. The plaintiff sued the union, two officers and eight pickets for damages and an injunction, claiming assault, nuisance, publication of false and misleading statements, inducing breach of contract (which was not pursued) and conspiracy to injure.

The invocation of the doctrine of civil conspiracy obliged the trial judge to form an opinion as to the purpose of the concerted action of the defendants. His lordship's conclusion is contained in the following paragraph:[76]

> The purpose was clearly to injure plaintiff and, through it, to punish Codville for not settling the strike in a manner satisfactory to the de-

[76] *Ibid.*, at p. 62.

> fendants; the fact that in the dispute there was no direct relationship between plaintiff or its employees and the defendants; the threats made by Desautels to Dusessoy; the deceiving stickers and placards; the untruthful statements contained in the leaflet; the rapid course of action taken by the union organization; the picketing, amounting to nuisance: all these taken together build up a case of wrongful purpose, namely, a conspiracy to injure plaintiff in its trade, for which the defendants are accountable.

With respect, the essential purpose of the defendants was not, on the evidence, to punish Codville, but to negotiate a collective agreement. The threats made by Desautels to Dusessoy in the telephone conversation conveyed in angry tones and hostile language the fact that the union proposed to engage in secondary picketing with the harmful consequences to Dusessoy inherent in it. Neither the deceptive and untruthful stickers, placards and leaflets, nor the nuisance caused by the pickets are inherent ingredients in secondary picketing. "The rapid course of action taken by the union organization" is evidence of nothing more than foresight. The only element in the "case of wrongful purpose" of lasting significance is the fact that there was no direct relationship between the plaintiff or its employees and the defendants.

The conclusion that the purpose of the defendants was to injure the plaintiff is a refinement of the facts that would be pointless but for the doctrine of civil conspiracy. What the defendants were trying to do is obvious: to gain a favourable collective agreement with Codville through economic pressure on certain of Codville's customers. Yet the doctrine of civil conspiracy requires a determination of a singleness of purpose vis-à-vis the customers that glosses over the fact that the defendant had a long-range purpose in relation to Codville quite inconsistent with ruining Codville's enterprise, as against the short-range purpose of using Dusessoy and others to put pressure on Codville; that there can be tremendous play in the dimensions of apparent motive through the impact of mood, as evidenced by the deterioration of the telephone conversation; that evidence of motive can be highly tenuous and is only in part representative of purpose; and that purposes in this area of human conduct can be selfish and altruistic, economic, social and political. The artificial singleness of conclusion demonstrates the awkwardness, indeed the ineptitude, of the doctrine of civil conspiracy in action in the circumstances of secondary picketing.

The judgment does not end with the conclusion respecting the purpose of the defendants, but continues to consider the merits

of secondary picketing *per se* (wrongly described twice over in the judgment as being a course of conduct of recent vintage):[77]

> By law plaintiff enjoys freedom of trade, an undeniable right just as strong as freedom of speech. That right of trade can only be curtailed in very peculiar circumstances for the good of the community as a whole and not only in the interests of a specific and clearly limited group. Plaintiff has a proprietary right to trade and to do business with persons or corporations of its choice — the more so when it has no dispute with anyone — and this right belongs to it unless the Legislature, by clear and unequivocal language, has interfered with it. That is not the case here.

This paragraph sets in juxtaposition freedom of trade and freedom of speech, and arrives at a conclusion that where they conflict the proprietary "right" to trade should prevail over the freedom of speech of a specific and clearly limited group unless the legislature prescribes otherwise. That conclusion reflects a fairly comprehensible proposition of policy, debatable though it may be, particularly to those whose conduct it curtails. It assumes that freedom of trade is a legal right, and that the freedom to trade of the individual proprietor should prevail over the freedom to persuade of a group of employees, presumably because, where the employees have no dispute with the proprietor, there is a greater public interest in the former freedom than in the latter. These points go to the heart of the question whether as a matter of public policy secondary picketing should or should not be permissible under the law. But the value of the judgment as a basis for considering the merits of secondary picketing is attenuated by the complete confusion of the event of secondary picketing with the other events not inherent in secondary picketing, as evidenced by the subsequent statement that:[78]

> In the present state of the law and in the absence of specific legislation on the subject, I feel that I am amply justified in disposing of the secondary boycott aspect of this case by my finding that it was part of the conspiracy to injure plaintiff in his trade.

The foregoing analysis of the Canadian cases has been calculated to demonstrate two qualities: first, that there is a fundamental judicial indisposition to secondary picketing, and second, that the characterization of secondary picketing as being unlawful on the basis of common-law principles as they stand at present presents a colourful confusion of fact, inference, assumption, law and policy that would be kaleidoscopic in quality had it the saving grace of internal order. I submit that a major reason for the con-

[77] *Ibid.*, at p. 63.

[78] *Ibid.*, at p. 66.

fusion is that where the common law has touched labour relations it has not managed to adjust to what it met. This in turn has been caused by the fact that just as the common law may have been about to adjust, statute law enunciated new legislative policy based in part on the assumption that unions were unlawful associations at common law.[79] But whatever the explanation, considerations of fundamental issues of policy seem to have given way in the cases to considerations of rules that either were inept in their application, such as the doctrine of civil conspiracy, or were developed to meet substantially different problems, such as the tort of inducing breach of contract,[80] and have not stood up well to the strain of adaptation.

The choice of remedy, I suggest, lies in two directions, the judicial and the legislative processes of law making. There are advantages and disadvantages in each.

The advantage of judge-made law over the product of the legislature lies in the very element of viability in the common law which seems so lacking in the cases relating to secondary picketing. The common law is capable of change and growth, and a proposition enunciated today is always subject to interpretation and modification in its application tomorrow. In contrast, the policy of a statute tends to crystallize, to harden, and when subjected to the

[79] Although the defendants in *Kuzych* v. *White et al.* unsuccessfully raised the defence that Kuzych could not pursue his claim for damages *etc.* for wrongful expulsion from the union in a court of law because unions at common law are in unreasonable restraint of trade ([1949] 4 D.L.R. 662), the argument would not have sounded strange to the Parliament that enacted the English Trade Union Act of 1871. This Act extended certain advantages to trade unions on the assumption that they were unlawful associations at common law (see, for instance, *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153, *Farrer* v. *Close* (1869), L.R. 4 Q.B. 602); unions found they had to establish themselves as unlawful at common law to obtain the benefits of the Act which, as a consequence, was amended in 1876 to remove the anomalous definition of trade union. Similarly, the finding of the Ontario High Court (McRuer C.J.H.C.) in *Reg.* v. *Canadian Pacific Railway Company* (1962), 31 D.L.R. (2d) 209, that strikes are lawful at common law would have sounded highly academic to those who were convicted, fined, jailed and transported under the English Combination Acts of 1799, 1800 and 1825, the Molestation of Workmen Act of 1859 and the various Master and Servant Acts, notwithstanding certain statements to the same effect in *R.* v. *Duffield* and *R.* v. *Rowlands* (1851), 5 Cox 404 and 436 and *R.* v. *Druitt* (1867), 10 Cox 592 (in each of which there were convictions) and, long after the enactment of the reform legislation of the 1870's, similar statements in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co. et al.*, [1892] A.C. 25, at p. 47, *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 538, *Jose* v. *Metallic Roofing Co. of Canada Ltd.*, [1908] A.C. 514, at p. 518, and *Newell* v. *Barker & Bruce*, [1950] S.C.R. 385, at p. 397.

[80] For instance, compare *Lumley* v. *Gye* (1853), 2 El. & Bl. 216 and *Bowen* v. *Hall et al.* (1881), 6 Q.B.D. 333 with the *Thomson* case, *supra*, footnote 4, and *Body et al.* v. *Murdoch et al.*, [1954] O.W.N. 334, 338, 515 and 658.

continual strain of change is in danger of developing fatigue; and this is so in spite of the myth expressed in the rule of interpretation that statutes are to be read as if they were always speaking.[81] The disadvantage, some would say the disqualification, of the common law is to be found in another great myth that it is not the proper function of judges to make or even to explain the law, but only to expound it. This view is frequently invoked to justify a judicial phobia against casting a judgment in the language of social policy, and would seem to explain in large part the stubborn adherence, against great obstacles of analysis, to classical heads of tort liability in the secondary picketing cases.

However, with all respect to the judgments in *Fender* v. *St. John Mildmay*,[82] it is submitted that the heads of public policy are not closed; they never have been and, so long as the common law is to continue its self-critical process of working itself pure—a process calculated not only to work out anomalies in the legal *status quo* but also to keep the law abreast of social change—the heads of public policy never will be closed. Random evidence of change in the common law in this century founded on the judicial view of public policy may be observed in the development of promissory estoppel, in the changing attitudes of the courts to standard form "contracts", in the determination of the limits of contractual freedom in the area of restraint of trade, and in the shifting view of the basis of liability for negligent acts. In this latter instance, Professor Fleming[83] puts in relief the issue of policy behind the question of the scope of legal liability for negligence: where do the values in our society dictate that the risk of loss should fall? The admonitions in the judgments in *Fender* v. *St. John Mildmay* against judicial inventiveness may have been a timely caution against the imposition of personal inclinations in the guise of sociological verities. But judicial creativeness exists as a phenomenon of the common law, and it seems appropriate to consider its proper role. Mr. Justice Cardozo[84] would limit the role to filling gaps in the common law, for these are areas where something must

[81] For instance, British Columbia does not have a Lord Chancellor, a Lord Chief Justice of the Court of King's Bench, a Lord Chief Justice of the Court of Common Pleas, a Lord Chief Baron of the Court of Exchequer, Senior Puisne Judges of each of the three last mentioned Courts, nor a Judge of Her Majesty's Court of Probate, in spite of section 3 of the Divorce and Matrimonial Causes Act, R.S.B.C., 1960, c. 118.

[82] [1938] A.C. 1. The elevation of Lord Denning to the House of Lords, two decades after this judgment, raises some doubt as to whether the view expressed in the *Fender* case will prevail in fact, if not in form.

[83] Fleming, J.C., The Passing of *Polemis* (1961), 39 Can. Bar Rev. 489, esp. at p. 520.

[84] The Nature of the Judicial Process (1921), p. 113.

be done as cases arise. But there are other areas that equally cry out for something to be done: they are areas that are so full of common-law propositions crowding and pushing at one another that none seems free to get the measure of its task. Here, if not a new garment, at least a refitting is called for, and if it is to bear the label of the common law it must by definition be bench-tailored.

If the task of restatement is not performed by the courts, it is open to legislatures to determine how the conflict in economic interests apparent in secondary picketing should be resolved. The advantage of law-making by the legislature on this subject is that a complex issue of policy should be determined in a political forum, as was done in one direction in England by the Trade Disputes Act of 1906,[85] and as was done in the opposite direction in the United States by the Taft-Hartley Act of 1947[86] and the Landrum-Griffin Act of 1959.[87] If legislative policy can so demonstrably take opposite positions, whatever a legislature may do may be expected to arouse controversy. It is not therefore surprising that the British Columbia Trade-unions Act of 1959,[88] which prohibits secondary picketing,[89] and which at present is the only provincial statute in Canada addressed to the subject, should have received such a mixed reception. It seems appropriate to note that a determination under the Trade-unions Act of the precise limits of secondary action of kinds other than that contained in the description of secondary picketing offered at the beginning of this article, must await judicial interpretation. It may also be noted that although a Select Committee on Labour Relations of the Ontario Legislature in 1958 recommended legislation that would have had the effect of outlawing secondary picketing,[90] legislation to that effect did not materialize. For those who deplore in principle legislative intervention in this area of the law, it may be appropriate to close with a quotation from Mr. Justice Brandeis' dissenting opinion in the *Duplex* case:[91]

> All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions

[85] *Supra*, footnote 2.
[86] *Supra*, footnote 18.
[87] *Supra*, footnote 19.
[88] *Supra*, footnote 28.
[89] It also limits the application of the doctrine of civil conspiracy in the following section:
"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." Similar provisions may be found in the English Trade Disputes Act of 1906, *supra*, footnote 2, s. 1, the Ontario Rights of Labour Act, R.S.O., 1960, c. 354, s. 3(1), and the Saskatchewan Trade Union Act, R.S.S., 1953, c. 259, s. 22.
[90] Recommendation 42, p. 41.
[91] *Supra*, footnote 16.

developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defence, may substitute processes of justice for the more primitive method of trial by combat.