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The Task Force on Industrial Relations-Picketing

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THE TASK FORCE ON INDUSTRIAL RELATIONS — PICKETING

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Picketing represents both a form of protest and the use of power. Historically it usually took place within the framework of a labour dispute. Now it is part of the arsenal of weapons of protest groups everywhere.

A picket line is not a formal abstraction. It is people, frequently under tension and in anger, demonstrating their views and their presence. It may be a demonstration of peace and tranquility, a picture of lazy indolence at the side of a plant gate in the summer sun, signs propped against cars, with a game of cards to pass the time. It may be a brutal, vicious knot of pickets, screaming their hate, literally and figuratively exploding into violence. It may also be a smouldering, sullen expression of determination or frustration, with wildness just under the surface. It may be the sad, gray pickets of the I.T.U. in front of the Star Building or the chanting, unruly mob at Tilco Plastics, or mothers with their kids in carriages protesting prices at Loblaws.

The Federal Task Force viewed picketing in the labour relations sense. Its Report seems not to recognize the narrowness of this focus. As I have noted, picketing is a form of social protest and a labour dispute is merely one of the locations where such a protest may take place. Indeed, in some instances, a labour dispute may generate the act of picketing while at a later stage other persons representing different interests will participate. For instance, the Tilco Plastics picketing was turned from picketing for the purpose of furthering a strike to a protest against the use of injunctions. In another strike at Thunder Bay against a retail store, striking employees were joined on the picket line by university students advocating the overthrow of a capitalist society. Thus there is an air of unreality in discussing picketing as merely another problem in labour relations.

The Task Force has stated that the law of picketing should be codified, that the common law of industrial torts should be repealed and that adjudication of matters under the code should be assigned to a reconstituted labour relations board. I have already commented briefly on the limitations of looking at picketing in this way. Nevertheless, before dealing with these matters in turn, some general comments are in order.

Labour Relations reflects the full range of human conflict. It deals not so much with conflicts between institutions but between people in a management role, people in the union and people on the production line who are required by law to recognize each other and to bargain with each other and who may detest each other for it. In many instances their difficulties are

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resolved by agreement; on occasion they are not. The end result of such a breakdown is usually a strike. The strike may be lawful or unlawful but it is invariably accompanied by picketing in some form.

As the late Mr. Justice Rand pointed out in his Report it is usually impractical for a company which employs more than perhaps 400 people at the location in question to try to obtain replacements for the strikers and to attempt to carry on normal operations. Therefore, unless a significant number of employees refuse to join the strike, most large plants are closed to all normal production work. A picket line at the plant then represents formal notice to the public that a strike is occurring and attempts to enlist their support. It also has the practical advantage of involving strikers in a form of activity against the company and to enable the union to keep track of the strikers and their activities. It also is a tangible expression of power to management and carries a clearly implied threat if management attempts to open the plant or move goods in or out. If, on the other hand, the company is small or if the company attempts to operate, then the picket line serves a completely different purpose. The picket line is then a physical barrier to impede workers from entering the plant and to halt the normal flow of parts, materials and products in and out of the plant that is being struck. In many instances, persons will refuse to cross a legal picket line even though the picketers are peaceful and respectful. This may be done out of self interest, directions from their own union or a legitimate sense of loyalty and sympathy towards the strikers. There are other persons who will attempt to cross the picket line. It is at this point that violence may flare and the conduct of picketers is converted from that of peaceful communicators of information to musclemen.

It is the purpose of the picketing that is important. If the pickets are primarily concerned with informing the public that a strike is taking place, there are many more effective ways of doing this than through the presence of a picket line. A struck plant buried inside some industrial quarter of a city is passed by only a tiny fraction of the public. Use of the media, on the other hand, would reach most people in the city. The fact of the matter is that most picket lines in labour disputes are established to physically force a company to close its operations or to let a company know in unmistakable terms of the possible consequences if the company desires to open its operations. In short, picketing is a club used to bring about a successful resolution of the strike. It is seldom, if ever, a pure use of the right to freedom of speech. If a public expression of view was desired it is hard to conceive of a more ineffective way to reach the public than by picketing except where violence takes place or some dramatic incident causes media reports on the matter.

Perhaps a word should be said at this point concerning the establishment of a picket line in order to require an employer to extend voluntary recognition to a union and to sign an agreement with that union. Such activity is common in the construction industry. Clearly, picketing for organizational purposes is an effort to avoid the necessity to obtain recognition through lawful channels under the Labour Relations Act. The purpose of the picketing, therefore, is

to apply economic force to an employer and to attempt to require him to do something he does not want to do and to circumvent the certification procedures under the Act.

The Federal Task Force has stated that the law of picketing should be codified. It is difficult to quarrel with this proposition in the abstract. Nevertheless, it raises a host of issues. What will the code say? Who is going to write it? What about the constitutional problems? Is it intended to cover picketing in the labour relations sense only or is it intended to more general use of picketing as a matter of civil (sometimes uncivil) demonstrations?

There is no question that the common law respecting picketing is somewhat unclear to say the least. Indeed, the word "picketing" does not appear in the Criminal Code or in the Ontario Labour Relations Act. The Code still uses that delightfully archaic phrase "watching and besetting". The Rand Report gives a most useful analysis of some of the problems inherent in framing a proper definition of picketing. Obviously, picketing in the sense of presenting oneself, with or without a written message, as a protest against a felt grievance must be preserved. The difficulty is that a picket line is a potent weapon. It is one thing if picketing is used by a union as part of its power bargaining with an employer. General Motors can take care of itself nicely, thank-you. But what if the union starts to picket a small parts supplier in another city whose employees are not members of the union and have no interest in the labour dispute. This was one of the questions before the Ontario Court of Appeal in the Hersees case where an independent retail store was picketed because of a strike against a manufacturer of certain goods sold by the store. How indiscriminately can picketing be tolerated? Surely, limits must be framed as to when picketing may take place and how lawfully picketing may be conducted. But what are these limits? Should they be fixed or should different conduct be allowed depending on the nature and circumstances of the dispute.

In a sense, the studies and the dialogue that would have to take place as part of the process of drafting and enacting such a code would serve an educative process. I suspect, however, that the process of devising an equitable code of picketing and adopting it through the normal legislative and political process will be extremely difficult. Both labour and management on this issue are bound to adopt partisan and emotional view points, as will the various political parties. Perhaps one starting point should be the public interest that is so often ignored in these matters. If this is held to be paramount, then the question becomes one of balancing the private interests of labour and management against the over-riding right of the public to a general protection against a breakdown in community order and security.

It would appear that the Federal Task Force envisages that the code would include provisions respecting the common law and industrial torts, at least in part. If the codified law is sufficiently broad, then it is likely that the common law of industrial torts would of necessity be repealed in respect of cases where the code applies. Whatever form the code may take it must reflect general public acceptability. In my view it should cover protests generally where picketing may take place. Even more importantly, it must

not be allowed to result from a political victory by either labour or management with the usual "public be damned" attitude. It must allow orderly protest through the act of picketing with safeguards against misuse. Since protest is part of the fabric of our times, it must reflect that fact and attempt to control it in the interest of society as a whole.

Assuming that a suitable codification of the law is possible, a further difficulty arises with respect to adjudication under the code. The Federal Task Force is of the view that the code should be enforced by a reconstituted Labour Relations Board which would have the right to issue Restraining and Mandatory Orders to replace the equity injunction now available in the Courts. It is difficult to be sure what is meant by a reconstituted Board. If the Task Force was directing its attention to the Canada Labour Relations Board it must be noted that only a very small percentage of labour disputes come within its jurisdiction. If it is anticipated that provincial boards would also have certain authority, would the same code apply across Canada? In view of the present political turmoil is this realistic? Would the Courts view the matter as one of criminal law and therefore appropriate only to a court of law? Assuming these difficulties are overcome, would the code be enforced by a labour relations board respecting only picketing in labour disputes? By "reconstitute" does the Task Force envisage a separate division of the board? If so, are these to be labour and management appointees on the board? Are they all to be legally trained? Will the code be enforced by the board itself acting in the role of a prosecutor as in the case of the National Labour Relations Board in the United States or in the advisory sense as is the practice before labour relations boards in Canada. While even the Federal Task Force views the existing board as inappropriate for this purpose we are left in the dark as to why and what the Task Force has in mind to replace it.

There is currently a theory among some persons who have studied this field that administrative tribunals by their very nature are better equipped to deal with labour relations matters than are the courts. In cases such as certification procedures this may well be true. In certain other matters, the proposition is questionable. It is argued, for example, that members of Labour Relations Boards have more day to day practical knowledge of labour relations matters and issues than do judges. Again, this is true in many instances and is one of the reasons for the appointment of side members to represent labour and management on the Board. In cases of picketing we are dealing with the balancing of civil interests and on occasion criminal issues as well. Judges spend most of their judicial time in making just such judicial balances and are in a position where they can concern themselves with questions of public interest policy. It is a meaningless generalization to say that judges are not in tune with the currents of thought of our times. Obviously, some are and some are not. So too with members of labour relations boards. Members of administrative boards, on the other hand, are appointed by governments and of necessity the boards in question and their policies are not independent of politics and of political pressure. I am also of the view that judges in Canada on the whole are held in much higher respect than many trade union people would have us believe. On the other hand, there is no doubt that revisions would have to be made to court practices and

procedure if the courts were to administer such a code. It might be necessary, for example, to appoint a separate division of the High Court to deal with labour relations matters. Provision would have to be made for expeditious hearing of such matters. On balance it would be my view that the courts (or a separate Labour Court) would be preferable to a labour relations board in matters of adjudication where any form of violence or taint of criminality is involved. With respect to other picketing issues, I would be more concerned with the calibre and breadth of mind of the individuals making the decisions than the more formal question of whether they were to be known as judges or members of a labour relations board.

Whatever body is responsible for the adjudication of the code, it is critical that the code have teeth. Restraining and Mandatory Orders are necessary to any adequate enforcement procedure. Presumably, the Federal Task Force envisaged that the adjudicating body would have wide discretion in issuing such orders. This poses many problems concerning procedure, proof and other ancillary matters.

The Federal Task Force has heard briefs and representations from many sources. It has studied these submissions, pondered and come to certain conclusions. With respect to the statement that is the subject of these remarks it has left unanswered (and perhaps unanswerable) many more questions than it has answered.