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Picketing of Private Homes: The Anomalous Peaceful Picketing Clause

WARREN K. WINKLER*

On the 18th of September, 1962, striking employees of the A. R. Clarke Company of Toronto were found guilty of the offence of watching and besetting. The city newspapers reported that Magistrate Graham had convicted two strikers, Donnelly and Brierly, because they peacefully picketed the homes of other employees of the company who refused to stop work when the strike was called.¹

The public policy salient in both federal and provincial labour legislation has been to foster stability in labour relations through collective bargaining.² Striking has been described as a continuation of collective bargaining³ and is a common law right which the Courts will protect.⁴ Peaceful picketing is the most familiar trademark of any strike, probably because the picket line is thought to serve such a variety of purposes. The picket line animates the quarrel and makes the strike more effective; the picket line communicates the information of the dispute to the rest of the community;⁵ the picket line enlists the support of independent parties⁶ and serves to identify people for the purposes of both the employer and the strikers; the picket line very often simply intimidates. In pursuance of all these

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¹ Toronto Globe and Mail, Toronto Telegram, Toronto Daily Star, Sept. 19, 1962; *Reg. v. Donnelly and Brierly*, an unreported decision of Magistrate Graham.

² *Oil Workers International Union, C.I.O.-C.C.L., Port Credit, Local 610 and Trinidad Leaseholds (Canada) Ltd., and International Union of Operating Engineers, Local 796*, (1949-54) C.C.H. L.L.R. P. 17,005 (O.L.R.B.). See also Woods and Ostry, *Labour Policy and Labour Economics in Canada* (1962), c. iv; [1960] 1 Ont. Leg. Ass. Deb. at p. 695. For the American position see Newman, *The Law of Labour Relations* (1953), pp. 1-12.

³ Reynolds, *Labour Economics and Labour Relations* (3rd ed. 1960), at p. 279.

⁴ *Regina v. Canadian Pacific Railway Co.* (1962), 31 D.L.R. (2d) 209, aff'd. (1962), 33 D.L.R. (2d) 30 (Ont. C.A.).

⁵ Finkelman, *The Law of Picketing in Canada*, (1937-38), 2 Univ. Toronto L.J. 67 at p. 69. See also Armour, *Picketing*, 57 C.C.C. 1 at p. 14. See also Tanenhaus, *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 U. Pitt. L. Rev. 397 (1952-53) at p. 417-18.

⁶ Carrothers, *Recent Developments in the Tort Law of Picketing*, (1957), 35 Can. Bar Rev. at p. 1005.

good, bad and doubtful objectives, picketing may be either lawful⁷ or unlawful, depending upon its form, object or result.⁸

In any discussion of legal policy one must always be cognizant of underlying social issues. A visit to the cellars of the law to examine the foundations of the criminal implications of picketing seems timely especially in view of the fact that a quarter of a century has now passed since the appearance of Professor Finkelman's exhaustive dissertation on this subject.⁹ During that time not only has the social milieu been recast but several significant legal landmarks have been passed which must now be taken into consideration.

Modelled after the English Conspiracy and Protection of Property Act¹⁰ the Canadian Criminal Code provides in section 366:¹¹

(1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing, . . .

(f) besets or watches the dwelling house or place where that person resides, works, carries on business, or happens to be, . . .

is guilty of an offence punishable on summary conviction.

(2) A person who attends at or near or approaches a dwelling house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

The words "watch and beset" have been taken by the Courts to define picketing¹² or at least are understood to include picketing. Picketing is a problem of social significance and has been analogized to free speech or the liberty of self-expression. As such, it may be

⁷ *General Dry Batteries of Canada Ltd. v. Brigenshaw et al.*, [1951] 4 D.L.R. 414 (Ont. H.C.); *Aristocratic Restaurants (1947) Ltd. v. Williams et al.*, [1951], S.C.R. 762, 3 D.L.R. 769 (S.C.C.); *Mostrenko v. Groves* (1953), 10 W.W.R. (N.S.) 519; *Grinnell Company of Canada v. Retail Wholesale and Department Store Union Local 535 et al.* (1956), 18 W.W.R. 263 (B.C.C.A.) *Hersees of Woodstock Ltd. v. Goldstein et al.*, [1963] 1 O.R. 36 (Ont. H.C.), rev'd. (Ont. C.A.) Feb. 26, 1963, unreported Mar. 15, 1963, *Union Nationale des Employes de Vickers v. Canadian Vickers Ltd.*, (1955-59) C.C.H. L.L.R. P. 15,187 (Que. Q.B.); *Borek v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local 311, et al.*, (1955-59) C.C.H. L.L.R. P. 15,106 (Que. Sup. Ct.); *A.-G. B.C. v. Ellsary et al.* (1959), 19 D.L.R. (2d) 453.

⁸ *Supra*, footnote 6.

⁹ *Supra*, footnote 5.

¹⁰ 38 and 39 Vict., c. 86 (1875).

¹¹ S.C. 1953-54, c. 51, s. 366. The section was first enacted in S.C. 1876, c. 37, s. 2. In 1892 the criminal law was consolidated in the Criminal Code and the peaceful picketing proviso (now 366(2)) omitted: S.C. 1892, c. 29, s. 523. At the instance of Canadian labour the clause was restored by S.C. 1934, c. 47, s. 12.

¹² *Res. v. Doherty and Stewart*, 86 C.C.C. 286 at p. 295; *Aristocratic Restaurants, supra*, footnote 7 at p. 786.

protected by the Bill of Rights¹³ as a civil liberty. However, the two recent cases of *Regina v. Gonzales*¹⁴ and *Koss v. Kohn*¹⁵ held that a general act such as the Bill of Rights cannot and was never intended to repeal a specific enactment without saying so expressly. Freedom of speech cannot be spoken of '*simpliciter*'; it cannot be unlimited because the interests of the community require that some limitations be placed upon it.¹⁶ It is in this light that the section of the Code must be read.

Where the picketing of private homes occurs there are definite conflicts of social interests. Should the rights of the individual to the peaceful enjoyment of his residence give way to the right of workmen to picket? Which liberty is to take precedence over the other;¹⁷ a problem most clearly raised where domestic employees are involved?¹⁸ Is there such thing as the 'sanctity of the home'?¹⁹

The subject matter to which section 366 must be applied lends itself to a highly emotional interpretation of the Act. Oliver Wendell Holmes Jr. once commented:

¹³ Canadian Bill of Rights, S.C. 1960, c. 44, s. 1(d). In the United States picketing has been equated with freedom of speech and held to be protected by the Amendments to the Constitution. See Tanenhaus, *supra*, footnote 5, and *Thornhill v. Alabama*, 310 U.S. 88 (1940) at p. 104; *International Brotherhood of Teamsters etc. v. Vogt*, 354 U.S. 284 (1957); *Fruit and Vegetable Packers and Warehousemen, Local 760, etc., v. N.L.R.B.*, 308 F. 2nd 311 (1962). There is a distinction between "free speech picketing" and "more than free speech picketing." In the case of *Zeeman v. Amalgamated Retail and Department Store Employees' Union*, 18 U.S.L. Week 2375 (Cal. Sup. Ct. Feb. 1, 1950), the picketing of a residence was held to be permissible as an exercise of the right to "free speech."

See also the Saskatchewan case of *Reg. v. Vogelgesang*, (1955-59) C.C.H. L.L.R. P. 15,141 in which a police magistrate held that the Saskatchewan Bill of Rights, which guaranteed freedom of expression, took precedence over a municipal by-law prohibiting the distribution of handbills which was being done in this case, by strikers picketing a store.

¹⁴ (1962), 132 C.C.C. 237 (B.C.C.A.) at p. 239.

¹⁵ (1961), 36 W.W.R. 100 (B.C.C.A.).

¹⁶ See the remarks of Justice Black for a summary of the opposite approach to this which is taken in the United States: *Justice Black and First Amendment "Absolute": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962). at pp. 553-57. He feels that the rights guaranteed by the Amendments to the American Constitution, i.e., freedom of speech, are absolute and cannot be abridged. However, this is a literal interpretation of the words used in the Amendment. See also *People v. Mago*, 38 Labor Cases 65, 835 (1959). Compare the *Fruit and Vegetable Packers* case, *supra*, footnote 13.

¹⁷ *State v. Cooper*, 285 N.W. 903 (Minn., 1939).

¹⁸ *Strikes and Boycotts—Picketing Private Residence*, 24 Minn. L. Rev. 132 at pp. 133-34. See also Barry, *A Union May Peacefully Picket the Home of an Employer with whom it has a Labour Dispute*, 38 Geo. L.J. at pp. 687-689. The Ontario Labour Relations Act does not apply to domestic employees. R.S.O. 1960, c. 202, s. 2(a).

¹⁹ *People v. Levner*, 30 N.Y.S. 2d, 487 (Mag. Ct. City of N.Y., 1941) at p. 493. "In view of current trends and decisions, this court is not at this time prepared to state that picketing a home is, in and of itself, disorderly conduct. . . . We do not possess the same fervent championship of the right of domestic privacy that pertains in England. . . ." [referring to English Trade Disputes Act, 17 and 18 Geo. 5, c. 22 (1927) repealed by 9-10-11 Geo. 6, c. 52, s. 1.].

The danger is that such considerations should have their weight in an articulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain . . . The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.²⁰

It must be kept in mind that this is a criminal statute with criminal sanctions and that anyone found guilty bears the stigma of a criminal conviction. The standard of proof to be used is that used in all criminal cases, proof beyond a reasonable doubt, or (where circumstantial evidence is used) proof that the circumstances are inconsistent with any conclusion other than guilt.²¹ Each requirement of the section must be proven according to this standard. Finally, there is a presumption in favour of the liberty of the individual.²² The interpretation and application of section 366 must therefore be analytical if the intention of Parliament is to be borne out and justice done.

An Analysis of Section 366

Section 366 provides, in essence, that any person who does any of the enumerated acts, wrongfully and without lawful authority, with a view to compel someone to do something that he has a right to do or refrain from doing will be punished. A qualifying proviso is appended which exonerates anyone who attends in close proximity to a dwelling house or place for the purpose only of obtaining or communicating information. Thus the prosecution must prove beyond a reasonable doubt that the act complained of

- (1) was "wrongful and without lawful authority";
- (2) was done with a "view to compel"; and
- (3) amounted to "watching and besetting."

It has been held that the introductory words, ". . . wrongfully and without lawful authority with a view to compel . . ." constitute the offence and that the enumerations are only means by which the offence may be committed.²³ The enumeration of particular acts would appear to exhaust the ways in which the offence can be committed.²⁴

(a) *Wrongfully and without lawful authority*

The interpretation of these words, perhaps the most significant in the section, have resulted in a bifurcation of judicial opinion. On

²⁰ Holmes, *Privilege, Malice and Intent*, 8 Harv. L. Rev. 1 (1894-95) at p. 9.

²¹ *Reg. v. Branscombe*, [1956] O.W.N. 897 (Ont. C.A.) at p. 898.

²² Maxwell on Interpretation of Statutes (11th ed. 1962), at p. 275.

²³ *The State (at the prosecution of John Charles Hardy) v. District Justice Cathal O'Flynn*, [1948] Ir. R. 343.

²⁴ Maxwell, *supra*, footnote 22, at pp. 264-75. Moulton, L.J. in the *Ward, Lock* case, *supra*, footnote 20 at p. 329 stated: "The classes of acts are set out in the five several subsections, each of which must, of course, be read with the opening words of the section."

the one hand there are cases which indicate that the words are redundant and meaningless; that they are inserted in criminal statutes as a matter of course and not out of necessity. The countervailing authorities would require strict proof that the act complained of was wrongful or without lawful authority. They would require that the picketing be illegal, criminal, tortious, or at least constitute a civil nuisance. In the case of *Lyons v. Wilkins*, Lindley, M.R. said:—

It is not necessary to show the illegality of the overt acts complained of by other evidence than that which proves the acts themselves, if no justification or excuse for them is reasonably consistent with the facts proved. This is the principle always applied in criminal prosecutions in which the words 'feloniously' 'wrongfully,' or 'maliciously' are introduced into the charge, and have to be proved before the person accused can be properly convicted: see Archbold's Criminal Pleading and Evidence, 19th ed. pp. 64-7.²⁵

Less than ten years later, sitting in a court of co-ordinate jurisdiction in the case of *Ward, Lock and Company (Limited) v. Operative Printers' Assistants' Society*, Vaughan Williams, L.J. stated that the words in the first clause of the section, "wrongfully and without legal authority" were introduced for the very purpose of limiting criminal prosecution to cases so tortious as to create a civil cause of action. The summons before the magistrate and the punishment on conviction were enacted by way of an additional remedy to the civil remedy already existing.²⁶

Moulton, L.J., in referring to the judgment of Lindley, M.R. in the *Lyons* case, pointed up the distinction between these two judgments very succinctly when he said:

But he arrives at it in a different way. He construes the word 'compel' in the opening words of the section in such a sense as to make the act of compelling wrongful in itself, and therefore considers the presence of the word 'wrongfully' as superfluous, or at least as only an indication of the phraseology to be used by the pleader. I see no reason why we should treat so lightly a word of such importance.²⁷

Professor Finkelman suggests four grounds upon which the *Ward, Lock* view should prevail:²⁸

(a) Vaughan Williams, L.J. had concurred reluctantly in the *Lyons* case, and did so only because he considered himself bound by authority. In *Ward, Lock*, with the approval of his brothers, he asserted the views which he regarded as correct.

(b) Lindley, M.R. had concluded that all watching and besetting constituted a common law nuisance; the saving clause would then become meaningless for it does not authorize the commission of a nuisance. Thus, although picketers could not be prosecuted under this section, nevertheless in every instance they could still be proceeded against at common law for committing a nuisance, a conclusion contrary to the intention of the Legislature and the

²⁵ [1899] 1 Ch. 255 at p. 267. Chitty, L.J. agreed at p. 272.

²⁶ (1906), 22 T.L.R. 327 at p. 329. Moulton, L.J. concurred at p. 329.

²⁷ *Id.*

²⁸ *Supra*, footnote 5 at pp. 88-91.

opinion of various judges that picketing to obtain and communicate information is permissible. He continues by saying that on the other hand it could be argued that an equally absurd result would flow from an unqualified acceptance of the principle, suggested by Moulton, L.J. in the *Ward, Lock* case. For if the watching and besetting to be criminal must at least be a common law wrong, the proviso permitting attendance for the purpose of communicating information would be meaningless unless it justified or excused the commission of such a wrong. Professor Finkelman concludes that, however, the absurdity does not arise, because, where the watching and besetting, although it constitutes a civil wrong, is merely for the purpose of obtaining and communicating information, the parties are left to their civil remedies and the complainants are not given the additional protection of the criminal law. Finally, it may be that the proviso was added as a precautionary afterthought to prevent hostile magistrates from holding every form of watching and besetting an unlawful act.

(c) The cases may be distinguished on the facts. The picketers committed a nuisance in the *Lyons* case; they did not in the *Ward, Lock* case.

(d) The English Court of Appeal (which decided both *Ward, Lock* and *Lyons*) approved the *Ward, Lock* decision in the case of *Fowler v. Kibble*.²⁹

Strangely, the Courts have not yet recognized the danger inherent in the *Lyons* decision. The effect of the decision is actually to shift the onus of proof onto the defence to establish that the watching and besetting is lawful. In the absence of such proof the watching and besetting is presumed to be wrongful and without lawful authority. Lindley, M.R. in the *Lyons* case stated:

The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him to do or not to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for nuisance at common law: . . .³⁰

Chitty, L.J. explained the problem in these words:

The acts mentioned in the five sub-sections being in themselves unlawful, the words 'wrongfully and without legal authority' are inserted to provide for any unforeseen case in which the evidence of the overt acts may possibly shew *some lawful excuse* or justification (as 'authority' is said to cover 'excuse' . . . lawful authority or justification).³¹

Vaughan Williams, L.J. in the same case, disagreed saying:

. . . 'wrongfully and without legal authority' mean unwarranted by law, which in an indictment for nuisance is ordinarily expressed by the word 'injuriously'. . . This is a different thing from holding the words 'wrongfully and without legal authority' to mean *without lawful excuse*, which would shift the onus from the prosecution to the defence.³² [Italics added.]

²⁹ [1922] 1 Ch. 487.

³⁰ *Supra*, footnote 25 at p. 267.

³¹ *Id.*, at p. 272.

³² *Id.*, at p. 273.

Moulton, L.J. in the *Ward, Lock* case would appear to have been thinking on a similar plane to Vaughan Williams, L.J. when he concluded at page 330:

. . . but in my view that which decides the question is that there is no evidence of any improper or illegal acts. . .³³

On the other hand, it is a principle of the criminal law that where the word 'wrongful' is included in a statute it need not be proven as a limb of the offence.³⁴ Proof of the conduct complained of in the statute is sufficient proof of wrongfulness. The primary burden of proof rests on the Crown unless the statute clearly shifts it to the defence. The secondary burden of proof, that of adducing evidence, is shifted to the defence, there being a rebuttable presumption that the conduct was wrongful. However, the accused person need not introduce any evidence to disprove the wrongfulness, that is, upon failing to do so the issue will not be automatically concluded against him. If, at the close of the Crown's case, there is a remote possibility that the conduct was not wrongful, the Crown will not have satisfied the primary burden. In practice this is not such a significant advantage, as it would appear to be incumbent upon the defence to introduce evidence which may cast doubt upon the wrongfulness of the conduct.³⁵

The Canadian cases prior to 1938 (the date of Professor Finkelman's article) pay little attention to the differences in approach set forth in the two cases previously discussed.³⁶ However, in the case of *Rex v. Reners*³⁷ Harvey, C.J.A. held that the *Lyons* case was to be followed.³⁸ Clarke, J.A. (dissenting) followed the *Ward, Lock* definition of "wrongfully and without legal authority" taking care to point out that in the *Fowler* case,³⁹ which followed *Ward, Lock*, the *Lyons* decision had been brought to the attention of the Court.⁴⁰ This dissenting judgment in the Court of Appeal set the stage for an authoritative statement by the Supreme Court of Canada on the meaning to be given the words. However, in the Supreme Court, Newcombe, J. speaking for the majority, found the picketing in question to constitute a nuisance and thus the application of either case would bring about the same result. He stated:

The judgments concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority.⁴¹

³³ *Supra*, footnote 26.

³⁴ *Supra*, footnote 25.

³⁵ *Reg. v. Sharpe*, [1962] O.W.N. 261 (Ont. C.A.).

³⁶ See Finkelman, *supra*, footnote 5, at p. 91 footnote 113.

³⁷ [1926] 2 D.L.R. 236 (Alta. C.A.) aff'd. [1926] S.C.R. 499 (S.C.C.).

³⁸ The reasons are critically analysed by Finkelman, *supra*, footnote 5, at pp. 92-94.

³⁹ *Supra*, footnote 29.

⁴⁰ *Supra*, footnote 37 at p. 244.

⁴¹ *Id.*, (S.C.C.) at p. 506.

There is little discussion by the Court as to the essential difference between the two cases it being unnecessary for the decision. Idington, J. concurred in the result but differed in his reasoning, accepting the *Lyons* case as the authority to be followed.⁴² The cases decided in England, with the exception of *Lyons*, he considered to be of little assistance in Canada in view of the deletion of the peaceful picketing proviso from the Canadian statutes (taken out in 1892 and inserted again in 1934).⁴³ Stating that watching and besetting ". . . always was at common law wrongful, and might be the basis of a civil action, and hence clearly wrongful,"⁴⁴ and since *Lyons* had been adopted as the law in Manitoba and Alberta⁴⁵ and more especially since the proviso had been removed, he thought *Lyons* to be good law.⁴⁶

Professor Finkelman asks, firstly, why all of the English cases since the omission of the proviso from the criminal code, except *Lyons*, are rejected as authority when they are all decisions on the same statute—the Conspiracy and Protection of Property Act, 1875. Furthermore, he argues, the proviso, on a literal reading of the section, modifies watching and besetting and not wrongfully and without lawful authority. He concludes that the decisions on the latter phrase, whether English or Canadian, are worthy of consideration in Canada.⁴⁷

The law was discussed once again in the Supreme Court of Canada in the case of *Williams et al. v. Aristocratic Restaurants (1947) Ltd.*⁴⁸ This was a civil case involving the peaceful picketing of certain business premises by two picketers and in which the Court found the picketers not liable. Kerwin, J. in discussing the criminal law stated:

It was said . . . [in the] *Reners* case, that the judgments in the *Ward, Lock* case and the *Lyons* case concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. Picketing is a form of watching and besetting but that still leaves for decision, in each case, what amounts to a nuisance. *Whatever might have been held some years ago, in these days the actions of the appellants did not constitute a nuisance.*⁴⁹ [Italics added].

This appears to have been exactly the position taken in the *Ward, Lock* case; in the absence of proof of civil nuisance the picketing is not wrongful and therefore there is no offence.

Rand, J. discussed both cases but decided the issue by applying the peaceful picketing proviso.⁵⁰ Kellock, J. evaluated the cases,

⁴² *Id.*, at p. 514.

⁴³ *Supra*, footnote 11.

⁴⁴ *Id.*, at p. 511.

⁴⁵ *Id.*, at p. 513.

⁴⁶ *Id.*, at p. 514.

⁴⁷ *Supra*, footnote 7.

⁴⁸ *Id.*

⁴⁹ *Id.*, at p. 786.

⁵⁰ *Id.*, at p. 789.

recognized the disagreement between *Ward*, *Lock* and the *Lyons* case, but did nothing to clarify the situation.

Since 1938, the cases, civil and criminal, have generally followed the *Ward*, *Lock* case requiring proof of tortious conduct to satisfy the condition of "wrongfully and without lawful authority" but there has been no express disapproval of the *Lyons* case.⁵¹ When all of the arguments are marshaled it would appear that the *Ward*, *Lock* decision should govern the interpretation of this troublesome phrase. There is a definite need for an authoritative decision categorically stating the position that Canadian courts may be expected to take in this matter.

(b) *With a view to compel*

In order to have committed an offence under section 366 the accused person must have picketed with a "view to compel." It is incumbent upon the prosecution to prove this beyond a reasonable doubt. It has been held that "view" means purpose and not motive,⁵² but this distinction is not altogether clear. However, it is not essential to prove that the purpose of the accused had been effected.⁵³

The compulsion may be directed against the employer in order to cause him to comply with the demands of the strikers. It may also be directed toward a prospective employee for the purpose of forcing him to sell his labour elsewhere or against an individual member of the public, a prospective customer, with the intention of effecting the "struck" employer indirectly.⁵⁴ The compulsion need not be physical in nature,⁵⁵ but it implies a coercive purpose.⁵⁶ *Rand*, J. in the *Aristocratic* case decided that compulsion may be brought about by persuasion:

⁵¹ *Canada Dairies Ltd. v. Seggie*, 74 C.C.C. 210 at p. 219; *Rubenstein v. Kumer et al.*, 73 C.C.C. 334 (Ont. H.C.); *Wasserman v. Sopman*, 77 C.C.C. 334; *Rex v. Doherty and Stewart*, 86 C.C.C. 286 at p. 293; *Smith Brothers Construction Co. Ltd. v. Jones et al.*, [1955] O.R. 362; *General Dry Batteries of Canada Ltd. v. Brigenshaw et al.*, [1951] 4 D.L.R. 414 at p. 418 (Ont. H.C.); *Rex v. Bonhomme*, 86 C.C.C. 100. However, the issue is far from settled—see *Poole and Poole v. Ragen and Toronto Harbour Commissioners*, [1958] O.W.N. 77; *Southam Co. Ltd. v. Gouthro et al.*, [1948] 3 D.L.R. 178 (B.C.S.C.) at pp. 190-91 per Wilson J.: "Of these provisions it may be said that the offences described in s. 501 (now s. 366) were offences and torts at common law (C.F. judgment of Fletcher Moulton L.J. in *Ward, Lock & Co. v. Operative Printers' Assistants' Soc.*, *supra*) . . . the presence of such unreasonable numbers of persons, crowding the sidewalks, blocking the entrances to the building, cannot be justified under . . . s. 501 of the Code. . . ."; see also *Hersees case*, *supra*, footnote 7, per Aylesworth, J.A. at p. 14.

⁵² *Lyons v. Wilkins*, *supra*, footnote 25 at p. 270.

⁵³ *Rex v. Doherty and Stewart*, *supra*, footnote 51 at p. 291.

⁵⁴ *Lyons v. Wilkins*, *supra*, footnote 25 at p. 270 and pp. 272-3 and *Aristocratic Restaurants*, *supra*, footnote 7 at p. 788.

⁵⁵ *Canada Dairies Ltd. v. Seggie*, *supra*, footnote 51 at pp. 218-19.

⁵⁶ *Aristocratic Restaurants*, *supra*, footnote 7 at p. 788.

If the meaning is that the compulsion cannot be brought about by persuasion, I confess I am equally unable to follow the reasoning. For what conceivable use or purpose would information be furnished if not to win support by the persuasive force of the matter exhibited? The persuasion is not ordinarily or necessarily sought of the person to be compelled; economic pressure is to affect him; but that pressure, quite legitimate by those who exert it, may easily be set in motion by persuasion exercised upon either workmen or the public is a frequent experience of labour controversy.⁵⁷

Coercion may be of a moral, social or economic nature. For the purposes of the Act moral coercion will suffice,⁵⁸ and it has recently been indicated that social coercion is also sufficient.⁵⁹ Economic coercion is clearly prohibited according to Mr. Justice Rand in his statement above. It must be remembered that social and moral coercion are both designed to bring economic pressure to bear on the "struck" employer indirectly. Professor Finkelstein agrees that the compulsion need not be an accomplished fact but states that where peaceful picketing has been considered, judges have been overly anxious to find compulsion. He suggests that in doing so the courts in effect declare that all persuasion amounts to compulsion.⁶⁰

Fortunately, the Legislature foresaw the possibility of such an interpretation and in the case of picketing provided two safeguards. Picketing carried out with the object of compelling must be (a) wrongful and without lawful authority and (b) must not be excluded by the proviso. As Moulton, L.J. said in the *Ward, Lock* case:—

In my opinion, the Legislature inserted the word 'wrongfully' expressly, because it did not intend to leave this all-important limitation of the ambit of the clause to the chance that a Court might construe the word 'compel' in such a restricted sense. And the course of the arguments in the present case convince me that the Legislature was prudent in so doing.⁶¹

Of course the proper interpretation must be given to the two protective phrases. Moulton, L.J. went on to say that since not all compulsion is undesirable, or perhaps even the converse of this, his suggested interpretation of "wrongfully" was essential.

As a general rule, purpose is proven by indirect evidence. Out of necessity resort must be had to the surrounding circumstances and the purpose of compulsion inferred from the circumstances in each case. Although the evidence used may be circumstantial, the

⁵⁷ *Id.*

⁵⁸ *Rex v. Reners, supra*, footnote 37 at p. 240 (Alta. S.C.): "... a picketing effected . . . to constitute a menace and practical compulsion by moral force even if no physical force were contemplated. . . ." See also *Quinn v. Leathem*, [1901] A.C. 495 at p. 541: "There are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees."

⁵⁹ *Reg. v. Donnelly and Brierly, supra*, footnote 1.

⁶⁰ *Supra*, footnote 5 at p. 86. See also *Besler v. Matthews et al.*, 71 C.C.C. 183; *Reg. v. Donnelly and Brierly, supra*, footnote 1; *Aristocratic Restaurants, supra*, footnote 7.

⁶¹ *Supra*, footnote 26 at p. 329.

criminal standard must nevertheless be met if a decision of guilt is to be sustained.⁶²

(c) *Watching and besetting*

If the *Ward, Lock* case is to be followed, the watching and besetting or picketing, in order to constitute an offence under section 366(1) (f), must be shown to be wrongful and without lawful authority. Picketing is not a civil wrong *per se*, although it may constitute a nuisance, a conspiracy, possibly an illegal threat, or libel.⁶³

In *Rex v. Elford*⁶⁴ and the *Donnelly and Brierly* decision,⁶⁵ the courts held that the picketing of private homes amounted to a private nuisance. This is traceable to an article by Armour⁶⁶ in which a private nuisance was described as "an act or omission which causes inconvenience or damage to a private person." The difference between a private nuisance and a public nuisance is that in order to prove the latter the task is more onerous, requiring proof of special damage.⁶⁷ Whether such a distinction exists in theory is highly conjectural,⁶⁸ however, it does enable the Crown to meet the requirement of "wrongfulness" more easily where the watching and besetting of a private residence is involved.

(d) *The peaceful picketing clause*

Subsection (2) of section 366 provides that a person who attends at or near or approaches a dwelling house or place, for the purposes only of obtaining or communicating information, does not watch or beset for the purposes of the Act. Mr. Justice Locke, in his dissenting judgment in the *Aristocratic* case was of the opinion that picketing was not included in the proviso; rather, "attending" implied not a continued but a temporary presence.⁶⁹ However, Rand, J. in the same decision explained that: "There is nothing in the statute placing a limit of time on 'attending'."⁷⁰ Furthermore, that 'attending at or near or approaching to such house' for the purpose mentioned is not to be taken as a form of watching or besetting, then likewise it is outside of the penalized conduct and could not

⁶² *Supra*, footnote 21 at p. 898.

⁶³ Finkelman, *supra*, footnote 5 at pp. 98-101.

⁶⁴ 87 C.C.C. 372.

⁶⁵ *Supra*, footnote 1.

⁶⁶ *Supra*, footnote 5 at pp. 78-81.

⁶⁷ *Rex v. Elford*, *supra*, footnote 64 at p. 374. See also *Reg. v. Donnelly and Brierly*, *supra*, footnote 1. See also Clerk and Lindsell on Torts (12th ed. 1961), at pp. 636-41.

⁶⁸ See *Bird v. O'Neal*, [1960] A.C. 907 (P.C.) at p. 927.

⁶⁹ *Supra*, footnote 7 at p. 778.

⁷⁰ *Id.*, at p. 789. "Attending at or near" the premises would not appear to include entry onto the premises. See *McCusker v. Smith*, [1918] 2 Ir. R. 432 and *Larkin v. Belfast Harbour Commissioners*, [1908] 2 Ir. R. 214.

be excepted from it."⁷¹ Indeed, if the proviso is to establish a true exception this is the only interpretation which is acceptable. Doubt would be cast upon the conclusion that attending includes picketing only if the proviso were shown to be a precautionary measure not modifying watching and besetting, in subsection 366(1) (f).

In order to be excepted from subsection 366(1) by the proviso the picketing must have been for the purpose of "obtaining or communicating information." The only information that could conceivably be "obtained," would be knowledge of strikebreakers⁷² working for the struck employer. Information about the strike could presumably only be "communicated" to people unaware of it; this would exclude the employer and employees of the employer. The information could only be "communicated" to prospective employees of the "struck" employer and the public at large. The sole purpose of this "communication of information" would be to solicit the support of independent parties in the economic struggle between the employer and organized labour.⁷³

A literal interpretation of the Act would indicate that the proviso was intended to permit the peaceful picketing of a house or place of business in order to persuade people to support the cause of the picketers. The Report of the Royal Commission which sat to recommend the nature of the English Conspiracy and Protection of Property Act is of no assistance in interpreting the section since the government Bills were introduced into the House of Commons far in advance of receipt of the Report.⁷⁴ In the debates on the Bill in the House, the view was expressed that the words "peaceably to persuade," were not necessary in the "peaceful picketing" clause after the word "information" since "it was clear that peaceful persuading was not illegal and there could therefore be no object in inserting the words in the Bill."⁷⁵ The debates in the Canadian House of Commons are unrevealing.

However, nowhere in the numerous cases in which the section has been discussed has doubt been cast upon the actual efficacy of the

⁷¹ *Id.*, at p. 788. Compare Carrothers, *The British Columbia Trade Unions Act, 1959*, (1960), 38 Can. Bar Rev. 295 at p. 302.

The Code does not permit watching and besetting; to the contrary the proviso to section 501 (now s. 366) 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.

This view would appear to require the qualification since it is only deemed not to be a watching or besetting for the purposes of the Act.

⁷² *Regina v. Bauld*, 13 Cox. C.C. 282.

⁷³ Compare the view in Slessor and Henderson, *Industrial Law* at p. 15, referring to the 1906 Act in England: "It is doubtful whether this includes information to persons not parties to the dispute, and there must in any event be an intention proved actually to receive or communicate information."

⁷⁴ Howell, *Labour Legislation, Labour Movements and Labour Leaders* (1902), at p. 367.

⁷⁵ Hansard's Parliamentary Debates (1875), at p. 715. See also Webb, *The History of Trade Unionism* (2nd ed. 1920), at p. 291.

proviso.⁷⁶ The problem stems not from a scepticism as to the genuine nature of the proviso but from an inability to outline the factual situations in which it applies apparently because of the superficial incompatibility of compulsion on the one hand and peacefully picketing to communicate information on the other.⁷⁷ This problem has become more profound with the increased readiness on the part of the Courts to find in social or moral coercion sufficient evidence of compulsion. This anomaly is compounded in the following manner. In order to convict under the section it is necessary to prove that the accused person wrongfully and without lawful authority picketed the premises of the complainant for the purpose of compelling him to do or refrain from doing something. Before the accused is put into the position of being able to take advantage of the proviso by showing his purpose to have been the communication of information, the purpose of compulsion has been proven against him. Thus, as Magistrate Graham in the *Donnelly and Brierly* case suggested, where the element of compulsion can be inferred from the surrounding circumstances, the proviso will never operate. In the decision in *Williams v. Aristocratic Restaurants*, Mr. Justice Rand said:

*This may mean that the conduct envisaged by the proviso excludes compulsion as the object in view. If it does, then with every respect for this high authority, I am unable to follow it; unless the conduct within the exception has that object it would not be within the first part of the definition: it is assumed in determining a question under s-s (4) and the proviso that there was an intention to act with a view to compel by 'attending at or near . . . in order . . . to communicate information . . . but there is a difference between watching and besetting for the purpose of coercing either workmen or employer by presence, demeanor, and unexpressed, sinister suggestiveness, felt rather than perceived in a vague or ill-defined fear or apprehension, on the one side; and attending to communicate information for the purpose of persuasion by the force of a rational appeal, on the other.'*⁷⁸ [Italics added.]

⁷⁶ *Regina v. Bauld*, *supra*, footnote 71; *Lyons v. Wilkins*, *supra*, footnote 25; *Ward, Lock*, *supra*, footnote 26; *Midland Superior Express Limited v. General Truck Drivers and Helpers Union, Local 31* (1956), 19 W.W.R. 618; *Rex v. Doherty and Stewart*, *supra*, footnote 12; *Besler v. Matthews et al.*, *supra*, footnote 60; *Canada Dairies Ltd. v. Seggie*, *supra*, footnote 51; *Hertig v. Reiss et al.*, 68 C.C.C. 334; *Shane v. Lupovich*, 78 C.C.C. 272.

In *Rex v. Carruthers*, 86 C.C.C. 247 (Ont. Co.C.), the first reported case interpreting the proviso after its addition in 1934, the following was said at pp. 248-49.

They also have a right to attend at, or near, or approaching to their employer's place of business (commonly called a picket line) to obtain or communicate information. . . . I can see nothing wrong with a member of a picket line using peaceful persuasion or an employee about to enter his employer's premises to work, but if force is used, or, if any threat or threatening gesture is made, or if access to the premises is blocked by a member, such act is wrongful and without lawful authority, and a besetting or watching within the meaning and intent of s. 501(f) [now Section 366(1) (f)].

⁷⁷ Royal Commission on Trade Disputes and Trade Combinations [cd. 2852], 1906 at p. 157; see also questions 1730, 2354, 2356; see also Ford, *A Breviate of Parliamentary Papers, 1900-1916, The Foundation of the Welfare State* (1957), at p. 200.

⁷⁸ *Supra*, footnote 7 at pp. 788-89. The proviso is thought to permit "peaceful" persuasion [*supra*, footnote 75] yet persuasion may constitute "compulsion" for the purposes of the Act [*supra*, footnote 57].

He stated further that communication is not limited to a rational appeal.

If 'persuading' means to influence by the force of rational appeal, then the interpretation given the proviso, if it is to be applied in all cases without exception, seems to me to be unwarrantably restrictive; certainly it would appear to be so where the appeal is to the public⁷⁹

This line of argument is strengthened by the fact that regardless of the result of the case, the complainant still has recourse to his civil remedies.⁸⁰ It is submitted that the adoption of any other line of reasoning is to permit the Courts to legislate in lieu of the Canadian Parliament and involves a judicial repeal of section 366(2) of the Criminal Code.

To conclude that the communication of information may involve a certain amount of compulsion does not in itself provide a solution to the problem of the application of the section to any given factual situation. The question which arises is at what point does the purpose of obtaining or communicating information become the purpose of compulsion and thus preclude the accused from seeking shelter under the proviso. This is simply a matter of what weight is to be given to the evidence adduced; it is a matter of degree and of the application of the "best evidence" rule. In performing such a function, the Courts would be performing their proper historical and legal function and not infringing upon the duties of Parliament.

(e) *Dwelling house or place*

On a literal reading of the proviso, a "dwelling house" and any other "place" are given unequivocal and synonymous treatment. In the *Donnelly and Brierly* decision Magistrate Graham appears to dilute the proviso where the peaceful picketing of a private residence is involved. He comments:

. . . the picketing was done in such a manner as to inform the neighbours of the complaint in a public manner what his [the complainant's] private views were on a particular subject. I feel that the line must be drawn somewhere and as far as picketing is concerned that line should be drawn where it interferes with an individual's privacy, the privacy to live peacefully in his home.⁸¹

To differentiate between a private residence and another place is certainly to violate the intention of the draftsman.

It would appear that Magistrate Graham in the *Donnelly* case concentrated primarily upon the nature or type of the coercion. He stated:

The person whose home was picketed was a person who resided and lived in that home and did not carry on his business in that home and, as such, the interference was directed not as to his mode of carrying on business but as to his individual enjoyment of his place to reside.⁸²

⁷⁹ *Id.*, at p. 789.

⁸⁰ *Id.*

⁸¹ *Reg. v. Donnelly and Brierly*, *supra*, footnote 1.

⁸² *Id.*

The nature of the coercion, be it social, moral or economic, should not be the determining factor, rather a Court should be concerned with the degree of coercion when deciding between the purpose of compulsion or communication of information.

In the *Donnelly* case there were but two picketers; there was no altercation or noise, simply an exhibition of signs. This would appear to be a case in which the purpose of communication of information clearly outweighed the purpose of compulsion and would therefore permit the peaceful picketing proviso to operate.

CONCLUSION

As a result of numerous statutory transformations the policy underlying section 366 of the Criminal Code has become obscure. The decisions on this branch of the law are in a serious state of disarray.⁸³ Unfortunately the words of the Act contribute to this confusion by reason of their vagueness and lack of lucid definition. An authoritative pronouncement by the Supreme Court of Canada would constitute a major step in stabilizing this portion of the law of labour relations but a more decisive contribution could be made to the whole field of labour relations if the Parliament of Canada were to revisit this section of the law in the light of its more recent social context.⁸⁴ The picketing of private homes may flout our social sensitivities but an outraged social sensibility does not justify the application of any section of the Criminal Code in other than its literal and grammatical sense.⁸⁵

⁸³ Tremear's Criminal Code (5th ed. 1944), at p. 579.

⁸⁴ Tritschler, *Report of the Brandon Packers Strike Commission*, January 1961, at p. 87 did not recommend any amendment.

⁸⁵ At least one State Legislature, Hawaii, has specifically legislated against the picketing of private residences. With regard to threats to watch and beset see Eames, *Industrial Disputes and the Criminal Law*, [1960] Crim. L. Rev. (Eng.) 232 at p. 241.