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Harry W. Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

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TORT LIABILITY FOR STRIKES IN CANADA: SOME PROBLEMS OF JUDICIAL WORKMANSHIP*

H. W. ARTHURS †

Toronto

I. *Introduction.*

Recognition of the social utility and, indeed, of the necessity of trade unions implies acceptance of the economic and social pressure that can come from united action. Such acceptance does not solve all difficulties; it leaves open the most troublesome of all questions—the questions of how far and when.¹

That legislatures in Canada, since at least the 1940's, have recognized trade unions and embraced collective bargaining as essential industrial policy is trite. The impact of this embrace upon the legality of "economic and social pressures" is the theme of this inquiry.

The lusty and forgivable infant that was trade unionism fifteen years ago has developed in public, legislative, and judicial imagery, into a churlish adolescent. Canadian courts are thus confronted with the unenviable task of working within a legislative framework adopted in one era, on the basis of sentiments of a later day, and the common-law precedents of an earlier one. The fact that the legislation is American in origin and that the common law is English while the attitudes are peculiarly Canadian complicates matters still further. It is the interaction of legislation, common law, and attitudes that is the measure of tort liability for strikes.

*Insofar as an understanding of judicial techniques is to emerge from this article, organization in the categories developed by the decisions is dictated. It is thus necessary to disappoint the reader who ponders the status of the economic, jurisdictional, recognition, makework, or secondary strike, and to burden him with causes of action for breach of statute, conspiracy, and interference with legal rights.

†H. W. Arthurs, LL.B. (U. of T.), LL.M. (Harvard).

¹Frankfurter and Greene, *The Labor Injunction* (1930), p. 204.

The techniques and philosophies which determine liability may appear through consideration of the early common law, the nature of collective bargaining legislation, and the tort doctrines currently employed by the courts — actions for breach of a statute, civil conspiracy, and intentional interference with another's rights. To the extent to which these doctrines are unsatisfactory, an interesting experiment in industrial self-government through compulsory arbitration will be explored. Finally, an attempt will be made to assess the compatibility of the case law and the scheme of industrial relations as it exists, and as contemplated by the legislation.

II. *The Strike at Common Law Before the Labour Relations Acts.*

It is not atypical of the attitude of nineteenth century Canadian lawyers that strikes, if not illegal, were nonetheless pernicious.

The strikers must thus necessarily . . . fail to obtain any enduring fruit of the struggle and privation they have borne with so much cheerfulness and, withal, moderation. To annul permanently the effects of an economic law as infallible in its operation as any physical law, may well be deemed a hopeless undertaking.²

Nonetheless, by 1898 the Supreme Court of Canada was ready to concede that, absent illegal means, union men might concerted-ly cease to work to prevent the employment of non-union men. In *Perrault v. Gauthier*,³ Girouard J., in reaching this result, relied heavily upon *Allen v. Flood*,⁴ especially the judgment of Lord Herschell:

It would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. . . . It is not for your Lordships to express any opinion on the policy of trade unions . . .⁵

A man's right to work or not to pursue a particular trade or calling or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right . . . of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium.⁶

² Gordon, *Strikes and Strikers in Their Legal Aspects* (1883), 3 Can. L.T. 367, at p. 373.

³ (1898), 28 S.C.R. 241.

⁴ [1898] A.C. 1; the cases seem to have been heard concurrently, and the concurring opinion of Taschereau J. seems to have been written before the decision in *Allen v. Flood* was reported.

⁵ *Ibid.*, at p. 129.

⁶ *Ibid.*, at p. 138. Cf. Rand, *Responsibilities of Labour Unions*, Special Lectures, Law Society of Upper Canada (1954), p. 38.

By 1908, the Privy Council, in *Jose v. Metallic Roofing*, rejected the notion that strikes were *per se* illegal. The trial judge was held to have misdirected the jury in telling them that:

The calling out of the men on strike by resolutions of the unions, if those resolutions were the cause of the strike, was an actionable wrong, without regard to motive, and without regard to the conspiracy alleged.⁷

Again, in *I.L.G.W.U. v. Rother*, the right to strike was euphemistically propounded:

I will concede the right of the employees to strike. I will concede the right of the Union to peacefully promote the success of such strike⁸
and:

A man may work when and for whom he chooses, and for what wage and under what conditions as to him seems best . . . I should say a man had a right to advise another to leave the employment of his employer, provided he left such employment with due regard to the law governing the relations of employer and employee.⁹

Nonetheless, strikes whatever their purpose—despite dicta to the contrary¹⁰—were found actionable with mysterious constancy. The usual grounds of liability were (i) conspiracy to injure,¹¹ and

⁷ [1908] A.C. 514, at p. 518.

⁸ (1923), 34 K.B. 69 (Que. C.A.), at p. 70, per Martin J. Just what Martin J. had in mind was revealed by his statement that "If members of labour Unions prefer idleness to employment, that is their affair, and so long as they do not attempt to interfere with men who are willing to work or with the business of employers . . . no one is likely to interfere with them." *Ibid.*, at p. 72.

⁹ *Ibid.*, at p. 74, per Greenshields J.

¹⁰ Obiter dicta indicating a right to strike: *Hynes v. Fisher* (1883), 4 O.R. 60; *Perrault v. Gauthier* (1898), 28 S.C.R. 241; *Krug Furniture v. Berlin etc. Woodworkers* (1903), 5 O.L.R. 463; *Cotter v. Osborne* (1906), 5 W.L.R. 14 (Man.); *Lefebvre v. Knott* (1907), 32 S.C. 441 (Que.); *Graham v. Bricklayers' Union* (1908), 9 W.L.R. 475 (B.C.); *Jose v. Metallic Roofing*, [1908] A.C. 514 (P.C.); *Vulcan Iron Works v. Winnipeg Lodge 174* (1911), 21 Man. R. 473 (C.A.); *Slueter (Slenter) v. Scott* (1915), 22 D.L.R. 900 (B.C.); *Loc. Union 1562, U.M.W.A. v. Williams and Rees* (1919), 59 S.C.R. 240; *Rex v. Russell*, [1920] 1 W.W.R. 624 (Man. C.A.); *Chase v. Starr*, [1923] 3 W.W.R. 500 (Man. C.A.); *I.L.G.W.U. v. Rother*, [1923] 3 D.L.R. 768 (Que. C.A.); *Johnston v. Mackey*, [1937] 1 D.L.R. 443 (N.S.C.A.); *Lupovich v. Shane*, [1944] 3 D.L.R. 193 (Que. S.C.).

¹¹ Liability for strikes in conspiracy: (a) Recovery by the employer: *Vulcan Iron Works v. Winnipeg Lodge 174*; *Cotter v. Osborne*; *Krug Furniture v. Berlin etc. Woodworkers*, *ibid.*; but see *contra*: *Hay v. Local Union*, [1929] 2 D.L.R. 336 (Ont. C.A.); *Jose v. Metallic Roofing*, *ibid.*; *Mitchell v. Woods* (1906), 4 W.L.R. 371 (B.C.) (blacklisting by employers of striking employees not actionable conspiracy). (b) Recovery by workmen: *Slueter (Slenter) v. Scott*; *Loc. 1562 U.M.W.A. v. Williams & Rees*; *Johnston v. Mackey*, *ibid.*; but see *contra*: *Perrault v. Gauthier*, *ibid.*; *Corbett v. Canadian National Printing Trades*, [1943] 4 D.L.R. 441 (Alta. C.A.); *Graham v. Bricklayers*, *ibid.* (refusal to admit to union membership not conspiracy).

(ii) inducing breach of contract.¹² No wonder, then, that one writer felt constrained to remark that:

[In 1939] existing legislation and court decisions relative to strikes and picketing made it fairly clear that any union activity that was likely to be effective . . . would subject the participants to both criminal and civil penalties.¹³

It is against this common-law background in the era before the passage of compulsory collective bargaining statutes that the civil liability for strikes must be understood in the post-statute era. This much, at least, appears from the dicta in the cases: absent a nominate tort (*e.g.* assault, procuring breach, defamation), absent a criminal act, absent an intent to injure, strikes might lawfully be waged or threatened in furtherance of some legitimate economic interest.¹⁴ Those interests sometimes considered legitimate included higher wages,¹⁵ a union shop,¹⁶ the nonemployment of persons with whom the union did not wish to work,¹⁷ and assistance to fellow-unionists engaged in some legitimate dispute.¹⁸ Political strikes were beyond the pale,¹⁹ as were gratuitous demonstrations of force,²⁰ or strikes calculated to injure an employer in the carrying on of his business, by interfering with his contracts with employees or customers,²¹ or jurisdictional strikes.²² These categories of lawfulness and unlawfulness obviously overlap and lose their meaning.

Although these cases have seldom reappeared in recent years, they are skeletons in our closet of which the judges and the parties are all aware. Their influence is largely felt because the courts continue, even today, to resort to the hoary English "freedom of

¹² Liability for strikes for procuring breach: *Hynes v. Fisher*, *ibid.* (injunction refused: "dirty hands"); *Le Roi Mining Co. v. Rossland Miners' Union* (1901), 8 B.C.R. 370; *Brauch v. Roth* (1904), 10 O.L.R. 284; *Small v. A.F. of M.* (1903), 2 O.W.R. 33; *Klein v. Jenovese & Varley*, [1932] O.R. 504 (C.A.).

¹³ Laskin, Recent Labour Legislation in Canada (1944), 22 Can. Bar Rev. 776, at p. 780.

¹⁴ *Supra*, footnote 10.

¹⁵ *Vulcan Iron Works v. Winnipeg Lodge*, *supra*, footnote 10, at p. 477, per Mathers J.

¹⁶ *Loc. 1562*, *U.M.W.A. v. Williams & Rees*, *supra*, footnote 10, at p. 247, per Duff J. (dissenting on this ground).

¹⁷ *Perrault v. Gauthier*; *Corbett v. C.N.P.T.U.*, *supra*, footnote 10; but see *contra*: *Loc. 1562*, *U.M.W.A. v. Williams & Rees*; *Sleuter (Slenter) v. Scott*; *Johnston v. Mackey*, *supra*, footnote 10.

¹⁸ *Krug Furniture v. Berlin etc. Woodworkers*, *supra*, footnote 10.

¹⁹ *Rex v. Russell*, *supra*, footnote 10.

²⁰ *Loc. 1562*, *U.M.W.A. v. Williams & Rees*, *supra*, footnote 10.

²¹ *Supra*, footnote 12.

²² *Johnston v. Mackey*, *supra*, footnote 10.

trade" cases upon which the early Canadian common law of strikes was based.²³

The passage of compulsory collective bargaining legislation²⁴ has drastically altered the daily conduct of labour relations, but its impact upon the common law has been rather less spectacular. It can best be seen by analyzing the structure and terms of the legislation and tracing doctrinal developments since it came into effect.

III. *Legislation Affecting the Legality of Strikes.*²⁵

All ten Canadian provinces (together with the federal government, insofar as its legislative authority extends)²⁶ have Labour Relations Acts which declare the right of employees to join unions and participate in their lawful activities.

The Acts generally²⁷ provide that there shall be no strike during the currency of a collective agreement. Furthermore, a union is required to obtain the right to bargain collectively (*i.e.* become certified) and, in fact, resort to the bargaining process as a condition precedent to the legality of a strike under the legislation.²⁸ The bargaining process, whether for an initial contract or upon renewal or renegotiation of an existing contract, involves resort to conciliation or mediation by the Department of Labour, and the issuing of a report and recommendations by the conciliation authority, in advance of which a strike is, again, illegal.²⁹ In three jurisdictions³⁰ a vote on the award may be part of this procedure. In four jurisdictions,³¹ a strike vote of the employees involved is interposed as a further condition precedent. In summary, before striking, unions must become entitled to bargain, must bargain,

²³ See Kennedy and Finkelman, *The Right to Trade* (1930), for a review of the English authorities, and the appendix therein for the derivative Canadian cases.

²⁴ Beginning with the Collective Bargaining Act of Ontario, S.O., 1943, c. 4.

²⁵ As of March 1st, 1960.

²⁶ For an analysis of the constitutional barriers to national labour legislation, see Logan, *State Intervention and Assistance in Collective Bargaining* (1956), pp. 3-6; Laskin, *Canadian Constitutional Law* (1951), p. 281; and see *Reference Re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529. The federal legislation parallels the Ontario Act in all sections here relevant.

²⁷ Except for Alberta and Saskatchewan.

²⁸ Except for Prince Edward Island and Saskatchewan.

²⁹ But see R.S.P.E.I., 1951, c. 164, s. 13, providing that resort to arbitration under the Arbitration Act is a condition precedent to strike, and that Her Majesty is a party to every arbitration.

³⁰ R.S.A., 1955, c. 167, s. 104 (am. 1957, c. 38, s. 40); S.B.C., 1954, c. 17, ss. 18-19; R.S.N.S., 1954, c. 295, s. 24(2).

³¹ R.S.A., 1955, c. 167, s. 94(4); S.B.C., 1954, c. 17, s. 50; R.S.N.S., 1954, c. 295, s. 24(3); R.S.P.E.I., 1951, c. 164, s. 20 (am.).

must resort to the governmental agency in aid of bargaining, and—frequently—must confirm by vote that further bargaining is so fruitless as to render a strike more desirable. Several Acts provide for administrative or judicial declarations of illegal strikes, presumably to inform the parties and the public of non-compliance with the Act.³² All provide for prosecution, summary conviction, and penalties for illegal strikes, both for the striking union and for individual employees. It will be noticed, however, that none of the Acts distinguish in terms between different kinds of strikes.

The British Columbia legislation alone confers a civil cause of action upon the employer struck in contravention of the Act.³³ All other substantive legislation dealing with civil causes of action is exculpatory. Four provinces³⁴ provide that an act done by two or more persons in furtherance of a trade dispute shall not be actionable unless the act would be actionable if done without the conspiracy. Of these, three provinces provide that a trade union may not as such be a party to, nor may a collective agreement be the subject of, an action unless they would so be held irrespective of any provision of the Labour Relations Act.³⁵ Newfoundland, alone, appeared to bar actions for interference with trade or employment, or for procuring breach of contract, in furtherance of a trade dispute although this exculpation proved ephemeral.³⁶ In short, (except for British Columbia) if civil liability is to be imposed for strikes in Canada, it must be at common law.³⁷

³² S.B.C., 1954, c. 17, s. 54(3); R.S.O., 1950, c. 194, s. 59; R.S.S., 1953, c. 259, s. 5(d)(e). In British Columbia, the judge making the declaration has the power to cancel the collective agreement, checkoff, or certification of the offending union. S.B.C., 1954, c. 17, s. 55. In Saskatchewan, the Labour Relations Board may determine that an unlawful strike exists, and make appropriate orders which are to be enforced by the courts. R.S.S., 1953, c. 259, ss. 10, 12.

³³ Trade-unions Act, S.B.C., 1959, c. 90, s. 4. See Carrothers, (1960), 38 Can. Bar Rev. 295, for discussion of new British Columbia legislation.

³⁴ Trade Union Act, R.S.N., 1952, c. 262, s. 4; Rights of Labour Act, R.S.O., 1950, c. 341, s. 3(1); Trade Unions Act, R.S.S., 1953, c. 259, s. 22; Trade-unions Act, S.B.C., *ibid.*, s. 5.

³⁵ R.S.N., *ibid.*, s. 6 (no action in tort against union or members); R.S.O., s. 3(2)(3); R.S.S., *ibid.*, ss. 23, 24.

³⁶ R.S.N., *ibid.*, s. 5. This provision was rendered nugatory by the decision in *Anglo-Newfoundland v. I.W.A.* (1959), 17 D.L.R. (2d) 766 (Nfld.), which confined its protection to unions which had complied with the filing requirements of the Act (of which, apparently, there had been none since the passage of the Act). See editorial note, 17 D.L.R. (2d) 766. In fact, the section may have been repealed by a 1959 amendment to the Labour Relations Act, s. 52A(1).

³⁷ It is only the substantive issues which will be dealt with herein; hence no distinction will be drawn between suits against the union officers or members (individually or in a representative capacity) and the union

IV. *Some Problems in Defining a Strike.*

Before proceeding to an examination of the techniques by which the common law imposes liability for strikes, several definitional matters require enunciation. All but two Acts define "strikes".³⁸ Two main legislative definitions appear, typified by Ontario:

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.³⁹

and British Columbia:

"strike" includes a cessation of work or refusal to continue to work by employees in combination or in concert or in accordance with a common understanding *for the purpose of compelling their employer to agree to terms or conditions of employment or of compelling another employer to agree to terms or conditions of employment of his employees.*⁴⁰

Both statutes involve these elements: (i) a cessation of work (ii) by employees and (iii) in combination or in concert or in accordance with a common understanding. In addition, the British Columbia legislation contains a limitation (*underlined*) which goes to the *purpose* at which the work-stoppage must be aimed before it is to be a "strike" within the Act.

Caveats should be entered to each limb of the statutory definitions. There are work-stoppages which do not amount to a strike, being *de minimis*,⁴¹ for which no civil relief would seem to be available. On the second limb of the definitions, when the employment relation terminates, the strike ceases to exist.⁴² It is the third limb, that of "combination or . . . common understanding", which has given the courts the most trouble. Surprisingly, it has

itself. For an analysis of the Canadian law on this subject see Sherbaniuk, *Actions By and Against Trade Unions in Contract and Tort* (1958), 12 U.T.L.J. 151; see also *Therien v. Teamsters* (1960), 22 D.L.R. (2d) 1 (S.C.C.).

³⁸ Prince Edward Island and Saskatchewan.

³⁹ R.S.O., 1950, c. 194, s. 1(1)(h), and see also R.S.C., 1952, c. 152, s. 2(p); R.S.N.B., 1952, c. 124, s. 1(p); R.S.N., 1952, c. 258, s. 2(1)(p); R.S.Q., 1941, c. 162A, s. 2(f).

⁴⁰ S.B.C., 1954, c. 17, s. 2(1) (emphasis added); and see also R.S.A., 1955, c. 167, s. 55 (1)(i); R.S.M., 1954, c. 132, s. 2(1)(p); R.S.N.S., 1954, c. 295, s. 1(q).

⁴¹ *Belleville Lock Co. v. Tyner*, [1950] O.W.N. 793 (H.C.); *Borek v. Amalgamated Meat Cutters etc.*, [1956] S.C. 333 (Que.); *Patchett v. Pacific Great Eastern Rwy.* (1957), 23 W.W.R. (N.S.) 145 (B.C.C.A.), per Davey J.A. (dissenting on other grounds).

⁴² *Belleville Lock Co. v. Tyner*, *ibid.*; *Seaboard Owners v. Cross*, [1949] 3 D.L.R. 709 (B.C.). See also *Re Canadian Gypsum and Nova Scotia Quarry-workers etc. Union* (1959), 20 D.L.R. (2d) 319.

been held that the refusal of a single workman to work is a "strike", although this is difficult to square with the legislation.⁴³ More important are the cases dealing with a cessation of work by employees who may not be acting "in accordance with a common understanding". The question arises when a picketline is respected by employees who have no primary dispute with the picketed employer. In *Smith Bros. Construction v. Jones No. 2*⁴⁴ McLennan J. held, in such a situation that the refusal of employees to cross a picket-line was not a "simultaneous cessation of work" and therefore not a strike. However, he noted that:

If the development of the Trade Union movement has reached the point where workers will not cross a picket-line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be. Loyalty to the rule that I have mentioned having been developed, the rule should not be abused for a wrongful purpose and where there is no justification.⁴⁵

He went on to hold the picketing union liable for unjustified interference with contractual relations. Several cases, however, have held that the refusal by employees to cross a picket-line would visit additional liability upon the picketers for procuring an illegal strike.⁴⁶ Implicit in this reasoning is a readiness to find the "strikers" liable for their unlawfulness. Except for one case,⁴⁷ however, the work stoppages were not "for the purpose of compelling (an) employer to agree to terms and conditions of employment", but rather involved recognition and jurisdictional disputes. The argument appears not to have been made, but it is conceivable that a work stoppage for this purpose falls outside the statutory ban.⁴⁸ Furthermore, the element of "common understanding" of the employees *inter se* appears to be lacking, except insofar as

⁴³ *Swansea Construction Co. v. Royal Trust Co.* (1956), 5 D.L.R. (2d) 687 (Ont. C.A.); but see *contra Thomas Fuller Construction Co. v. Rochon* (1957), 10 D.L.R. (2d) 670 (Ont.). For American authorities to this effect, see 83 *Corpus Juris Secundum* pp. 543-4. McAllister, Case and Comment, (1956), 34 *Can. Bar Rev.* 587, at p. 589, suggests that the *Swansea* judgment accords with the view that "the strength of numbers as against one cannot be made a decisive basis of the law".

⁴⁴ [1955] 4 D.L.R. 255 (Ont.).

⁴⁵ *Ibid.*, at p. 264.

⁴⁶ *Pacific Western Planing Mills v. International Woodworkers etc.*, [1955] 1 D.L.R. 652 (B.C.); *Bevaart v. Flecher* (1956), 2 D.L.R. (2d) 77 (B.C.); *Dawson, Wade v. Tunnel etc. Union of Canada* (1956), 5 D.L.R. (2d) 663, 715 (B.C.); *Bennett & White v. Van Reeder* (1956), 6 D.L.R. (2d) 356 (Alta. C.A.); *Merloni v. Acme Construction*, [1959] C.C.H. Lab. L.R., para. 15, 226 (N.B.).

⁴⁷ *Pacific Western Planing Mills v. International Woodworkers etc.*, *ibid.*, where no work stoppage did take place, but the terms and conditions of employment at the picketed plant were in issue.

⁴⁸ For an early attempt at a common-law definition in purposive terms, see Reid, What Is a "Strike"? (1912), 32 *Can. L.T.* 685.

they all profess loyalty to the same principle of union solidarity. In fact, as several judges have pointed out, the refusal to cross the picket-line may rather be motivated by a fear of being blacklisted by the union and hence deprived of job opportunities.⁴⁹

It should be noted, also, that to make actionable threats to strike or procuring a strike necessarily implies that the strike threatened or procured would itself be actionable. To threaten to do or to procure someone to do a lawful act is not actionable.⁵⁰

Imprecision in definition of a "strike", of course, should be kept in mind when considering theories of liability.

V. *Breach of the Labour Relations Act as a Cause of Action.*

A trio of British Columbia cases have developed the doctrine that breach of the Labour Relations Act is *per se* a cause of action.

The idea seems to have been cut from whole cloth in *Vancouver Machinery Depot v. United Steel Workers*.⁵¹ The union in that case struck in support of wage demands in advance of the strike vote required by section 31A of the Industrial Conciliation and Arbitration Act,⁵² then in force. The company sought to enjoin unlawful striking. The union defended on the grounds (i) that it was not a suable entity, and (ii) that the plaintiff's writ disclosed no cause of action. After holding, on the basis of the *Patterson* case⁵³ that unions certified under the collective bargaining legislation are juristic persons, Macfarlane J. turned to the substantive question:

While the Act here may have a public purpose as its end, the means by which it is sought to accomplish that end is by granting and imposing correlative rights and duties as between these parties and declaring any breach of the obligations so created as unlawful in certain circumstances.⁵⁴

⁴⁹ *Mostrenko v. Groves*, [1953] 3 D.L.R. 400 (B.C.); *Dawson, Wade v. Tunnel etc. Union of Canada*, *supra*, footnote 46.

⁵⁰ *Sorrell v. Smith*, [1925] A.C. 700, at p. 730; *Crofter v. Veitch*, [1942] A.C. 453, at p. 467; *Brown v. Spamberger* (1959), 21 D.L.R. (2d) 630 (Ont. C.A.). But see *contra* Note, Economically Motivated Interference with At Will Contract Held Actionable (1957), 57 Col. L. Rev. 1188.

⁵¹ [1948] 1 D.L.R. 114 (B.C.), *aff'd.* [1948] 4 D.L.R. 518 (B.C.C.A.), leave to appeal to S.C.C. denied, [1948] 4 D.L.R. 522.

⁵² S.B.C., 1947, c. 44.

⁵³ *Re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union, Loc. No. 1*, [1947] 4 D.L.R. 159 (B.C.), *aff'd.* [1947] 4 D.L.R. 166 (B.C.C.A.). The decision by Macfarlane J., however, dealt with prosecution and fines under the Act for illegal strikes: "The question I have to decide is as to the effect of this particular statute conferring these particular powers and imposing particular restrictions and liabilities on the trade union bringing itself under it . . ." *Ibid.*, at p. 164. On appeal, O'Halloran J.A. relied on the imposition of fines for "specified statutory breaches" at p. 173 (B.C.C.A.).

⁵⁴ [1948] 1 D.L.R. 114, at p. 127.

It thus follows that:

Declaring an act unlawful as between the parties means that if one person does such an act and causes harm to another, the person doing the act runs the risk of certain reactions detrimental to him. The essence of this risk is liability to pay damages as compensation for the harm done.⁵⁵

In so holding, the learned judge rejected the argument of defendants that the Act, being designed to secure industrial peace and to protect the public, did not make illegal what was formerly legal — economic strikes. Peace, the judge noted, is to be secured both by prohibitions of some acts (strikes) and encouragement of others (collective bargaining). As will be suggested below, however, it is self-contradictory to forbid strikes while encouraging collective bargaining. The former is the price of the latter.

Moreover, his judgment is based primarily upon two predicates: an acceptance of a line of authority imposing liability for breach of a statutory duty, and rejection of the authorities which hold the injunction an improper remedy for acts penalized by statute. As to the second, the judge's stated refusal to follow *Dallas v. Felek*⁵⁶ (and his failure to refer to *Robinson v. Adams*⁵⁷) is apparently even repudiated by him when in an aside,⁵⁸ he declined to grant the injunction to which he had already held the plaintiffs entitled because of an "unseemly conflict" with concurrent quasi-criminal proceedings in another court.

On the dominant theme of liability for breach of the Labour Relations Act, O'Halloran J.A., in the Court of Appeal agreed that a union could be made liable in damages "for the purpose of implementing that Act and for causes of action that may possibly be founded directly upon its provisions or a breach thereof".⁵⁹ It is submitted that these judgments confuse the procedural decision in the *Patterson* case — holding the union as an entity subject to the statutory penalties expressly provided — with the substantive issue of finding a cause of action secreted in the Act itself. Only Macfarlane J. deals with this problem, and his failure to advert to the leading Canadian authorities in the closely anal-

⁵⁵ *Ibid.*, at p. 134.

⁵⁶ [1934] O.W.N. 247 (C.A.).

⁵⁷ (1924), 56 O.L.R. 217 (C.A.). "The equitable jurisdiction of a civil court cannot properly be invoked to suppress crime . . . Much less should the courts interfere when the thing complained of is not within the terms of the criminal law, although it may be rightly regarded as objectionable or even immoral, for then the civil courts by injunction are attempting to enlarge and amend the criminal law. Government by injunction is a thing abhorrent to the law of England and of this province." at p. 224, per Middleton J.A.

⁵⁸ *Supra*, footnote 54, at p. 133.

⁵⁹ [1948] 4 D.L.R. 518, at p. 521, and see Sloan, C.J.B.C., at p. 524.

ogous field of combines makes his judgment less than adequate.

In the *Pacific Western Planing Mills* case,⁶⁰ an injunction was granted against inducing an illegal strike in plaintiff's business operation. Upon breakdown of industry-wide contract negotiations, a strike vote was held in which plaintiff's employees alone voted against a strike. Plaintiff's plant was picketed by defendants (employees of the other plants) who carried "on strike" signs. The picketing was held tortious because:

[The Act] provides in effect that no employees shall strike until a vote of the employees in the unit affected . . . in favour of a strike. Here as stated the vote of the plaintiff's employees was against a strike . . . 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 this unlawful act unlawful.⁶¹

It thus appears that absent the requisite procedural steps, not only are strikes in breach of the statute unlawful, but so also is picketing to persuade non-strikers to come out, though why there should be a presumption that they will strike illegally is by no means clear. The decision in this case is the more peculiar because of the judge's failure to appreciate that this was an industry-wide strike following industry-wide bargaining and an industry-wide strike vote. In fragmenting the strike vote result, he deprived the union of the broad strike sanction which it needed to back up its broad demands.⁶²

If strikes are unlawful and provisions analogous to section 33⁶³ are read as conferring a cause of action against the strikers as in the *Vancouver Machinery* case, a similar liability is apparently to be imposed upon those who "declare or authorize" such strikes. A strict reading of the case, then, would leave equally vulnerable those who advise a strike which might or might not turn out to be contrary to the Act,⁶⁴ and those who do in fact breach the Act. The defendant picketers are thus deprived of the

⁶⁰ *Supra*, footnote 46.

⁶¹ *Ibid.*, at p. 655.

⁶² Carrothers, *A Study In the Law of Picketing* (1955), 2 U.B.C. Leg. Not. 187, at p. 238, suggests that the case can only be supported on the "thin strand" of false information conveyed by the picketers.

⁶³ Industrial Conciliation and Arbitration Act, R.S.B.C., 1948, c. 155, s. 33: "Notwithstanding anything contained in the Act, no person shall declare or authorize a strike and no employee shall strike until after a vote of the employees in the unit affected as to whether to strike or not to strike has been taken and the majority of such employees who vote have voted in favour of a strike."

⁶⁴ *Cf.* "A person who advocates the object without advocating the means is (not) to be taken to have advocated recourse to unlawful means." *Thomson v. Deakin*, [1952] Ch. 646, at pp. 697-8 (C.A.), per Jenkins L.J.

defence of *mens rea* available to them in the penal proceedings upon which this action is supposedly based.⁶⁵

In the case of *Therien v. International Brotherhood of Teamsters*,⁶⁶ the plaintiff alleged interference with his livelihood. The defendant union insisted upon his membership although, as an owner-operator and an employer, he was not legally able to join. Upon his refusal of membership, the union procured his dismissal from a trucking job. In dismissing a motion to strike out the plaintiff's writ because a union is not suable entity, Wilson J. found that "the plaintiff sets up breaches by the defendant of the *Labour Relations Act* which can give him a cause of action".⁶⁷ The breach relied on was an unfair practice under the *Labour Relations Act*.⁶⁸

At trial, Clyne J. more clearly enunciated the doctrine:

As I have already said, I think the plaintiff has at common law a cause of action But I also think that the violation of sec. 6 of the statute itself creates a liability on the part of the defendant.⁶⁹

After calling in aid authority, the judge continued:

While it may be said that the object of the Act was the preservation of industrial peace for the public benefit, the reading of the Act as a whole indicates an intention of the Legislature to create rights for the benefit of individuals I have no doubt that under the Act an employee would have a right of action against an employer if he were dismissed because he was a member of a trade union. By the same token, I think a person whose right of refraining from joining a union is infringed by coercion and who suffers damage thereby, has a cause of action In my view the plaintiff has a cause of action against the defendant both under the statute and at common law.⁷⁰

Damages were awarded for "loss of a valuable business connection" as well as for the loss suffered as a result of his discharge on this particular job.

In the Court of Appeal, DesBrisay C.J.B.C. alone appears to have relied heavily upon the breaches of the Act as giving a cause

⁶⁵ American Law Institute, Restatement, Torts, s. 286, comment c. (The topic is only dealt with in the context of negligence). However, the English cases hold defence to the penal action irrelevant. Salmond, Torts (11th ed., 1953), p. 611, note (s).

⁶⁶ (1956), 6 D.L.R. (2d) 746 (motion to strike out writ), (1957), 13 D.L.R. (2d) 347, aff'd. (1958), 16 D.L.R. (2d) 346 (B.C.C.A.), aff'd. (1960) 22 D.L.R. (2d) 1 (S.C.C.).

⁶⁷ *Ibid.*, (1956), 6 D.L.R. (2d) 746, at p. 749.

⁶⁸ S.B.C., 1954, c. 17, s. 6: "No trade-union, employers' organization, or person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a trade-union."

⁶⁹ (1957), 13 D.L.R. (2d) 347, at p. 359.

⁷⁰ *Ibid.*, at pp. 360-1.

of action.⁷¹ Sheppard J.A., although also affirming the decision below, differed on this point:

In relying upon secs. 4 and 6 of the statute the Plaintiff is not to be taken as asserting a statutory cause of action. The plaintiff is here founding upon a common-law cause of action⁷²

Davey J.A. refrained from deciding the point.⁷³ In the Supreme Court of Canada, Locke J. alone adverted to this basis of liability, and adopted the reasoning of Sheppard J.A., below.⁷⁴ The reasoning in the Supreme Court of Canada may well obviate future resort to the doctrine that breach of the Labour Relations Act *per se* confers a civil cause of action.

At any rate, the authorities and dicta⁷⁵ which had so held must now be read subject to Locke J.'s holding that liability is founded upon "not a statutory cause of action, but a common-law cause of action".⁷⁶

The general proposition of law that a civil action will lie for breach of a statute which carries penal sanctions, has had a chequered career in Canada. The problem is a thorny one at best, but the Canadian decisions reflect the additional factor of a distribution of legislative powers which gives the provinces exclusive control in relation to property and civil rights within the province, while reserving criminal law to federal jurisdiction.⁷⁷

⁷¹ (1958), 16 D.L.R. (2d) 646, at p. 655.

⁷² *Ibid.*, at p. 680. ⁷³ *Ibid.*, at p. 666.

⁷⁴ (1960), 22 D.L.R. (2d) 1, at p. 13.

⁷⁵ Injunctions for breach of the Act, see e.g.: *Aird & Son Ltd. v. Loc. 500, Int'l. Union of Shoe and Leather Workers et al.*, [1948] 3 D.L.R. 114 (Que.); *Smith Bros. Construction Co. Ltd. v. Jones No. 1 & 2*, [1954] 2 D.L.R. 117 (motion for interlocutory injunction), [1955] 4 D.L.R. 255 (Ont.); *Oakville Wood Specialties Ltd. v. Mustin*, [1950] O.W.N. 735; *Har-A-Mac Const. Co. Ltd. v. Harkness*, [1958] O.W.N. 366; *Dawson, Wade Co. v. Tunnel etc. Union of Canada*, *supra*, footnote 46; *Gagnon v. Foundation Maritime*, [1958] C.C.H. Lab. L.R., para. 15, 213 (N.B.C.A.); *Dominion Bridge v. Int'l. Bridge etc. Ironworkers* (1959), 20 D.L.R. (2d) 621 (B.C.C.A.) (quashing contempt conviction for violation of injunction against striking). Damages for breach of the Act; see e.g.: *Acme Construction v. Merloni*, *supra*, footnote 46; *Vails Star Laundry v. Monckton Laundry etc. Union* (1956), 40 M.P.R. 169 (N.B.) (strike held legal on facts); *Smith Bros. Construction v. Jones No. 2*, *supra*, footnote 44; *Dewar v. Dwan* (1957), 11 D.L.R. (2d) 130 (Ont.); *Hallnor Mines Ltd. v. Behie*, [1954] 1 D.L.R. 135 (Ont.); *Re Paterson and Nanaimo etc. Union, Loc. No. 1*, [1947] 4 D.L.R. 159 (B.C.C.A.). But see *contra*: *Southam v. Gouthro*, [1948] 3 D.L.R. 178 (B.C.); *General Dry Batteries Ltd. v. Brigenshaw et al.*, [1951] 4 D.L.R. 414 (Ont.); *Peerless Laundry & Cleaners Ltd. v. Laundry etc. Workers' Union*, [1952] 4 D.L.R. 475 (Man.).

⁷⁶ *Supra*, footnote 74.

⁷⁷ For a discussion of the existence of a civil cause of action for breach of the federal combines legislation, see *Transport Oil Ltd. v. Imperial Oil Ltd.*, [1935] O.R. 111, [1935] 1 D.L.R. 751, *aff'd.* [1935] O.R. 215, [1935] 2 D.L.R. 500 (C.A.). It is on the constitutional ground that the *Transport Oil* decision was followed in *Gordon v. Imperial Tobacco Sales Co.*, [1939]

Constitutional questions aside, the cases focus on legislative intent. The reluctance, indeed refusal, of the Canadian courts to look to legislative history,⁷⁸ combined with the unavailability of this material,⁷⁹ of necessity makes this an exercise of imagination rather than investigation.

The question of intent has been phrased in its commonly accepted form by Duff J. (as he then was) in *Orpen v. Roberts*:

But the object and provisions of the statute as a whole must be examined with a view to determining whether it is part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.⁸⁰

This type of speculation has been termed a "dangerous business", both in the United States⁸¹ and Canada.⁸² As one author commented:

When a statute explicitly creates a criminal liability, the court which reads a civil obligation into the enactment is embarking upon a perilous speculation. This does not exceed its power, but it does overstep the decent amenities of judicial conduct A right is simply the *ex post facto* aspect of a remedy, and it savors of absurdity to impute

2 D.L.R. 27 (Ont.). See Finkelman, Case and Comment, (1935), 13 Can. Bar Rev. 517 to the same effect. And see *Philco Products v. Thermionics*, [1940] S.C.R. 501. "If B commits an indictable offence and the direct consequence . . . is that A suffers some special harm different from that of the rest of His Majesty's subjects, then, speaking generally, A has a right of action against B. . . this well-settled doctrine does . . . apply to indictable offences under section 498 of the Criminal Code . . ." *Ibid.*, at p. 504, per Duff C.J.C. See Case and Comment, (1941), 19 Can. Bar Rev. 51, attacking the inquiry into legislative purpose. For discussion of an analogous situation in the United States, concerning the effect of the federal labour legislation on state common law relief, see 32 A.L.R. 2d. 829, 1026 (Anno.) and cases and articles cited therein. State jurisdiction is preserved where the conduct is neither prohibited nor protected by the federal legislation. See also Cox, The Right to Engage In Concerted Activities (1951), 26 Ind. L.J. 319, at p. 334.

⁷⁸ Kilgour, The Rule Against the Use of Legislative History (1952), 30 Can. Bar Rev. 769; Davis, Legislative History and the Wheat Board Case (1953), 31 Can. Bar Rev. 1; Milner, Correspondence, (The Use of Legislative History) (1953), 31 Can. Bar Rev. 228.

⁷⁹ The evidence of the hearings preceding the first "effective" labour Act, that of Ontario, is available in shorthand in the legislative library. Laskin, Collective Bargaining in Ontario: A New Legislative Approach (1943), 21 Can. Bar Rev. 684, footnote 6.

⁸⁰ [1925] S.C.R. 364, at p. 370.

⁸¹ Thayer, Public Wrong and Private Action (1913), 27 Harv. L. Rev. 317, at p. 320.

⁸² "That a penal statute never intended—and in a country like Canada, may be constitutionally unable—to confer a civil cause of action is now apparent to almost every one except the courts." Wright, The English Law of Torts (1955), 11 U.T.L.J. 84, at pp. 94-5.

to the legislature an intention to create a civil liability, where it has manifested no intention of creating a civil remedy.⁸³

The dangers inherent in this inquiry are, perhaps, best demonstrated by the contradictory analyses of Wilson J. in the *Southam* and *Therien* cases. In the former case, he was prepared to find that — like the English Conspiracy, and Protection of Property Act (1875),⁸⁴ and the Trade Disputes and Trade Unions Act (1927),⁸⁵ where there was no federal problem—P.C. 1003 did not in and of itself create a civil cause of action. In the latter case, dealing with essentially identical legislation, he was prepared to concede that it did.

Midway between the two readings of the statute is the analogy to the law of public nuisance drawn by Thayer:

As society develops, new dangers to the public welfare are constantly perceived, and new prohibitions are enacted by the legislature Whatever form the prohibition may take, and the varieties are infinite, a danger has been deemed by the legislature so great as to justify making its creation or continuance a public wrong. A new statutory "nuisance" has thus been created in every sense in which that word has legal significance; and . . . an action lies in favour of one who has suffered a private injury from a public nuisance.⁸⁶

In the field of strikes and trade combinations, he suggests, "The rules of the fight have been changed by the final authority, and the field of competition has been cut down accordingly".⁸⁷ Thayer's plea is for "self-restraint and breadth of view" on the part of the judges, and a deference to legislative determination of social values. It is hard to take issue with this approach, except that it may reach indirectly the result that it hesitates to reach directly. The imposition of civil liability for strikes is more than the redress of a private injury; it involves a substantial policing of labour relations. This may not be entirely improper in the area of injunctive relief to prevent irreparable injury.⁸⁸ However, it is

⁸³ Lowndes, *Civil Liability Created by Criminal Legislation* (1931), 16 *Minn. L. Rev.* 361, at pp. 363-4.

⁸⁴ 38 & 39 *Vict.*, c. 86.

⁸⁵ 17 & 18 *Geo. V.*, c. 22, repealed (1946), 9 & 10 *Geo. VI.*, c. 52.

⁸⁶ *Supra*, footnote 81, at pp. 327-8.

⁸⁷ *Ibid.*, at p. 343.

⁸⁸ "It would be preposterous . . . that there was an unlawful strike in existence, and notwithstanding that irreparable injury was being suffered by the plaintiff as a result of that strike, no remedy would be available to the applicant because that remedy might have the appearance of interfering with a strike or with the relations between employer and employees", per Gale J. in *Oakville Wood Specialties Ltd. v. Mustin*, *supra*, footnote 75, at p. 737. It is interesting to speculate as to whom the irreparable harm is done by this injunction application, when the learned judge's comment that: "It is conceivable, although, I hope, hardly likely, that the action will eventually come to trial", *ibid.*, at p. 735, is contrasted with his later repudiation of the interim injunction as a strikebreaking weapon in

submitted that to award damages for breach of a statute is to accept legislative judgment on the nature of the wrong, while ignoring it on the price to be paid by someone in breach.

Even this, however, is to be preferred to the conjectural and unseemly inquiry into the "scheme of the legislation" pursued by the English and Canadian courts.⁸⁹

At best, one might hope for legislation in this area, either explicitly rejecting a cause of action in these cases, or explicitly conferring it in the case of strikes for purposes beyond the legitimate range of union activities.⁹⁰ In the United States, this view has been embodied in section 303(b) of the Taft-Hartley Act which provides:

Whoever shall be injured in his business or property by reason of [practices enumerated in s. 303(a)] may sue therefore . . . and shall recover damages by him sustained and the cost of the suit.⁹¹

The advantage of this type of legislation is that it enables the court to remain within "the decent amenities of judicial conduct" while redressing injuries not considered the legitimate hurt of economic strife. It should be noted, also, that liability is imposed because of the *object* of the strike, rather than the *formality*⁹² with which it is carried out.

Halliday Contracting Co. v. Nicols, [1952] 4 D.L.R. 75 (Ont.); *quaere*, also, as to the "irreparable" nature of the harm done.

⁸⁹ The test in *Orpen v. Roberts*, *supra*, footnote 80, seems not to have been rejected in any Canadian case. For a recent leading English case, see *Cutler v. Wansworth Stadium*, [1949] A.C. 398 (H.L.). Salmond on Torts, *op. cit.*, *supra*, footnote 65, at p. 604, suggests that breach of a statutory duty may give a *prima facie* right of action, depending on legislative intention. Street, Torts (1955), p. 284, recounts the history of an action upon a statute, but candidly admits, "Many of the decided cases can, for the most part, be regarded as judicial decisions of policy whether breaches of certain provisions should be compensated for in damages". For a discussion of the relevant factors, see at p. 289 *et seqq.* The American position appears to have developed a sophisticated test of legislative intent; American Law Institute, Restatement, Torts, ss. 286-8; Prosser on Torts (2d. ed., 1955), p. 154 *et seqq.* and p. 344 *et seqq.* The discussion in the Restatement should be read in the light of ss. 814 and 949 dealing with labour injunctions, to appreciate the full range of the data thought relevant. See also Fleming, on Torts (1957), p. 140 *et seqq.* for an Australian attack on "the will o' the wisp of a non-existent legislative intention", and *Martin v. Western etc. Union* (1934), 34 S.R. (N.S.W.) 593, for a review of the relevant considerations, and the refusal of damage relief in the face of penal sanctions by administrative process.

⁹⁰ British Columbia has recently introduced legislation imposing civil liability for all breaches of the Act, without distinction as to gravity or purpose. See, Trade-unions Act, *supra*, footnote 33.

⁹¹ 61 Stat. (pt. 1) 136, at p. 158; (1947), 29 U.S.C.A., s. 187. S. 303 (a) renders unlawful (for purposes only of the damage action) certain forms of secondary pressure, recognition and jurisdictional strikes.

⁹² Jamieson, Industrial Relations and Government Policy (1951), 17 C.J.E.P.S. 25, at pp. 28-9; *cf. Goloff v. I.W.A.*, [1959] C.C.H. Lab. L.R. para. 15, 236 (B.C., Cy. Ct.).

Of course, where the legislature has established a statutory scheme conferring rights and obligations unenforced by either penal sanctions or private remedies, a creative court will fill the vacuum. In the United States, decisions under the Railway Labour Act⁹³ have sensibly reached this position.⁹⁴ The whole rationale of the American decisions disappears, however, in the face of penal provisions in the Canadian labour statutes, and ample heads of common-law recovery for conspiracy and inducing breach. If legislation is not forthcoming specifically to confer causes of action, then the illegally struck employer has remedies short of conjectural resort to legislative intent.

Finally, as the *Vancouver Machinery*⁹⁵ case itself showed, there is considerable confusion between the substantive basis of liability and the procedural problem of the suability of a union. In holding, in the *Therien* case, that a union certified under the Labour Relations Act is suable both in contract and tort, the Supreme Court of Canada avoided the anomaly created by the decisions⁹⁶ of the British Columbia courts: that a union is suable in tort if the action is couched in terms of a breach of the Labour Relations Act, but not if framed in traditional common-law terminology, although the acts complained of be identical

VI. Civil Conspiracy.

The modern tort of conspiracy stands condemned, almost universally, as the vehicle of judicial anti-unionism.⁹⁷ Authors throughout the common-law world have denounced it as a "weapon . . . wielded with transparent partisanship to counter the aspirations of the trade union movement".⁹⁸

The constituent elements of the tort, at least in the strike con-

⁹³ 48 Stat. 1185, 45 U.S.C., s. 151 *et seqq.*

⁹⁴ *Texas N.O.R. v. Bro. Railway etc. Clerks* (1930), 281 U.S. 548; *Steele v. Louisville & Nashville Ry. Co.* (1944), 323 U.S. 192.

⁹⁵ *Supra*, footnote 51.

⁹⁶ *Vancouver Machinery Depot v. United Steel Workers*, *supra*, footnote 51; *Pacific Western Planing Mills*, *supra*, footnote 60; *Therien v. Teamsters*, *supra*, footnote 66.

⁹⁷ Teller, *Labor Disputes and Collective Bargaining* (1940), ss. 13-24; Prosser, *op. cit.*, *supra*, footnote 89, p. 755 *et seqq.*, Fleming, *op. cit.*, *supra*, footnote 89, pp. 725-6; Warm, *Judicial Attitude Toward Trade Unions and Labour Legislation* (1938), 23 *Minn. L. Rev.* 255, at p. 318 *et seqq.*, B.L., *Case and Comment*, (1942), 20 *Can. Bar Rev.* 636; Friedmann, *The Harris Tweed Case and Freedom of Trade* (1942), 6 *Mod. L. Rev.* 1, at pp. 5-7; *Social Security and Some Recent Developments in the Common Law* (1943), 21 *Can. Bar Rev.* 369, at p. 379; Cox, *op. cit.*, *supra*, footnote 77, at p. 323; American Law Institute, *Restatement, Torts*, s. 38, at pp. 95-6; *cf.* Sayre, *Criminal Conspiracy* (1921), 35 *Harv. L. Rev.* 393, at p. 427, calls the doctrine the "evil genius of our law".

⁹⁸ Fleming, *op. cit.*, *supra*, footnote 89, p. 725.

text, are (i) concerted activity (ii) to achieve an objective considered illegitimate or (iii) to achieve a legitimate objective by means which are either *per se* actionable or otherwise unlawful. Put negatively, to avoid civil liability, a strike must impinge upon neither social sensibilities of judges nor legal "rights". The attack on the tort has been mounted on three levels, paralleling the elements of the tort. First, is there in concerted activity anything so analytically distinctive as to merit judicial concern? Second, do judges (consciously or otherwise) in assessing objectives arrogate legislative value judgments to themselves; and, if so, are these judgments proper? Third, what factors invoke group liability where the individual may act with impunity?

The three-pronged attack on the conspiracy doctrine as an anti-strike weapon has been successful on the first two levels. As to the distinctiveness of concerted activity, the most recent English case in this field, the *Crofter* case,⁹⁹ effectively makes the point that conspiracy is an anomalous remedy and reflects its Star Chamber criminal antecedents.¹⁰⁰ The anomaly lies in the crudeness¹⁰¹ of drawing a line between one individual and two: "Some men are a host in their individual selves . . . some multitudes are asses".¹⁰²

At the second level, that of value-judgments, for a time at least it seemed that English,¹⁰³ American,¹⁰⁴ Canadian,¹⁰⁵ and

⁹⁹ *Supra*, footnote 50; to the same effect, see *Fraser v. McKernan* (1931), 46 C.L.R. 343, at p. 410, per Evatt J.

¹⁰⁰ *Ibid.*, at pp. 443-4, per Lord Simon, at p. 468, per Lord Wright; cf. Hughes, *The Tort of Conspiracy* (1952), 15 Mod. L. Rev. 209, at p. 213. Conspiracy has been called a "tort of meglomaniac pretensions" (at p. 214).

¹⁰¹ Fleming, *op. cit.*, *supra*, footnote 89, p. 724.

¹⁰² *Sorrell v. Smith*, *supra*, footnote 50, at p. 722 per Lord Dunedin (quoting counsel in *Quinn v. Leatham*, [1901] A.C. 495, at p. 504). "In the play, Cyrano de Bergerac's single voice was more effective to drive the bad actor Montfleury off the stage than the protests of all the rest of the audience to restrain him. The action of a single tyrant may be more potent to inflict suffering on the continent of Europe than a combination of less powerful persons." *Crofter v. Veitch*, *supra*, footnote 50, at p. 443, per V. Simon L.C.

¹⁰³ *Crofter v. Veitch*, *ibid.*, at p. 472, per Lord Wright: "English law . . . has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful . . . If further principles of regulation or control are to be introduced, that is a matter for the legislature."

¹⁰⁴ *U.S. v. Hutcheson* (1940), 312 U.S. 219, at p. 232, per Frankfurter J.: "So long as a union acts in its self-interest . . . the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means," (in the context of entitlement to protection under Clayton Act, s. 20).

¹⁰⁵ *Corbett v. Canadian National Printing Trades*, [1943] 4 D.L.R. 441 (Alta. C.A.).

Australian¹⁰⁶ courts were finally committing themselves to a policy of judicial restraint. Indeed, as one author has suggested, the Wagner Act itself (and presumably Canadian legislation patterned after it) was committed to a policy of non-intervention in the bargaining process, beyond guaranteeing its necessary preconditions.¹⁰⁷ The trend of the law was thus to leave labour free to choose its own legitimate objectives without judicial evaluation under the "lawful objectives" branch of conspiracy. In Canada, at least, this tendency was shortlived. In *Corbett v. Canadian National Printing Trades*,¹⁰⁸ the majority did follow the self-interest test of the *Crofter* case, although Ford J.A. (dissenting) spoke of the "unlawful and unjustifiable" acts of the union.¹⁰⁹ In *Southam v. Gouthro*,¹¹⁰ Wilson J., although finding liability for conspiracy on other grounds, likewise hewed to the *Crofter* test of self-interest:

Their object was at worst, the furtherance of their own interest (an object which the law accepts as legitimate) and at best an altruistic interest in the welfare of their Winnipeg brothers. No law has yet proclaimed altruism, however misguided, to be an illegal object.¹¹¹

The same judge in *Williams v. Aristocratic Restaurant*¹¹² again adopted Lord Wright's self-interest test in the *Crofter* case.

The trend of course, despite the optimistic predictions of commentators,¹¹³ was far from universal. For example, Manson J. in *Seaboard Owners v. Cross*¹¹⁴ in 1949 delivered an intemperate discourse on labour relations:

Lock-outs and strikes are both forms of warfare and neither are compatible with the good old British way of taking disputes to the Courts, which, unfortunately, in the case of certain disputes as between employer and employee, as the law stands, cannot be done . . . [The picketing] was calculated and intended to compel another person to do that which he had a right to abstain from doing . . .¹¹⁵

The same year, *Fokuhl v. Raymond*¹¹⁶ saw the Ontario courts giving voice to a moral indignation which, no matter how justified, is a far cry from judicial restraint. Relying on *Quinn v. Leathem*¹¹⁷

¹⁰⁶ *Fraser v. McKernan*, *supra*, footnote 99.

¹⁰⁷ Cox & Dunlop, *The Regulation of Collective Bargaining* (1950), 63 *Harv. L. Rev.* 389.

¹⁰⁸ *Supra*, footnote 105.

¹⁰⁹ [1948] 3 D.L.R. 178 (B.C.).

¹⁰⁹ *Ibid.*, at p. 453.

¹¹¹ *Ibid.*, at p. 184.

¹¹² [1950] 4 D.L.R. 548, at pp. 551-2 (B.C.).

¹¹³ ". . . the *Crofter* case is a landmark in the English law of civil conspiracy and an effective herald of a saner judicial attitude to trade union functions under the common law. As such it stands as an example to Canadian courts." B.L., *Case and Comment*, *supra*, footnote 97, at p. 640.

¹¹⁴ [1949] 3 D.L.R. 709 (B.C.).

¹¹⁵ *Ibid.*, at p. 715.

¹¹⁶ [1949] 4 D.L.R. 145 (Ont. C.A.).

¹¹⁷ [1901] A.C. 495.

and *Klein v. Jenoves*¹¹⁸ to find an interference with contractual relations, Roach J.A. went on to say:

Every person is entitled to enter into whatever lawful contracts he may choose to make The free and full exercise of that right is not subject to the dictation or control of any other unauthorized person. Raymond invaded the harmonious trade relations existing between the respondent and his employees . . . with a high-handed, dictatorial assumption of power . . . which ought to have been repelled by them with such force and vigour as to make it certain once and for all time that they were not slaves¹¹⁹

McRuer C.J.H.C. has delivered many important decisions in labour law in Ontario. He has spoken in a compassionate way of,

. . . all the lawful rights to strike and the lawful rights to picket; . . . a freedom that should be preserved and its preservation has advanced the interests of the labouring man and the community as a whole to an untold degree over the last half-century.¹²⁰

Yet, for him, the "broader and more important question" to be considered was "the line between lawful strikes and picketing and conspiracy to injure in order to obtain benefits for a particular person or class".¹²¹ He resolved the question before him (the legality of picketing in support of a premature economic strike) by forbidding employees 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".¹²²

With respect, the dichotomy created between "lawful strikes" and "conspiracy to injure", and talk of "the purpose of injuring the business of their employer" invites the judicial evaluation of labour objectives which may subvert the "freedom" the learned Chief Justice so prizes. This "vocabulary of vituperation"¹²³ enshrined in the conspiracy formulation is exactly what the *Crofter* case was thought to have discarded.¹²⁴

In *Hammer v. Kemmis*¹²⁵ for example, damages for conspiracy

¹¹⁸ *Supra*, footnote 12.

¹¹⁹ *Supra*, footnote 116, at p. 159.

¹²⁰ *General Dry Batteries v. Brigenshaw*, *supra*, footnote 75, at p. 419.

¹²¹ *Wilson Court Apts. v. Jenovese*, [1958] O.W.N. 302, at p. 303.

¹²² *General Dry Batteries v. Brigenshaw*, *supra*, footnote 75, at p. 419.

¹²³ *Pratt v. B.M.A.*, [1919] 1 K.B. 244, per McCardie J.

¹²⁴ "We hope that in the interest of the national drive for salvage, the famous trilogy of cases, *Mogul S.S. Co. v. McGregor*, *Gow & Co. . . . Allen v. Flood . . .*, and *Quinn v. Leatham . . .*, together with *Sorrell v. Smith . . .* will now be consigned to the scrap heap." Note, (1942), 58 L.Q. Rev. 150. The *Crofter* case was said to "represent a functional approach to trade unionism, . . . and thus atones, after forty years, for *Quinn v. Leatham*". B.L., Case and Comment, *supra*, footnote 97, at p. 636.

¹²⁵ (1956), 3 D.L.R. (2d) 565, (1956), 18 W.W.R. (N.S.) 673 (B.C.), *aff'd.* (1956), 7 D.L.R. (2d) 684, (1956), 20 W.W.R. (N.S.) 619 (B.C.C.A.).

to injure by unlawful means (including nuisance and intimidation) were awarded to a marginal bakery operator, the victim of organizational picketing. The purpose of the picketing was held by the British Columbia Court of Appeal to be punitive. The basis upon which the purpose was evaluated by Sheppard J.A. was an excerpt from the trial testimony:

Q. Well, why so busy with something *that does not concern you* then? You had no members in there and you had no complaints or requests for assistance?

A. Well, I think, your Honour, that our job is to organize all the bakeries in the City . . .¹²⁶

The unsympathetic attitude there revealed is to be contrasted with that of Davey J.A., dissenting:

I should think wages below Union standards, even in one shop, would be a matter of proper concern to the Union as a potential threat to the standards it seeks to maintain.¹²⁷

and:

. . . Hammer had thrown down the gage of battle; consequently . . . it would be useless to attempt to organize the shop by silent penetration or to secure a collective agreement by negotiation . . . those objects could only be secured by economic pressure. Economic pressure exerted by persons acting in concert is not unlawful *per se*.¹²⁸

One cannot but sympathize with Hammer's plight, yet the dissenting judgment surely reveals a deeper understanding of the social realities, and brings to the fore the real clash of values which inheres in judicial evaluation of "purpose".

The debate continues between those judges who are content to allow the clash of interests to be self-regulating, and those whose convictions about a "right" to trade or work impel them to label objectives as lawful or unlawful, and so to colour conspiracy. It is submitted that the former position is more consistent with collective bargaining legislation. In the absence of legislative pronouncement on the legitimacy of labour demands, moreover, judicial standards do presume to evaluate what public policy has not. This evaluation inflames the very antagonisms it seeks to dampen, unless undertaken with restraint.

Assuming then, as indeed was the case in *Southam v. Gouthro*,¹²⁹ that a judge will not presume to evaluate the objective of a striking union, "lawful purpose" is put to one side. Emerging as a likely basis of visiting tort liability upon striking unions is the "unlawful means" phase of the conspiracy liturgy. This poses the

¹²⁶ *Ibid.*, at p. 704 (emphasis added).

¹²⁷ *Ibid.*, at p. 689.

¹²⁹ *Supra*, footnote 75.

¹²⁸ *Ibid.*, at p. 691.

third problem: what factors invite group liability for conduct innocently done by an individual?

Unlawful means, as was acknowledged in the *Crofter*¹³⁰ case, include nominate torts and crimes. To these the Canadian courts have added violations of the Labour Relations Acts, which render actionable, in conspiracy, strikes which were formerly innocent, and not prescribed if done by one individual, merely because of prematurity or other noncompliance with the Act. In *Southam v. Gouthro*, although treating picket-line violence as the illegal means upon which to found an action of conspiracy, Wilson J. indicated that a strike in breach of P.C. 1003 would be an actionable conspiracy to do an unlawful act;¹³¹ the element of agreement, however, not being made out, liability was imposed on other grounds. The fact that the learned judge relied on the definition of a criminal conspiracy stated by Willes J. in *Mulcahy v. The Queen*¹³² (which was also cited in *Crofter*) directs attention away from the "lawfulness of object" inquiry to solely that of "lawfulness of acts". Acts forbidden by statute are unlawful, hence their employment as the means to legitimate ends invokes liability for conspiracy, though the acts are not *per se* actionable.

In *Dewar v. Dwan*,¹³³ a group of Canadian Confederation of Labour unionists sought to hold American Federation of Labor members liable for conspiracy to injure, alleging that they had been discharged as a result of a threat by defendants to strike, which would have been contrary to the Ontario Labour Relations Act. McRuer C.J.H.C. conceded that a cause of action might thereby accrue to the struck employer, but rejected the notion that it gave plaintiffs a cause of action. Stated in this fashion, the decision is hard to reconcile with that in *Therien v. Teamsters*,¹³⁴ the acts being qualitatively identical. It does not matter that the legislation *per se* gives no cause of action to the plaintiff. Mere unlawfulness supports a conspiracy action. It would have been more tenable, it is submitted, to dismiss this and similar conspiracy actions out of hand on the basis of the Ontario Rights of Labour Act.¹³⁵ However, the learned Chief Justice was unwilling to try the unknown:

¹³⁰ *Supra*, footnote 99, at p. 462, per Lord Wright, at p. 445 per Viscount Simon, L.C.

¹³¹ *Supra*, footnote 75, at p. 188.

¹³² "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." (1868), L.R. 3 H.L. 306, at p. 317.

¹³³ (1957), 11 D.L.R. (2d) 130 (Ont.).

¹³⁴ *Supra*, footnote 66.

¹³⁵ *Supra*, footnote 34, s. 3(1).

"This Act", he pointed out, "has not been applied or interpreted in any case, and I do not intend to apply or interpret it in this case."¹³⁶

Two further Ontario cases suggest judicial repeal of the Rights of Labour Act. In *Fokuhl v. Raymond*,¹³⁷ a union official took the position that a subcontractor, not being a "bona fide electrical contractor", nor a member of the Association with which the union had contracts, was not to work on a union job. He therefore forced the plaintiff subcontractor's employees, who were union men, but who had no valid collective agreement, to quit their jobs so that the subcontract could not be performed and would have to be terminated. In *Newell v. Barker*¹³⁸ two union officials forced termination of a subcontract with a non-union employer by threatening to call a strike of the principal employer. A strike in either case would have violated now-section 49 of the Ontario Labour Relations Act.¹³⁹ In neither case was this argued. In the *Fokuhl* case, the Ontario Court of Appeal found, *obiter dicta*, that in quitting work, plaintiff's employees had made themselves liable in conspiracy, although liability was imposed on a different basis:

The sole purpose of that combination was to compel the respondent to give up and terminate his contractual relations with the Austin Company and thus to injure him. A combination for that purpose . . . would plainly be unlawful and actionable.¹⁴⁰

This was regarded as a conspiracy to injure ("wrongful purpose") by interfering with contractual relations ("wrongful means"). Undoubtedly, the result of the case is proper because, as Roach J.A. pointed out, "The record is replete with illustrations of the power (defendant) wielded, and his "yen" to demonstrate that power".¹⁴¹

In the *Newell* case, the Supreme Court of Canada drew a different inference as to "wrongful means" from facts which appear to differ only in the way in which the language of diplomacy differs from that of the marketplace:

Throughout the evidence establishes that the respondents did no more than what they individually conceived to be their respective duties as officers of the union¹⁴²

The court goes on to find that there was no evidence to support

¹³⁶ *Supra*, footnote 133, at p. 140.

¹³⁷ [1949] 4 D.L.R. 145 (Ont. C.A.).

¹³⁸ [1950] S.C.R. 385, [1950] 2 D.L.R. 289.

¹³⁹ R.S.O., 1950, c. 194, s. 49 am. S.O., 1954, c. 42, s. 14.

¹⁴⁰ *Supra*, footnote 137, at p. 156.

¹⁴¹ *Ibid.*, at p. 176.

¹⁴² *Supra*, footnote 138, at p. 296.

liability for conspiracy to injure. Moreover, as Rand J. pointed out, citing the *Crofter* case:

It is now established beyond controversy that in the competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct

A building contractor who, in the conditions of labour organization today, contemplates available labour as unaffected by its own special interests, proceeds on a false assumption; he is familiar with the everyday refusal of union employees, for a variety of reasons, to enter upon work¹⁴³

Despite the ephemeral quality of dicta, the *Newell* decision is surely significant. First of all, throughout the entire litigation, the Rights of Labour Act was not once judicially referred to. Secondly, although the *Fokuhl* decision technically rested on interference with contract, and did not discuss the *Crofter* case, dicta in that case indicated a willingness to find liability for conspiracy. If reconcilable in formula with *Newell*, *Fokuhl* is thus totally irreconcilable in result.¹⁴⁴ *Fokuhl*, however, was not discussed in *Newell*, and thus cannot be taken to be overruled. Finally, the *Fokuhl* decision turned upon the phraseology of a "cause of action," while *Newell* represented a closer examination of the facts. Rand J., at least, was able to approach the problem in terms of the actionability of a strike as a social phenomenon, while the Ontario courts in the *Fokuhl* case were left to grapple with verbal formulae.

In a recent New Brunswick decision,¹⁴⁵ the "right" to refuse to deal with an uncertified union, purportedly granted by the Labour Relations Act, was held to have been violated by a recognition strike. Those who engaged in such a strike were said to have engaged in an "unlawful combination", for which they were held liable in damages.

The use of breaches of the statute as illegal acts upon which to found a conspiracy action is by no means inevitable. In *Coles*

¹⁴³ *Ibid.*, at pp. 299-300.

¹⁴⁴ The decisions are the more surprising because in *Fokuhl* the pressure was at least directed towards the primary party to the dispute, the plaintiff, while in *Newell*, the pressure was secondary. The remoteness of pressure was considered in neither case.

¹⁴⁵ *Merloni v. Acme Construction*, *supra*, footnote 46. "The predominant purpose of those who promoted the strike, and were directing the picketing was . . . to circumvent the *Labour Relations Act* . . . the cessation of work was to be obtained and thereby recognition of the union compelled or the plaintiff put out of business." (at para. 11, 670). Ritchie J., in this case, fashioned from whole cloth a code of conduct for uncertified unions—a feat the New Brunswick legislature has yet to attempt.

v. *Cunningham*,¹⁴⁶ an action was brought (i) to enjoin picketing by seamen who had quit their ship in violation of section 251 of the Canada Shipping Act,¹⁴⁷ and (ii) for damages for conspiracy in tying up plaintiff's ship. In refusing the injunction, Coady J. held that the illegality of the "strike" did not affect the legality of the picketing. Conversely, it can be argued that in the action for conspiracy (which was not dealt with at that time) the unlawful act was not referable to the conspiracy alleged to have caused the damage.

This, indeed, is the thrust of the argument by Wilson J. in *Aristocratic Restaurants v. Williams*,¹⁴⁸ also a picketing case in which damages for conspiracy were sought. Granted, said the learned judge, that "if the acts agreed on and done are unlawful *per se* and cause damage, an inquiry into the object of the conspiracy is not necessary".¹⁴⁹ This leaves unresolved the further question that "proof of *damnum absque injuria* is not enough, the damage must have been *caused* by an illegal act".¹⁵⁰ Recovery was therefore refused.

It is the necessity of proving the causal relationship between the unlawful act and the damage suffered that may mitigate the cumulative effect of conspiracy plus breach of statute. Admitted that it is for the conspiracy and not for the wrongful acts *per se* that liability is imposed. Nonetheless, it is hard to see why a strike for legitimate objectives should be actionable before resort to conciliation as required by the statute, and not after. The unlawfulness is referable only to the timing of the strike (the parties being free to reject the conciliation report); the onus should thus be thrown on the plaintiff to show that the timing caused him a loss which he would not otherwise have borne.

To hold that *any* unlawfulness makes actionable an otherwise lawful "conspiracy" would involve serious consequences. A strike held in pursuance of the statutory requirements might become an actionable conspiracy because of a single incident of picket-line violence, or breach of a municipal no-handbill by-law. Clearly, though the conspiracy element creates an independent and super-added liability for wrongful acts done in pursuance of it,¹⁵¹ the liability ought, at least, to be confined to the damage flowing from

¹⁴⁶ (1953), 10 W.W.R. (N.S.) 507 (B.C.).

¹⁴⁷ R.S.C., 1952, c. 29.

¹⁴⁸ [1950] 4 D.L.R. 548, revs'd., [1951] 3 D.L.R. 769 (B.C.C.A.); revs'd., [1951] S.C.R. 762.

¹⁴⁹ [1950] 4 D.L.R. at p. 551.

¹⁵⁰ *Ibid.*, at p. 554.

¹⁵¹ *Southam v. Gouthro*, *supra*, footnote 75.

the wrongful acts, as opposed to those which are lawful. In the case of strikes altogether forbidden by statute, e.g. strikes in breach of a collective agreement, or for some other legislatively proscribed objective, all the natural consequences of the strike could be said to have been caused by the conspiracy.¹⁵²

Thus, the factors which invite liability for group action appear to be conceptual rather than factual. Breaches of provisions of the Labour Relations Acts have been used as ciphers in the formula "wrongful means plus concerted activity equals cause of action". Liability for conspiracy to injure purportedly turns upon evaluations of the purpose and conduct of the defendant—factual matters—but no analysis of the facts seems to take place. Rather an emotional correlation develops between seemingly antisocial activity contravening vaguely-stated standards, and conspiracy to injure. In sum, the conspiracy cases defy reconciliation,¹⁵³ and although the Canadian cases provide no recent examples of liability for a strike *simpliciter* under the doctrine, one is driven to three conclusions:

- (a) "It is not necessary to construct any specious theory by virtue of which combination is sought to be made the basis of unlawfulness. Combined activity is a single circumstance whose illegality is discoverable in impairment of the right to a free and open market."¹⁵⁴
- (b) The tort is conceptually at odds with the statutory plan of collective bargaining, and its corollary of concerted action by unions. The common law, always suspicious of numbers, developed the tort of conspiracy in the latter part of the nineteenth century in response to the then-prevailing antipathy towards concerted economic activity.¹⁵⁵ Far from sharing this antipathy towards concerted action, modern collective bargaining legislation presupposes its necessity to equalize the management-labour

¹⁵² *Therien v. Teamsters*, *supra*, footnote 66.

¹⁵³ See *Crofter v. Veitch*, *supra*, footnote 50, at p. 472 per Lord Wright.

¹⁵⁴ *Teller*, *op. cit.*, *supra*, footnote 97, at p. 46; cf. *Kennedy and Finkelman*, *op. cit.*, *supra*, footnote 23, pp. 58-92.

¹⁵⁵ Bryan, *Development of the English Law of Conspiracy* (1909), ch. v., esp. p. 146 *et seq.*; Haslam, *Law Relating to Trade Combinations* (1931), ch. 2; Sayre, *op. cit.*, *supra*, footnote 97, at p. 412 *et seq.* The criminal antecedents of the tort have had a longer and better researched history. It has also been suggested that this antipathy was directed one-sidedly against labour. Gregory, *Labor and the Law* (1955), ch. 2, "Free Enterprise in England—The Double Standard". Cf. *Friedmann*, *The Harris Tweed Case and Freedom of Trade*, *supra*, footnote 97, at p. 6. *Forkosch*, *Labor Law* (1953), suggests this was "an economic flip-flop but not a legalistic about-face . . ." (p. 380).

contest.¹⁵⁶ With legislation pointing in one direction and the conspiracy doctrine in the other, little wonder that courts stand bewildered at the cross-roads. So long as the concerted activity is within the allowable statutory limits, the road is clear; once it runs afoul of these limits, the courts are apt to seize upon the conspiracy doctrine as an available tool to fashion a result that they deem just. Unfortunately, the tool is inappropriate to the job at hand, having been developed to deal with quite another evil.

Nor are the objections to the use of the conspiracy doctrine purely historical. There are serious misgivings because of the vagueness of the authorities,¹⁵⁷ as well as the latitude given by the doctrine to individual judges;¹⁵⁸ witness: the legislative repudiation of the doctrine in England fifty years ago,¹⁵⁹ in the United States twenty-five years ago,¹⁶⁰ and in several Canadian jurisdictions.¹⁶¹

- (c) Finally, the doctrine is superfluous. To the extent to which it has been utilized to make actionable the infliction of injury which cannot be identified under the more tradi-

¹⁵⁶ To some extent, a parallel development is discernible in the common law. See Friedmann, *ibid.*, at p. 2 (comment on the evolution in English judicial thinking on economic individualism over the past fifty years); *cf.* Friedmann, *Social Security and Some Recent Developments In the Common Law*, *supra*, footnote 97, at p. 379; McAllister, *Case and Comment*, (1956), 34 Can. Bar Rev. 587, at p. 589. For legislative attitudes, see Laskin, *op. cit.*, *supra*, footnote 79; Rand, *op. cit.*, *supra*, footnote 6, pp. 41-2. It is noteworthy that the original Ontario Collective Bargaining Act contained a repudiation of the civil conspiracy doctrine: S.O., 1943, c. 4, s. 3(1). For expressions of the American policy, see Wagner Act (1935), s. 1: "It is hereby declared to be the official policy of the United States to . . . [encourage] the practice and procedure of collective bargaining and . . . full freedom of association . . ." See also Cox, *op. cit.*, *supra*, footnote 77, at p. 322: "The Wagner Act became law on the floodtide of the belief that the conflicting interests . . . can be adjusted only by private negotiation, backed, if necessary, by economic weapons, without the intervention of law."

¹⁵⁷ "The indefiniteness of the law of conspiracy to injure prevents it from being a practical guide to workmen as to what they may do in times of strike and what they must avoid . . . The law of conspiracy to injure is a law unfitted for workmen in case of trade disputes." Report of Royal Commission on Trade Disputes (1906), Cd. 2825, p. 89. See also *Crofter v. Veitch*, *supra*, footnote 50, at p. 472.

¹⁵⁸ Warm, *op. cit.*, *supra*, footnote 97, at p. 261 *et. seqq.*; S.A.D.S., Note, (1942-4), 8 Camb. L.J. 101, at p. 102; Friedmann, *The Harris Tweed Case and Freedom of Trade*, *supra*, footnote 97, at p. 6.

¹⁵⁹ Trade Disputes Act (1906), 6 Edw. VII, c. 47, s. 1 (Am. Conspiracy and Protection of Property Act (1875), 38 & 39 Vict., c. 86, s. 3).

¹⁶⁰ Norris-LaGuardia Act (1932), ss. 4-5, 47 stat. 70-1, 29 U.S.C.A. 104, 5 (limiting substantive entitlement to labour injunctions in United States federal courts).

¹⁶¹ Trade Unions Act, R.S.N., 1952, c. 262, s. 4; Rights of Labour Act, R.S.O., 1950, c. 341, s. 3(1); Trade Unions Act, R.S.S., 1953, c. 259, s. 22.

tional heads of recovery, it has been assigned the role filled by the *prima facie* tort doctrine in the United States.¹⁶² That doctrine at least has the virtue of demanding a clearer exposition of the competing social interests¹⁶³ than does the conspiracy formulation in terms of "lawful" or "wrongful". If the conduct complained of to make the conspiracy actionable is itself actionable, then conspiracy adds nothing. If the conduct is not traditionally actionable if done by one, then rather than make liability turn upon numbers, it is our traditional conceptions of tort liability which should be re-examined.

VII. *Intentional Interference With Another's Rights.*

Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse.¹⁶⁴

This classic English formulation of the doctrine appears to have found wide support in the United States, as the theory of *prima facie* liability for the unjustified infliction of harm, largely advanced by Holmes J. in an early article in the Harvard Law Review.¹⁶⁵ Certainly, legal opinion diverges widely on the limits of liability. Fidelity to the historical antecedents of the doctrine, as well as an appreciation of its potential abuse, have led to proposals that it be narrowly confined¹⁶⁶ or rejected altogether as a mode of analysis.¹⁶⁷

¹⁶² Teller, *op. cit.*, *supra*, footnote 97; Haslam, *op. cit.*, *supra*, footnote 155, p. 191 *et. seqq.*; Smith, Labor Law (1950), pp. 78-81; Forkosch, *op. cit.*, *supra*, footnote 155, ch. 8; Prosser, *op. cit.*, *supra*, footnote 89, p. 732; Rand, *op. cit.*, *supra*, footnote 6, at p. 38; Hale, *Prima Facie* Torts, Combination and Non-Feasance (1946), 46 Col. L. Rev. 196; Lathorp, Note, (1943), 41 Mich. L. Rev. 1143, at p. 1144.

¹⁶³ See *infra*, next section.

¹⁶⁴ *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598, at p. 613 (C.A.), *aff'd.*, [1892] A.C. 25.

¹⁶⁵ Holmes, Privilege, Malice and Intent (1894), 8 Harv. L. Rev. 1; *Vegeahn v. Guntner* (1896), 167 Mass. 92, 44 N.E. 1077; *Plant v. Woods* (1900), 176 Mass. 492, 57 N.E. 1011; *Aikens v. Wisconsin* (1904), 195 U.S. 194. For general discussions of the doctrine, see Kennedy and Finkelman, *op. cit.*, *supra*, footnote 23; Hale, *op. cit.*, *supra*, footnote 162; Sayre, Inducing Breach of Contract (1922), 36 Harv. L. Rev. 663; Carpenter, Interference With Contract Relations (1927), 41 Harv. L. Rev. 728.

¹⁶⁶ Sayre, *ibid.*, suggests that the remedy ought to be confined to cases where the defendant has appropriated for himself the very advantages sought by plaintiff.

¹⁶⁷ Wright, Introduction to the Law of Torts (1944), 8 Camb. L.J. 238, suggests that torts is an interest-balancing process, and that discussion of "rights and wrongs", "lawful and unlawful" acts, common in the *prima facie* cases, is essentially question-begging.

Looked at as a general theory of liability, under which may be subsumed conspiracy, inducing or procuring breach, and interference with legal rights, the *prima facie* tort doctrine may well be a convenient analytical aid. Indeed, Holmes J., in his article indicated that he was only propounding a method of understanding cases, not of deciding them.

The American development in the labour law area focused on the issue of "justification", recognizing that the conflicting interests of labour and management render inevitable the deliberate infliction of harm. In so doing, the social issues were brought to the fore and subjected to scrutiny. The method was essentially a three-step process of cognition that:

- (i) The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be obtained merely by logic and the general propositions of law which nobody disputes.¹⁶⁸
- (ii) The issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats.¹⁶⁹
- (iii) The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.¹⁷⁰

As applied to labour cases, the American doctrine of just cause has taken the formulation that:

Workers are privileged intentionally to cause harm to another by concerted action if the object and means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.¹⁷¹

Translated into successive steps as an analytical tool, the doctrine looks to (i) the invasion of a legally recognized right of the employer, (ii) by union action judicially peaceful, legal, and not condemned by public policy, (iii) in furtherance of a primary motive of self-betterment, and (iv) some overbearing public policy which should dictate the result no matter how the earlier questions were resolved.¹⁷² At the fourth level, that of overbearing public policy,

¹⁶⁸ *Vegeahn v. Guntner*, *supra*, footnote 165, at p. 106 (Mass.), at p. 1080 (N.E.).

¹⁶⁹ *Plant v. Woods*, *supra*, footnote 165, at p. 505 (Mass.), at p. 1016 (N.E.).

¹⁷⁰ *Johnson v. United States* (1908), 163 F. 30 (1st. Cir.), at p. 32, per Holmes J.

¹⁷¹ American Law Institute, Restatement, Torts, s. 775. There is likewise a privilege to threaten to engage in privileged activity: s. 783.

¹⁷² Forkosch, *op. cit.*, *supra*, footnote 155, s. 160.

the just cause doctrine reveals its weakness as a method of deciding cases,¹⁷³ though retaining utility as a purely analytical device.¹⁷⁴ All the criticisms levelled at the courts for abuses of the "wrongful purpose" limb of conspiracy to injure are germane here to the abuse of the doctrine of just cause. Nonetheless, it is not improbable that, in the main,

As the community conscience has grown more sensitive, the *prima facie* tort doctrine has helped to bring the law of torts into closer alliance with general good ethics.¹⁷⁵

In England (and Canada), the outcome of the *prima facie* tort doctrine has been rather less happy.¹⁷⁶ In introducing his chapter on "Interference with Advantageous Relations", Dean Wright observes:

. . . we launch on troubled waters which are studded with the rocks on which many an action has foundered—"rights", "malice", "intention", "lawful", and "unlawful" acts¹⁷⁷

The English approach has been bifurcated: on the one hand anarchical licence for commercial competition by means fair and foul,¹⁷⁸ up to the point of acts unlawful *per se*;¹⁷⁹ on the other hand sanctity of contract, interference with which probably admits of no justification,¹⁸⁰ at least in the pre-*Crofter*¹⁸¹ judicial attitude

¹⁷³ *Ibid.*, s. 162; Warm, *op. cit.*, *supra*, footnote 97; Frankfurter and Greene, *op. cit.*, *supra*, footnote 1, pp. 24-46.

¹⁷⁴ Forkosch, *op. cit.*, *supra*, footnote 155, p. 420.

¹⁷⁵ Note, The *Prima Facie* Tort Doctrine (1952), 52 Col. L. Rev. 503, at p. 504.

¹⁷⁶ For an amazing example of the English attitude, see Pollock, on Torts (14th ed., 1939), at p. 43 ff., where Landon, ed., attacks Pollock bitterly for the *prima facie* tort formulation. See also *Excursus C*, at p. 252. Nonetheless, the traditional intentional tort of trespass—to person or property—has long recognized a principle of justification. See Fleming, Torts (1957), ch. 5.

¹⁷⁷ Wright, Cases on Torts (2d. ed., 1958), p. 865.

¹⁷⁸ "English law . . . has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful . . . we live in a competitive or acquisitive society, and the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds that divide the rightful from the wrongful use of the actor's own freedom If further principles of regulation or control are to be introduced, that is a matter for the legislature." *Crofter v. Veitch*, *supra*, footnote 50, at p. 472 per Lord Wright. See also Earle, Law Relating to Trade Unions (1869), p. 12; *Mogul v. McGregor*, *supra*, footnote 164; *Ware and Defreville v. M.T.A.*, [1921] 3 K.B. 40 (C.A.); *Thompson v. New South Wales Branch of the B.M.A.*, [1924] A.C. 764; *Sorrell v. Smith*, *supra*, footnote 50.

¹⁷⁹ *Tarleton v. M'Gawley* (1794), 1 Peake N.P.C. 270, 170 E.R. 153; *National Phonograph Co. v. Edison-Bell Cons. Phono. Co.*, [1908] Ch. 335 (C.A.); *Pratt v. B.M.A.*, [1919] 1 K.B. 244 (apparently overruled by *Thompson v. N.S.W. Branch of B.M.A.*, *supra*, footnote 177, 40 L.Q. Rev. 389).

¹⁸⁰ *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749 (Q.B.); *Temperton v. Russell*, [1893] 1 Q.B. 715; *Quinn v. Leatham*, *supra*, footnote 102;

towards labour unions. Liability for unjustified infliction of harm is thus not seen by the English courts as the enunciation of a broad principle of which interference with contractual relations is but one instance.¹⁸² Just as attention focuses on interference with an *a priori* contractual right to the exclusion of justification,¹⁸³ other *a priori* rights can be developed: a right to earn a living,¹⁸⁴ to carry on business,¹⁸⁵ to refuse to bargain with a union¹⁸⁶ subject to legislation. At the same time, even the narrow tort of inducing breach of contract has potential for wide abuse to the extent that the strict requirements¹⁸⁷ of the tort are ignored. This, as will appear, has been the trend of the Canadian case law, though the English *progenitur* was long ago laid to rest by statute.¹⁸⁸

In *Fokuhl v. Raymond* which, as has been suggested, was really a strike situation, the union pursued its policy in the teeth of plaintiff's subcontract. The proffered justification was rejected at trial:

No doubt [said LeBel J.] the acts which prompted the interference with the plaintiff's subcontract were concerned with bringing conditions into line with union policy, with which the Court has no concern, but if the acts were in violation of the plaintiff's legal rights, and were committed knowingly, the defendants cannot be heard to say that the interest of the Union justifies their conduct. If that were so, contractual rights would be subservient to the general interests of a trade union, and this was clearly never the law.¹⁸⁹

Read v. Friendly Society, [1902] 2 K.B. 732 (C.A.); *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; *Larkin v. Long*, [1915] A.C. 814; see especially *Sorrell v. Smith*, *supra*, footnote 50, at p. 713 per Viscount Cave L.C. For authority *contra*: *Smithies v. N.A.O.P.*, [1909] 1 K.B. 310 (C.A.) (pursuit by union of its own contractual rights); *Brimelow v. Casson*, [1924] 1 Ch. 302 (contracts broken forced underpaid circus employees to prostitution); *Pratt v. B.M.A.*, *supra*, footnote 179, at p. 265 (*dicta re* privileged conduct); Citrine, *Trade Union Law* (1950), pp. 444-6.

¹⁸² Laskin, *Labour Law: 1923-1947* (1948), 26 *Can. Bar Rev.* 286, at p. 298.

¹⁸³ Note, *The Prima Facie Tort Doctrine*, *supra*, footnote 175.

¹⁸⁴ See Kennedy and Finkelman, *op. cit.*, *supra*, footnote 23, pp. 70-76 for a discussion of justification in the English law of inducing breach.

¹⁸⁵ *Allen v. Flood*, [1898] A.C. 1; *Quinn v. Leathem*, *supra*, footnote 102.

¹⁸⁶ *Mogul v. McGregor*, *supra*, footnote 164.

¹⁸⁷ *Lyons v. Wilkins*, [1896] 1 Ch. 811, [1899] 1 Ch. 255 (C.A.).

¹⁸⁸ See *Thomson v. Deakin*, [1952] Ch. 646 (C.A.), for the requirements of the tort.

¹⁸⁹ *Trade Disputes Act* (1906), 6 *Edw. VII*, c. 47, s. 3.

¹⁸⁹ [1948] 3 *D.L.R.* 11, at p. 25; foll'd. *Bevaart v. Flecher*, *supra*, footnote 46, (picketing by American Federation of Labour in jurisdictional dispute with "Christian Labour Association", resulting in liability because of refusal of unionists to cross picket line). But see Roach J.A.'s dictum: "It is trite law that it is a violation of a legal right to interfere with contractual relations recognized by law if there be no sufficient justification" *Fokuhl v. Raymond*, *supra*, footnote 137, at p. 174 (italics added). No justification was found.

It was indeed this very situation of which Professor Sayre disapproved¹⁹⁰ twenty-five years earlier (in an era much less tolerant of unionism) in questioning the *Glamorgan* decision,¹⁹¹ beyond which the provincial courts¹⁹² seem reluctant to progress.

Although the "yellow-dog" contract device revealed in the *Hitchman Coal* case¹⁹³ has been statutorily repudiated,¹⁹⁴ the imposition of liability for strikes as procuring breach of employment contracts is analogous, and requires analogous treatment.¹⁹⁵

The fundamental question in the *Hitchman* case was whether or not one set of interests should be sacrificed to another. To answer this deep lying problem, involving momentous social consequences, by a mere rule of thumb that defendant induced a breach of plaintiff's contract, is hardly a method calculated to produce justice.¹⁹⁶

The statutory collective agreement provision¹⁹⁷ for arbitration of "all difference between the parties" appears to offer a means of imposing liability for all concerted activity during the currency of an agreement as inducing breach of contract.¹⁹⁸ There thus inheres

¹⁹⁰ "Suppose, again, that an employer, fearing the approach of labour troubles, makes contracts with his customers requiring the delivery of his finished products by a certain date, and then advertises the contracts among his workmen, knowing that the time is so short that any strike will make it impossible to finish the goods by the required time and thus cause a breach of contract. Surely no such contract would make illegal and therefore enjoynable a *bona fide* strike for higher wages . . . The law cannot allow one by any such device effectively to paralyse otherwise lawful activities." (*op. cit.*, *supra*, footnote 165, at p. 682).

¹⁹¹ *Supra*, footnote 180.

¹⁹² See *e.g.* *Fokuhl v. Raymond*, *supra*, footnote 137; *Pacific Western Planing Mills v. International Woodworkers of America*; *Bevaart v. Flecher*, *supra*, footnote 46. But compare the decision of Rand J. in *Newell v. Barker*, *supra*, footnote 138.

¹⁹³ *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U.S. 229 (procuring breach of contract not to join union).

¹⁹⁴ See *e.g.* Ont. Labour Relations Act, s. 47(b); B.C. Labour Relations Act, s. 4(2)(b).

¹⁹⁵ See R.S.N., 1952, c. 262, s. 5.

¹⁹⁶ Sayre, *supra*, *op. cit.*, footnote 165, at pp. 695-6. The choice of the "rule of thumb" by the judge is, of course, a policy decision, albeit a decision *sub rosa*. Cf. Commons, *Legal Foundations of Capitalism* (1957 ed.), p. 294 *et seqq.*

¹⁹⁷ See *e.g.* Ontario Labour Relations Act, s. 32; B.C. Labour Relations Act, s. 22.

¹⁹⁸ *Wheaton v. United Bro. of Carpenters* (1956), 6 D.L.R. (2d) 500 (B.C.); *Wilson Court Apts. v. Jenovese* (1958), 14 D.L.R. (2d) 758 (Ont.). In both cases, the union took the position that the grievance clause did not apply to the subject-matter of the dispute. In the Ontario case, McRuer C.J.H.C. dismissed the union's offer to arbitrate if work were meanwhile suspended, and enjoined picketing. Although the statutory arbitration clause was in fact meant to prevent work stoppages, the facts reveal no collective agreement to which arbitration could be applied. In the B.C. case, damages were awarded for inducing breach when the union certified for the plaintiff's employees bowed to a jurisdictional demand by another union, and refused to perform certain work. The court suggested resort to arbitration should have been had. See also *Therien v. Teamsters*, *supra*, footnote 66.

in every collective agreement (as in the "yellow-dog" contract), a trigger for liability under the inducing breach doctrine. The impropriety of these strikes is clear, and the imposition of civil liability may well be a brake on undesirable work stoppages. However, the position of a union trapped in no man's land, in which it cannot resort to arbitration because there is a dispute other than "the interpretation, application, administration or alleged violation of the agreement", and cannot resort to self-help because of the statutory strike ban suggests at least one situation where to procure a strike during the currency of the agreement is not necessarily to procure a breach of the agreement.¹⁹⁹

Typical of the imposition of liability for procuring a strike as procuring breach of contracts of employment is the statement of Coady J. in the *Pacific Western* case:

To induce or persuade plaintiff's employees to break their contracts of employment is *per se* an unlawful act, a tortious act.²⁰⁰

Typical, likewise, is the failure of the judge to advert to the contractual status of the employees which would seem to be most obscure, their collective agreement having expired. Finally, the logical extension of this approach would be extensive liability for anyone who pickets to procure a strike where the employees are either under contract or employed at will—which covers all employment situations. This, nonetheless, was the basis for injunctions in numerous cases.²⁰¹ Picketing aimed at procuring a strike which would (presumptively) result in the breach of employment contracts was enjoined. The significance of this is twofold: (i) a relaxation of the strict factual requirements of the inducing breach doctrine,²⁰² and (ii) as in *Fokuhl v. Raymond*, a refusal to consider justification for procuring the strike.

In the *Bennett and White* case, in addition to an injunction, an award of damages was sustained on appeal. A clear line was drawn between the conspiracy cases, where justification was held relevant, and the inducing breach cases, where it was not. Upon their failure to organize a subcontractor's employees, the defendant

¹⁹⁹ In the area of union security, resort to the courts seems also to have been foreclosed, *McLaughlin v. Westward Shipping* (1959), 21 D.L.R. (2d) 770 (B.C.).

²⁰⁰ *Supra*, footnote 46, at p. 655.

²⁰¹ *Comstock, Midwestern v. Scott*, [1953] 4 D.L.R. 316 (B.C.); *Belleville Lock v. Tyner*, *supra*, footnote 41; *Todd, Bolton v. Tomson* (1956), 6 D.L.R. (2d) 711 (B.C.); *Bennett & White v. Van Reeder*, *supra*, footnote 46; *Dawson, Wade v. Tunnel, etc. Union of Canada*, *supra*, footnote 46; *Wilson Court v. Jenovese*, *supra*, footnote 198; *Canadian Overseas Shipping v. Kake*, [1958] O.W.N. 300; *Merloni v. Acme Construction*, *supra*, footnote 46.

²⁰² Recently enunciated in *Thomson v. Deaken*, *supra*, footnote 187.

union picketed a construction project. The picket line was respected by other employees, and the principal contractor (the principal employer) sued. Not only was it held that absent a collective agreement with either the principal or subcontractor, the defendant "had no Trade Union rights to protect",²⁰³ but in fact, justification was not an issue at all:

. . . appellants formed the picketline for the immediate if not predominant purpose of procuring the breach of contract. It may be accepted that they also had in mind to advance thereby the interests of their Trade Union, but this is not justification for committing a tortious act that in itself created common law liability.²⁰⁴

Apparently, then, the holding that a legal right has been violated concludes the justification problem, there being no violation where the conduct is privileged or justified. The reasoning here is similar to that in the "conspiracy to injure" cases.

The *Fokuhl* case was decided in the Ontario Court of Appeal primarily upon the authority of *Lumley v. Gye*, which was,

. . . stated by Lord MacNaghten, with comprehensive brevity, in *Quinn v. Leatham* . . . "A violation of a legal right committed knowingly is a cause of action, and . . . it is a violation of a legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference".²⁰⁵

However, the moral outrage of the court foreclosed any calm consideration of justification. The defendant's "high-handed, dictatorial assumption of power"²⁰⁶ in ordering plaintiff's employees off the job, thus causing him to lose his contract, was "unlawful means employed for the purpose of putting an end to his contract".²⁰⁷ "Justification" was thus analysed in terms of defendant's "legal right" to do what he did, rather than "considerations of policy and social advantage".²⁰⁸

Newell v. Barker, as has been suggested, is not easily to be reconciled with the decision in *Fokuhl v. Raymond*. It is true that Estey J. does point out that the defendants were not the "cause" of the cancellation of plaintiff's contract, that the principal contractor "acted upon his own judgment" in cancelling the contract, and that therefore "in these circumstances there was no interference on the part of the respondents with contractual relations

²⁰³ *Supra*, footnote 46, at p. 329. ²⁰⁴ *Ibid.*, per Clinton J. Ford J.A.

²⁰⁵ *Supra*, footnote 137, at p. 153. ²⁰⁶ *Ibid.*, at p. 159.

²⁰⁷ *Ibid.*, at p. 156, but *cf.* "Had the claim been based upon a contention that by some unlawful act of respondents the appellant had been disabled from carrying out its obligations, it would also, in my opinion, fail." *Newell v. Barker*, *supra*, footnote 138, at p. 401, per Locke J.

²⁰⁸ *Vegehlahn v. Guntner*, *supra*, footnote 168, per Holmes J.

within the meaning of the oft-quoted statement of Lord MacNaghten in *Quinn v. Leathem* . . .”²⁰⁹ On the other hand, the learned judge does say that defendants “were quite within their rights” in warning the principal contractor of “the difficulties that the employment of non-union men upon the construction of this building would involve”,²¹⁰ citing the forty-year-old decision in the *Williams and Rees*²¹¹ case. The absence of discussion of “justification” can be written off to the failure of the plaintiff to prove the anterior fact of the intentional infliction of harm. The fact that the defendants were “quite within their rights” in doing what they did may well have been a makeweight in the court’s reluctance to find causation.

Rand J. makes a much more frontal approach to the justification problem. Citing *Crofter*, he points out that “concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct”.²¹² The mode of analysis, he suggests, is to be found in the judgment of Viscount Simon in *Crofter*, and the line to be drawn is between “malevolence or a primary intent to injure a competitor” as distinguished from “strengthening or defending a recognized and accepted social interest”.²¹³ Nonetheless, his judgment rests equally upon the fact that the contract was not terminated by threats or coercion:

It is, I think, the proper view to attribute the cancellation of the contract not to the refusal of labour by the respondents, but to the chosen course of action of the building contractor. The decision to abstain may have been the controlling influence upon him, but whether we attribute the rule to the balance of policy between these contending factors, or to the election on the part of the building contractor, the result is the same. If this were not so, by unitedly declining to associate themselves with non-union workers, the respondents and their workmen would involve themselves in illegality brought about by the mere fact that the desire of the building contractor for their labour was stronger than that of observing the contract with Newell: by the offer of work made them, they became involved in the necessity of either accepting it with its objectionable conditions, or of avoiding collective refusal, or paying damages. To state that proposition in relation to the circumstances with which we are dealing is, I think, to answer it.²¹⁴

²⁰⁹ *Supra*, footnote 138, at pp. 393-4.

²¹⁰ *Ibid.*, at p. 391.

²¹¹ *Supra*, footnote 10. Although the union was not held liable in that case, only Duff J. held that there was no cause of action. Anglin C.J.C. and Brodeur, Idington, and Mignault JJ. would all have imposed liability for wrongful invasion of a legal right, had they not divided evenly on the suability of a union.

²¹² *Supra*, footnote 138, at p. 397.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, at pp. 398-9.

Upon this analysis, if instead of declining association with non-union men, the refusal were to further a jurisdictional claim, a boycott of "hot" goods, or any other union policy, there would be no liability—save where some "recognized and accepted social interest" outweighed the justification advanced.

The problem next reached the Ontario courts in the two *Smith Bros. Construction*²¹⁵ decisions. The facts were simple. Plaintiff, a construction company, was engaged in five projects when approached by officials of the carpenters' union for recognition. When the company declined to bargain on the ground that the union was uncertified, pickets were placed at the projects, the owners of which were first notified. The picket lines were respected both by plaintiff's employees, and those of his subcontractors. A "Declaration of unlawful strike" was secured from the Ontario Labour Relations Board,²¹⁶ followed by an interim injunction against "unlawfully interfering with the servants, agents, suppliers, patrons or customers of the plaintiff" and "inducing breach of contract";²¹⁷ ultimately a permanent injunction went against "inducing breach of contract or interfering with contractual relations", and damages were awarded.²¹⁸

In *Smith Bros. No. 1*, relying on *Fokuhl v. Raymond* and *Quinn v. Leathem*, Wells J. enjoined the picketing on the basis of the facts set out in Smith's affidavit:

It is perfectly clear that the effect of setting up the picket lines, even though they are peacefully set up and well-behaved, is to interfere without any *legal justification* in the contractual relation existing between the plaintiff and the owners of the various properties picketed . . . as a result of an unlawful strike certain very important contractual rights between the plaintiff and third parties have been interfered with, and for the moment abrogated, and this without justification.²¹⁹

But the judgment rests equally on quite a different approach. Insofar as the judgment looks to the policy of the Act and the fact that the Board has labelled the "strike" unlawful, the injunction seems warranted.²²⁰ This, however, is not the same as liability

²¹⁵ *Supra*, footnote 75.

²¹⁶ R.S.O., 1950, c. 194, s. 59, am. S.O., 1954, c. 42, s. 18; *Smith Bros. Construction & United Bro. Carpenters* (1954), 2 Can. Lab. Serv. 76-443. (O.L.R.B.).

²¹⁷ [1954] 2 D.L.R. 117, at p. 123.

²¹⁸ [1955] 4 D.L.R. 255, at p. 262; foll'd. *Har-A-Mac Construction Co. v. Harkness*, *supra*, footnote 75. Plaintiff failed to prove the extent of his damage, and recovery was therefore quite low.

²¹⁹ *Supra*, footnote 217, at p. 122.

²²⁰ "[Defendants' acts] are not only wrongful and contrary to the whole policy of the *Labour Relations Act*, and indeed in direct breach of s. 50, but they are obviously on the face of them dangerous and irresponsible." *Ibid.*

for inducing breach. The difference is critical in the light of *Smith Bros. No. 2*, for that decision expressly repudiated the Board's declaration of an unlawful strike—thereby casting doubt upon *Smith Bros. No. 1*, except insofar as recognition picketing was an “unjustified interference with plaintiff's contractual rights”.

In making out a case of inducing breach, McLennan J. in *Smith Bros. No. 2*, looked to Viscount Simon's dictum in *Crofter*:

If C has an existing contract with A and B is aware of it, and if B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract²²¹

On this formula, he found a breach had been induced in the case of a project whose owner, threatened with picketing, instructed plaintiff to leave the job. Justification was discussed in the context of the statutory provisions:

There was a perfectly lawful way open to the Union of which defendants were members and officers, to obtain a collective bargaining agreement with the plaintiff company under the provisions of the *Labour Relations Act*. They endeavoured to short-circuit that machinery and . . . this was an unjustified interference with . . . contractual relations, as a result of which the plaintiff suffered damage.²²²

In answer to the defendants' argument that no one was prevented from working, McLennan J. held:

. . . if the development of the Trade Union movement has reached the point where workers will not cross a picket line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be. Loyalty to the rule that I have mentioned . . . should not be abused to a wrongful purpose and where there is no justification.²²³

Stated this broadly, picket lines which result in a work stoppage are *prima facie* actionable.²²⁴ Presumably, if the picket line is ever to be allowed, there are some circumstances under which interference with contractual relations can be justified. This was not such a case, but as a method of analysis, the factors which weigh in the justification deserved clearer enunciation. In fact, it appears that plaintiff was paying less than union rates, and that his refusal was based not only upon the failure of the union to become certi-

²²¹ *Supra*, footnote 99, at p. 442.

²²² *Supra*, footnote 218, at p. 264.

²²³ *Ibid.*

²²⁴ The obvious qualification upon this dictum is that liability turns upon non-compliance with the statute, *Merloni v. Acme Construction, supra*, footnote 46. Thus, a happier phrasing of the doctrine would impose liability not for “interference with contractual relations” but for conduct below the statutory norm.

fied, but also upon the ground that his employees were satisfied. Had it not been for the finding that no strike in fact took place, plaintiff could have pointed to the ban on strikes in advance of certification under section 49(2), or on procuring an unlawful strike under section 50. But the Ontario Act does not preclude agreements with uncertified unions and is completely silent on the ambit of lawful pressure short of strikes.²²⁵ It does not appear whether the subcontractors whose employees refused to cross the picket lines had collective agreements, which may or may not have provided that the employees would not be required to work on "unfair" projects. In short, although the facts given appear to support the conclusion that the interference was unjustified, the issue is by no means satisfactorily dealt with.

In *Hammer v. Kemmis*,²²⁶ recognition picketing again involved union officers in liability for conspiracy to interfere with contractual relations. In view of the acceptance of the trial judge's finding that the picketing was aimed at interfering with plaintiff's existing contractual relations and punishing him for the alleged discriminatory discharge of two employees, there was no discussion by the majority of justification. Davey J.A., dissenting, felt compelled to reject this finding of the trial judge and draw his own inferences from the facts. For instance, plaintiff's wages and working conditions were substandard and gave him an undue competitive advantage; attempts were made to sign a contract with him; and the discharge of two employees was regarded by the union as discharge for union activity, as a result of which an unfair practice charge was laid. Plaintiff's marginal position as a wholesaler was certainly jeopardized by the union's demands, but their restraint in attacking only his wholesale, and not his retail, operations rebuts the inference that the union was acting in bad faith to ruin him, the more so since other marginal wholesalers had survived unionization. Davey J.A. went on to find that neither definite contracts nor unjustified interference were made out (and, parenthetically, that section 23(4) of the British Columbia Act contemplates the negotiation of agreements by uncertified unions: this being by way of justification for the union's activity). The importance of the case

²²⁵ "An employer, if he chooses to do so voluntarily, may waive certification . . . and enter into a collective agreement with a trade union representing a bargaining unit of his employees. An uncertified trade union, however, cannot compel an employer to recognize it before it has complied with all the requirements of the Act." *Merloni v. Acme Construction, ibid.*, at p. 11, 673, per Ritchie J. This view is to be contrasted with the rather more decorous and self-restrained view of Freedman J. in *Peerless Laundry v. Laundry etc. Workers, supra*, footnote 75.

²²⁶ *Supra*, footnote 125.

for understanding liability for strikes lies in the consideration of justification for procuring breach, and the scope of that issue as defined by the majority and minority opinions.

Two Ontario cases further obscure the inducing breach doctrine. In *Dewar v. Dwan*²²⁷ the union escaped liability for conspiring to "bring about the discharge or layoff of the Plaintiffs by the threat of an unlawful strike".²²⁸ In *Body v. Murdoch*²²⁹ defendants were enjoined from ". . . causing or procuring a breach . . . of any contracts between the Plaintiffs . . ." and their employer, the Canadian Broadcasting Corporation.²³⁰ Both cases involved jurisdictional disputes. In each case, secondary pressure was exerted (in *Dewar* by a threat to strike,²³¹ in *Body* by a refusal to work) which, *qua* the employer, was unlawful. In each case, plaintiffs were discharged. In *Dewar*, McRuer C.J.H.C. hewed to the narrow limits of inducing breach as set out in *Thomson v. Deakin* by Jenkins L.J., and conspiracy to injure. He found an intention neither to procure a breach, nor to injure, but merely to effectuate a long-standing policy (embodied in a collective agreement) not to work with non-union men or members of a rival union. Talk of intention to injure or to procure breach appears to subsume the justification issue,²³² but surely represents a conceptualistic note in an otherwise perceptive appraisal of "a struggle between two groups of Trade Unions". Stewart J. in *Body*, however, resorted to the *Fokuhl* case, found a wrongful interference with plaintiff's contract in that defendant's refusal to play was an unauthorized strike, and issued an interlocutory injunction. In granting leave to appeal, LeBel J. distinguished his own decision in *Fokuhl* by finding that there was no express intention to procure breach, and that there was no unlawful strike. The Court of Appeal was reluctant to deal with the matter at the interlocutory stage, and left unresolved this direct conflict between Stewart and LeBel JJ. below. The latter's opinion is more consistent with *Dewar*, it is submitted, because defendant's contract with the employer recognized the defendant's obligation to his union, and provided that it would not be interfered with. It is more consistent with *Thomson v. Deakin* and *Newell v. Barker* in that the more rigid requirements

²²⁷ (1957), 11 D.L.R. (2d) 130 (Ont.).

²²⁸ *Ibid.*, at p. 132, per McRuer C.J.H.C.

²²⁹ [1954] 4 D.L.R. 326 (Ont. H.C.), p. 334 (Ont. C.A.).

²³⁰ *Ibid.*, at p. 331.

²³¹ This was actually "tertiary" pressure, since defendants threatened to strike their own employer unless he had the sub-contractor discharge plaintiffs.

²³² *Supra*, footnote 227, at p. 133.

of inducing breach are adhered to. In the *Body* and *Dewar* cases, strike action, uncomplicated by picketing, and in a jurisdictional context is treated as interference with contractual relations. To the extent to which liability was imposed, the cases can be taken as a potential anti-strike weapon though, ironically, the interests protected are not those of the struck employer.²³³

On the facts—although not in reasoning or result—the recent decision of the Supreme Court of Canada in *Therien v. Teamsters*²³⁴ is barely distinguishable from *Dewar* and *Newell*. Plaintiff in this case was owner of a small fleet of trucks in British Columbia which he had supplied, with drivers, for over ten years to City Construction Co. In addition, plaintiff himself drove one of the trucks. Defendant union entered a collective agreement with the construction firm, covering the whole province, and purporting to apply to sub-contractors hired by the company, which provided for a union shop. In response to pressure from the union, Therien's employees became members, but Therien himself refused. The union then told him that he would be put off the job, which result they procured by threatening to "placard" City's jobs;²³⁵ fearing a work-stoppage, City discontinued the use of Therien's trucks. He sued and obtained an injunction and damages, which were unanimously affirmed in the Court of Appeals and in the Supreme Court of Canada.

The basis of the judgments in all the courts is found in the holding by Locke J. that:

. . . even though the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, you are not entitled to interfere with another man's method of gaining his living by illegal means . . . to ascertain whether the means were illegal, inquiry may be made both at common law and of the statute law.²³⁶

In the courts below, both Clyne J. and DesBrisay C.J.B.C. found unlawful both the union's objectives and the means employed to achieve them. As in *Hammer v. Kemmis*, Davey J.A. showed a keen awareness of the labour relations realities of the

²³³ There is a long history of Canadian cases pursuing this theme, which may reflect a praiseworthy concern for individual rights, if not a conscious weighing of the competing interests. *Sleuter (Slenter) v. Scott; U.M.W.A. v. Williams & Rees; Johnston v. Mackey, supra*, footnote 11.

²³⁴ *Supra*, footnote 66.

²³⁵ This must be taken to be a threat to stop work. (1958), 13 D.L.R. (2d) 347, at p. 350. If construed as picketing, *simpliciter*, reference to breach of the no-strike provisions of the Act would be meaningless, although picketing would still, admittedly, be inconsistent with the promised resort to arbitration.

²³⁶ *Supra*, footnote 37, at p. 13.

situation. He properly pointed out that the union was not so much interested in obtaining plaintiff's membership as in forcing the employment of a union man in his stead. On this basis, he disposed of the alleged violation of section 4. He saw no merit in the charge that the union aimed at "restricting services" under section 5(2), citing *Williams v. Aristocratic Restaurants*.²³⁷ But, showing due concern for buttressing the employees' right to join a union or no, he did find coercion that could reasonably have the effect of compelling plaintiff to join a union. "Coercion" he defined as "conduct consisting, not merely of the force of rational argument, but of the exertion of pressure",²³⁸ whether lawful in itself or not, including social or economic pressure. Lest this destroy the union shop, he pointed out that the institution is specifically preserved by section 8 of the Act, although this contract clause did not in terms refer to Therien. He, alone, adverted to the issue of justification and suggested that:

If the defendant did seek to attain its object by wrongful means, it cannot be justified by proving lawful purpose.^{2 9}

The means being coercion forbidden by statute, no justification can be advanced. This position appears to be adopted in the judgment of Locke J.

Finally, the one element of liability upon which all of the judges are agreed is that the union's resort to a threat of economic pressure to enforce its version of a collective agreement is unlawful, short-circuiting the scheme of arbitration contemplated by the agreement and the legislation. It is in the realm of determining the lawfulness of concerted activity—quite as much as in finally deciding the suability of certified unions—that *Therien* represents a landmark.

Liability is founded upon violation of a substantive provision of the legislation viewed as a datum of public policy rather than as an express grant of redress, and liability is phrased so as to permit the pursuit of self-interest, provided the means used are not unlawful.

A review of the cases involving "intentional interference with legal rights" reveals that the cases are split on the liability of parties to a jurisdictional dispute to each other,²⁴⁰ on liability for secondary pressure causing discharge of a subcontractor²⁴¹ because of a threat

²³⁷ [1951] S.C.R. 762, at p. 782, per Kerwin C.J.C.

²³⁸ (1959), 16 D.L.R. (2d) 646, at p. 660.

²³⁹ *Ibid.*, at p. 664.

²⁴⁰ *Body v. Murdoch*, *supra*, footnote 229 (liability); *Dewar v. Dwan*, *supra*, footnote 227 (no liability).

²⁴¹ *Therien v. Teamsters*, *supra*, footnote 66 (liability); *Newell v. Barker*, *supra*, footnote 138 (no liability).

to strike the principal employer, but unanimously condemn the calling of a strike by either a stranger union,²⁴² or a union which has had dealings with plaintiff employer²⁴³ at any stage short of full compliance with the Act²⁴⁴ or for any purpose other than collective bargaining demands.²⁴⁵ The importance²⁴⁶ of liability for calling a strike appears when it is realized that the defendants are often officers and members of the union to which the strikers themselves belong, so that the act of striking seems sure to visit liability on the union whether action is brought for the strike or for the inducing. In fact, the latter action is often a more convenient form of the former, because it is deterrent rather than remedial.

To the extent to which the "intentional harm" omelet can be verbally unscrambled, this has been done by Kennedy and Finkelman:

- (i) To commit any act which is clearly a tort, or to induce or procure another to commit such an act, is unlawful.
- (ii) To induce or procure another to commit an act which is not a tort, is not unlawful, even though this act injures a third party.
- (iii) To induce or procure another to break his contract is unlawful, unless there exists just cause or excuse. The full implication and meaning of "just cause and excuse" in this connotation are still in doubt.
- (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

²⁴² *Bevaart v. Flecher; Bennett & White v. Van Reeder; Dawson, Wade v. Tunnel etc. Union, supra*, footnote 46; *Smith Bros. v. Jones, No. 1 & 2, supra*, footnote 215; *Merloni v. Acme Construction, supra*, footnote 46.

²⁴³ *Fokuhl v. Raymond, supra*, footnote 137; *Wheaton v. Carpenters; Wilson Court v. Jenovese, supra*, footnote 198; *Comstock, Midwestern v. Scott; Canada Overseas Shipping v. Kake, supra*, footnote 201.

²⁴⁴ *Todd, Bolton v. Tomson, supra*, footnote 201; *Body v. Murdoch, supra*, footnote 229; *Therien v. Teamsters, supra*, footnote 66; *Pacific Western v. I.W.A.; Dawson, Wade v. Tunnel etc. Union; Smith Bros. v. Jones, No. 1 & 2, ibid.; Comstock Midwestern v. Scott; Wilson Court Apts. v. Jenovese, ibid.* But see *Dewar v. Dwan, supra*, footnote 227 (*contra*).

²⁴⁵ *Bevaart v. Flecher, supra*, footnote 46; *Body v. Murdoch, supra*, footnote 229 (jurisdictional disputes) but see *Dewar v. Dwan, ibid.*; *Canada Overseas Shipping v. Kake, supra*, footnote 201, (use of pilots although not required by law); *Hammer v. Kemmis, supra*, footnote, 125; *Dawson, Wade v. Tunnel etc. Union, ibid.*; *Bennett and White v. Van Reeder, supra*, footnote 46; *Smith Bros. Construction v. Jones, No. 1 & 2, supra*, footnote 75; *Har-A-Mac v. Harkness, supra*, footnote 75; *Merloni v. Acme Construction, supra*, footnote 46, (recognition).

²⁴⁶ For example, Carrothers' pioneering work, *The Labour Injunction In British Columbia (1956)*, shows that from 1946 to 1955, 75 labour injunctions were sought, 68 granted, of which 5 were directed against declaring a strike, 3 against supporting a strike, and 14 against persuading employees not to work, *inter alia* (p. 203).

“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.⁴

But their propositions, even to the extent to which they represent the mainstream of English law (to which Canadian courts constantly resort), do not solve particular problems. The solutions depend on the anterior selection of one or other of the half-dozen categories and its application to fact situations which fit several.²⁴⁸ And even if the selection process can be rationally justified, the problem of application and interpretation of the rule remains. And even if some degree of unanimity can be developed in this area, the bald fact is that we are by no means sure that the solutions thus arrived at are the ones most consistent with our labour policy and statutes. The short answer to any criticism is that unions which obey the legislation have nothing to fear from the courts.²⁴⁹ This, indeed, may explain the relative scarcity of cases imposing liability for strikes *simpliciter*. But surely the concern of the law is as much with imposing liability on a correct basis where it is deserved as with avoiding it where it is undeserved. If tort liability (as in *Therien*) is to be pitched upon compliance with the statute, a heavy onus of creative interpretation has been thrown upon the courts, for the statutes themselves do not purport to be complete codes of regulation.²⁵⁰

VIII. *Arbitration: An Alternative to Litigation?*

In one isolated area, that of the “wildcat” strike in breach of the no-strike clause of the collective agreement, a method of loss-compensation (not—strictly speaking—tortious) seems to be

²⁴⁷ Kennedy and Finkelman, *op. cit.*, *supra*, footnote 23, Preface. The authors do not appear to have pursued their declared intention to treat the problem philosophically in another volume.

²⁴⁸ It has even been suggested that the plaintiff may elect to frame his action in “conspiracy” (where justification may be pleaded) or in “inducing breach of contract” (where it may not). *Fokuhl v. Raymond*, [1948] 3 D.L.R. 11, at p. 21. Cf. *Bennett and White v. Van Reeder*, *supra*, footnote 46, at p. 329.

²⁴⁹ “If, after compliance with the procedure set out in the *Labour Relations Act*, a strike is called it must, in the absence of evidence to the contrary, be presumed the predominant purpose of the strike is to further the legitimate interests of the employees engaged in the strike and not to damage the interests of the employer. Such a strike is clearly lawful . . .” *Merloni v. Acme Construction*, *supra*, footnote 46, at p. 11, 673.

²⁵⁰ *Williams v. Aristocratic Restaurants*, *supra*, footnote 237, at p. 787, per Rand J.

emerging entirely outside the traditional legal arena. Two recent arbitration decisions²⁵¹ of Professor Laskin have held a union liable in damages for an unauthorized work stoppage. The reasoning used to ascertain liability is out of the mainstream of Canadian jurisprudence only because of its particular sensitivity towards policy and facts. In the *C.G.E.* case, work stoppages occurred in various departments in protest against the allegedly improper disciplinary suspension of the union chief steward. Article 21 of the agreement provided that "during the term of this Agreement . . . the union agrees that there shall be no slowdown, strike, or other stoppage of or interference with work".²⁵² The arbitration board held that:

A union, seeking certification or otherwise seeking to negotiate a collective agreement with an employer puts itself forward as a responsible party able to represent workers. This responsibility . . . involves in the first place exertion of discipline or control over members; otherwise there can be no substance in collective agreements How then is it met? . . . it would seem that the initial obligation of the union should be to make known to the management that the union has not authorized or encouraged the stoppage and thereafter to give continued evidence of this position by manifest steps to bring the stoppage to an end.²⁵³

In fact, union officials appear to have actively directed the stoppage, and certainly failed to take steps to end it. Whatever the provocation for the stoppage²⁵⁴—which may or may not have been a spontaneous gesture of protest—the union's proper resort was to the established grievance procedure rather than self-help. Having established the norm of industrial conduct, Professor Laskin prescribed damages for the breach:

The evolution of collective bargaining under legislative encouragement and sanction, and the introduction of self-government in industry through collective agreements containing their own machinery for enforcement, have invited, and, in fact, demanded, sobering responsibility by employers and trade unions. Part of that responsibility lies in a duty to redress established breaches of their collective engagements. The very prospect of having to answer for a breach is,

²⁵¹ *Re Canadian General Electric Co. and Local 507 United Electrical, Radio, and Machine Workers* (1951), 2 Lab. Arb. Cas. 608, 3 Lab. Arb. Cas. 1090 (Cent. Ont. Ind. Rel. Inst. pub.); *Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers Int'l. Union, Local 16-14 and Oil etc. Union, Technicians* (1958), 10 Lab. Arb. Cas. 31, at p. 51.

²⁵² (1951), 2 Lab. Arb. Cas. 608, at p. 609.

²⁵³ *Ibid.*, at p. 611.

²⁵⁴ It is this holding that appears to be the most vulnerable part of the decision, since a party to a contract who procures the other's breach should not then be heard to complain of it. Regarding the collective agreement not as a contract, but rather as a constitutional document, see *infra*, Professor Laskin's holding is more acceptable.

or should be, a factor in securing adherence to obligations voluntarily assumed.²⁵⁵

The decision surely implies enforcement of responsible citizenship in "self-government in industry" in addition to recompense for a contractual breach.

In the *Polymer* decision, faced with a substantially similar no-strike clause, Professor Laskin refused, as in the *C.G.E.* award, to impose automatic liability for any strike during the term of the agreement. He likewise declined the other extreme of holding liability only where there was an "official" strike. What he did decide was that responsibility rested with the union officers for terminating a "wildcat" strike which they did not, admittedly, initiate by (i) removing the shop stewards and committeemen from leadership of the stoppage, and (ii) urging the men to return to work. He carefully disavowed any unreasonable demand upon the shop stewards to spontaneously turn their backs on their co-workers. Nor need higher union officials have refrained from normal expression of views on the dispute which provoked the strike, either to the union's regular meeting or to the company, despite a potentially inflammatory effect. Again, he suggested that the validity of the grievance which provoked the strike has no bearing upon liability.

Finally, following the *C.G.E.* decision, he rejected the notion that the power to award damages must be expressly found in the collective agreement:

Such a view, apart from all other considerations, expresses a very rudimentary understanding of the processes of adjudication more appropriate to the twelfth and thirteenth centuries than to the twentieth.²⁵⁶

It is clear that if arbitrators are to award damages for strikes in breach of a no-strike clause, these two cases represent the outer limits of liability. Any showing that the union more actively furthered the strike would, *ipso facto*, give the company an arbitrable claim for compensation.²⁵⁷

Two lessons are suggested by these cases. First of all Professor Laskin clearly considers the strike a potent weapon not lightly to

²⁵⁵ *Supra*, footnote 252, (1951), 3 Lab. Arb. Cas., at p. 1094.

²⁵⁶ But cf. *Colonial Provision Co.* (1952), 17 (U.S.) L.A. 610; *Baldwin-Lima-Hamilton Corp.* (1958), 30 (U.S.) L.A. 1061 (jurisdiction to award damages denied).

²⁵⁷ For some United States examples, see *Motor Haulage Co., Inc.* (1947), 6 (U.S.) L.A. 720, aff'd. (1947), 7 (U.S.) L.A. 953; *Brynmore Press, Inc.* (1947), 7 (U.S.) L.A. 648. Professor Laskin's decisions appear unique in Canada.

be employed for temporary advantage in minor matters.²⁵⁸ Secondly, the parties having created for themselves a regime of industrial justice with its own tribunals administering the common law of the shop, they must accept the full implications of this system and live by it. Professor Laskin's language is neither a literal adherence to the broad statutory ban on all strikes, nor the conceptualistic judicial imposition of liability for all interference with or breach of contract. Until the courts familiarize themselves with the realities of labour relations, the parties may prefer to resort to self-imposed and self-administered regulation.²⁵⁹ Seen in this light, Professor Laskin's decisions do not merely indicate a more sophisticated handling of the facts in labour litigation. They may represent pioneering navigation through troubled waters between the courts (which can give relief but often do not understand the problems) and the Labour Board (which understands the problems but cannot make the struck employer whole). At least his decisions are some evidence of a felt need for adjudication of this type.²⁶⁰

IX. Conclusion: The Sources of Difficulty and Some Suggestions.

Though the cases imposing liability for strikes in Canada are few, they raise problems which are today primarily jurisprudential, but with a change tomorrow in the power position of unions are of potential social and economic significance. If we look first at what

²⁵⁸ Cf. "Strikes are costly to workers as they are to management. In normal times an occasional deliberate test of strength by strikes on matters of major importance may be necessary and desirable. The anticipated victory is then deemed to be worthy of the cost. But wanton and needless use of the strike weapon weakens the weapon itself, casts undue burden on the workers, and threatens to destroy their organization." Shulman, Umpire, *Ford Motor Co. & U.A.W.*, (opinion A-151, 1944), quoted in Cox, *Labour Law* (4th ed., 1958), p. 665.

²⁵⁹ The present Ontario legislation (Rights of Labour Act, R.S.O., 1950, c. 341, s. 3(3), Labour Relations Act, R.S.O., 1950, c. 194, s. 32(5)) is a bar to actions in the courts for enforcement of collective agreement provisions, and enforcement of arbitration awards must apparently be by penal sanctions (Labour Relations Act, R.S.O., 1950, c. 194, s. 61(1)). But see *Re Int'l. Nickel Co. of Canada Ltd., and Rivando*, [1956] O.R. 379 (C.A.) (certiorari to an arbitration board as a statutory tribunal). At the time of writing, the Ontario legislature has given two readings to a bill which will make labour arbitration awards enforceable (and thus, perhaps, reviewable) in the Supreme Court. In any case, the threat to strike or inducing a strike during the currency of the agreement has been regarded as tortious, see *supra*.

²⁶⁰ As further evidence, the merits of a recent strike on the issue of feather-bedding were arbitrated by Professor Laskin after an injunction had been issued. *Toronto Daily Star*, April 7th, 1959. And see *Re Canadian Gypsum and Nova Scotia Quarryworkers* (1959), 20 D.L.R. (2d) 319 (N.S.S.C.). (arbitration *re* propriety of discharge of strikers for acts of violence).

the judges do rather than what they say, liability is seldom imposed for strikes which conform to the procedural requirements and which seek by legal means to achieve legal ends.²⁶¹ Perhaps it is too much to ask more because the judges are labouring under physical, institutional, and analytical difficulties. But an examination of these difficulties may yield some guide for clearer expression, and safeguard against future unfortunate decisions.

A. *Physical Difficulties.*

Canadian courts are handicapped by a shortage of indigenous legal experience in labour matters. In absolute terms, the case load is very small, and legal writing in labour law is almost non-existent.²⁶² This means that the courts are unused to dealing with the strike problem in context, that they often lack socio-economic expertness and labour relations empathy and that they are not constantly called upon to revise and refine their doctrines. Practitioners in the labour field, too, are a small group²⁶³ and often lack prolonged experience in labour relations. This means that the presentation and decision of cases is far more of an *ad hoc* process, which in turn creates a deep-rooted conviction (at least in labour ranks) that the law and lawyers are incapable of handling labour relations.²⁶⁴

B. *Institutional Difficulties.*

The social context of Canadian labour relations produces anomalies in public and judicial attitudes, and in the legislative framework itself. For various reasons, Canadian labour prior to World War II was peculiarly unassertive.²⁶⁵ The economic expansion of the country during the last two decades, however, has been the occasion for the rise of a powerful labour movement pitted against well-entrenched capital in a more ideological, if less violent, version of the American experience.²⁶⁶ The stresses on judges trying honestly

²⁶¹ It was not always so. See Part II: The Strike at Common Law before the Labour Relations Acts.

²⁶² The Canadian Annual Digest ("every Canadian case") lists for 1946: 3 picketing and 1 strike cases; for 1956: 7 picketing and 2 strike cases, (both civil and criminal). An examination of English-language legal periodicals in Canada shows about ten articles on *all* aspects of Canadian labour law for each of the two periods 1943-6 and 1955-8.

²⁶³ See Carrothers, *op. cit.*, *supra*, footnote 246, Introduction, Table A, at p. xxvi.

²⁶⁴ *E.g.* Harvey, *History of the Trade Union Movement in Canada*, Special Lectures, Law Society of Upper Canada (1954), p. 21 *et seqq.*

²⁶⁵ Jamieson, *Industrial Relations in Canada* (1955), Ch. 1. Logan, *State Intervention and Assistance in Collective Bargaining* (1956), p. 77.

²⁶⁶ Jamieson, *op. cit.*, *ibid.* See also Jamieson, *Industrial Relations and Government Policy*, *op. cit.*, *supra*, footnote 92; and *Labour Problems of*

to maintain what they conceive to be the proper balance of power are obvious. As if to complicate the matter, there is abundant opinion²⁶⁷ that the distinctive Canadian legislative contribution—compulsory conciliation—serves only to aggravate the strikes it is designed to avoid. The gist of this contention is that the promotion of collective bargaining may often be inconsistent with government intervention to prevent strikes or maintain a static balance of economic power. All of this means that when a strike does erupt and ultimately finds its way to court in a civil action, the judge is really being called upon to adjudicate a complex of social, economic, and psychological conflicts of which he may be totally unsuspecting. Nor, in the more positivistic Canadian legal tradition, is he liable to be informed of these matters by Brandeis brief or judicial notice.²⁶⁸ He sees before him only an individual plaintiff seeking redress, whose claim is couched in the traditional phraseology of the common law: “rights” and “unlawful acts”. This is misleading. In fact, what the unions seek is not so much a form of the traditional wage bargain as a distribution of power embodied in a form of industrial constitution. Given this objective, the usual contractual assumptions of higgling in the marketplace and the expectations of commercial dealings are not appropriate, nor are the legal rules developed primarily to govern such dealings.²⁶⁹ In the United States, the courts are apparently reasonably to be expected to accommodate their thinking to new social situations. Thus a call for a “modern Mansfield” to bring within the judicial grasp the institution of labour arbitration.²⁷⁰ It may well be that Canada, too, requires a “modern Mansfield” to put the law back in touch with social realities, for it is this accentuated gap between the social phenomenon and the litigated case that underlies the analytical difficulties.

an Expanding Economy (1954), 20 C.J.E.P.S. 141. “Strikes, like risk and obsolescence, may be an unavoidable cost in an expanding economy.”

²⁶⁷ Jamieson, *op. cit.*, *supra*, footnote 92, at pp. 25-6; Woods, Canadian Collective Bargaining and Dispute Settlement Policy: an Appraisal (1955), 21 C.J.E.P.S. 447; Phillips, Government Conciliation in Labour Disputes (1956), 22 C.J.E.P.S. 523; Logan, *op. cit.*, *supra*, footnote 265, p. 83; Jamieson, *op. cit.*, *supra*, footnote 265, pp. 102, 113-4; Levinson, Compulsory Conciliation Machinery in Ontario (1958), 1 Osgoode Hall L.S.J. 47.

²⁶⁸ In the absence of a constitutional right to jury, that institution has fallen into almost total disuse (and, of course, was never available in injunction proceedings). Thus, even this most tenuous method of keeping the common law in touch with the climate of social opinion is lost. See *Merloni v. Acme Construction* (1959), 43 M.P.R. 123 (N.B.C.A.).

²⁶⁹ Jamieson, Industrial Relations and Government Policy, *op. cit.*, *supra*, footnote 93, at p. 25.

²⁷⁰ Cox, Reflections Upon Labor Arbitration in the Light of the *Lincoln Mills* Case (1959), 72 Harv. L. Rev. 1058, at p. 1059.

C. Analytical Difficulties.

As do many of our other institutions, Canadian labour law appears to draw upon both the English and American experience. Our statute law (save for the conciliation addendum) is based upon the Wagner Act.²⁷¹ Our case law, however, depends heavily upon the British cases (especially the older British cases). And, as has been pointed out, there are indigenous features of Canadian labour relations which make unwarranted too ready analogies to either country. Positing that legal rules reflect social assumptions, it appears that the legislation, cases, and attitudes cannot be squared.

Four basic social attitudes towards collective bargaining have been advanced as descriptive: (i) repression, (ii) toleration, (iii) encouragement, and (iv) intervention.²⁷² The English position is toleration: government confines itself to policing, protecting property rights (tangible and intangible), and preventing violence. The philosophy is *laissez-faire*, and the protection of the law is extended to individuals (human and corporate) as against combinations (e.g. unions) with greater or lesser notions of the economic equities.²⁷³ The American position is encouragement: collective bargaining is promoted by the government, workers are protected in their rights to organize and bargain, and the strike weapon may be used in aid of bargaining. Public policy has set outside limits on about what and how bargaining shall be conducted, and enforcement is by an administrative agency. The Canadian attitude partakes of both and also involves a measure of intervention to settle the dispute and avoid a strike if at all possible. These attitudes are not merely formal, but go to the heart of the substantive rules.

Canadian courts frequently resort to the classical English trilogy—*Mogul*, *Quinn*, and *Sorrell*—as authority for the existence of a “right to trade”.²⁷⁴ The very phrase poses two major difficulties: the jurisprudential value of such an analysis, and its

²⁷¹ Logan, *op. cit.*, *supra*, footnote 265, at pp. 26-8 lists other differences, largely administrative and procedural.

²⁷² Commons and Andrews, *Principles of Labor Legislation* (4th. ed., 1936), pp. 374-6.

²⁷³ The more anomalous inequities of the common law have been statutorily redressed. See e.g. Trade Disputes Act, (1906), 6 Edw. VII, c. 47. Lalande, *The Status of Organized Labour* (1941), 19 Can. Bar Rev. 638; Laskin, *Picketing: a Comparison of Certain Canadian and American Doctrines* (1937), 15 Can. Bar Rev. 10.

²⁷⁴ Kennedy and Finkelman, *op. cit.*, *supra*, footnote 23. The Canadian cases persist in discussion of the “right to earn a living” and the “right to carry on business”, see *infra*.

economic implications. Since the statutory acceptance of collective bargaining, Canadian cases have seldom produced a direct verbal clash between the "right to trade" and the "right to strike". The clash has been averted sometimes because the happy admixture of picketing in the strike situation provided a toehold for liability;²⁷⁵ in other cases, the one "right" or the other has been conveniently ignored;²⁷⁶ in still other cases, the "right to strike" has been divested by contract or statute,²⁷⁷ (whether or not the courts advert to this). But the fact remains that there is no absolute "right to trade"²⁷⁸ which may indicate that there is no "right" at all.²⁷⁹ As Dean Wright suggests, the clash of two absolute rights could only produce a legal impossibility.²⁸⁰ Unembarrassed by their good fortune in avoiding such an impasse, the courts continue to talk in terms they obviously do not literally mean: the right to enter into and enjoy contracts²⁸¹ which may be violated by unjustified interference;²⁸² the rights of a British subject to earn a living in his own way;²⁸³ the right to refuse to supply labour (but not necessarily to withdraw it);²⁸⁴ the right to strike (but not to prevent others from working);²⁸⁵ the statutory and contractual right to have labour supplied;²⁸⁶ the right of union members in a union shop to engage in work there free from improper interference from union officers;²⁸⁷ the statutory right to join or to refuse to join a union;²⁸⁸ the right of the union to protect the interests of its members;²⁸⁹ and the right to warn of the difficulties of employing non-

²⁷⁵ Carrothers, *op. cit.*, *supra*, footnote 246, at pp. 47-61, 90-4.

²⁷⁶ *Newell v. Barker*, *supra*, footnote 138, ignores the "right to trade"; *Fokuhl v. Raymond*, *supra*, footnote 137, ignores the "right to strike".

²⁷⁷ *Southam v. Gouthro*, *supra*, footnote 75; *Body v. Murdoch*, *supra*, footnote 229; *Therien v. Teamsters*, *supra*, footnote 66.

²⁷⁸ Kennedy and Finkelman, *op. cit.*, *supra*, footnote 23, p. 113.

²⁷⁹ Stone, *Province and Function of Law* (1947), pp. 625-6.

²⁸⁰ *Op. cit.*, *supra*, footnote 177, p. 865.

²⁸¹ *Fokuhl v. Raymond*, *supra*, footnote 138; *Hammer v. Kemmis*, *supra*, footnote 125.

²⁸² *Quinn v. Leathem*, *supra*, footnote 102, cited in *Fokuhl v. Raymond*, *supra*, footnote 137; *Smith Bros. Construction v. Jones, Nos. 1 & 2*, *supra*, footnote 75; *Body v. Murdoch*, *supra*, footnote 229; *Bevaart v. Flecher*, *supra*, footnote 46; *Tunney v. Orchard*, [1957] S.C.R. 436, (1957), 8 D.L.R. (2d) 273.

²⁸³ *Quinn v. Leathem*, *ibid.*; *Therien v. Teamsters*, *supra*, footnote 66; *Seaboard Owners v. Cross*, *supra*, footnote 42; *Tunney v. Orchard*, *ibid.*

²⁸⁴ *Therien v. Teamsters*, *ibid.*

²⁸⁵ *Lyons v. Wilkins*, *supra*, footnote 186; *Southam v. Gouthro*, *supra*, footnote 75.

²⁸⁶ *Canada Overseas Shipping v. Kake*, *supra*, footnote 201.

²⁸⁷ *Therien v. Orchard*, *supra*, footnote 282.

²⁸⁸ *Therien v. Teamsters*, *supra*, footnote 66.

²⁸⁹ *Newell v. Barker*, *supra*, footnote 138; *Fokuhl v. Raymond*, *supra*, footnote 137.

union men.²⁹⁰ One can only surmise that the "rights" of which the courts speak are the legal results they have decided to impose.²⁹¹

Without riding the right-rule-remedy merry-go-round so brilliantly constructed by Professor Fuller in his "Case of the Interrupted Whambler",²⁹² it at least seems clear that the decision to impose liability, to vindicate a "right", is essentially a policy decision. In a field like labour relations, this may not only be inevitable, but desirable. However, to predict the outcome of lawsuits it is necessary to know what motivates the policymaker, and to evaluate his decision it is necessary to know what the policy ought to be. Canadian cases do not make this clear. A court presented with the problem of a subcontractor dismissed as a result of union pressure would purport to decide whether or not there was a conspiracy to injure, as in *Newell*, or interference with contractual rights, as in *Fokuhl*, or unlawful interference with the right to earn one's living, as in *Therien*. This tells us nothing except the result. Surely liability would better be decided by examining whether the plaintiff has some interest worthy of protection, having regard to the economic implications of collective bargaining,²⁹³ whether the defendant (union or union officer) was primarily furthering a personal grudge or a predetermined policy,²⁹⁴ whether that policy ran afoul of a statutory standard,²⁹⁵ whether the kind of pressure exerted was condemned by statute or otherwise tortious,²⁹⁶ and whether to give or deny relief is the more con-

²⁹⁰ *Newell v. Barker, ibid.*

²⁹¹ Stone, *op. cit.*, *supra*, footnote 279, pp. 121-2 gives a Hohfeldian analysis of the confusion of "rights" and "privileges" in *Quinn, Mogul*, and *Allen*. But *cf.* Holmes, *The Common Law* (1946), p. 214.

²⁹² Fuller, *Problems of Jurisprudence* (1949), p. 628. This fictional suit "for a poultice" as a remedy for interruption of the "right to whamble" contains five judgments, each of which represents a different formulation of the relationship between rules, rights and remedies. Lest the reader be persuaded by the logic of any of the judgments, Professor Fuller suggests that the case be read once translating "whambling" as union-organizing, and then a second time, translating it as "union-discouraging".

²⁹³ See *e.g.* *Rand J.* in *Newell v. Barker*. "The market of labour is, therefore, restricted by considerations of competing interests which are now part of the accepted modes of action of individuals and groups.", *supra*, footnote 138, at p. 398 (S.C.R.).

²⁹⁴ *Fokuhl v. Raymond, supra*, footnote 137; *Dewar v. Dwan, supra*, footnote 227.

²⁹⁵ *E.g.*, makework strike (S.B.C., 1954, c. 17, s. 5(2)); violation of the Canada Shipping Act (*Seaboard Owners v. Cross, supra*, footnote 42; *Canada Overseas Shipping v. Kake, supra*, footnote 201); violation of anti-trust legislation (*cf. Allen Bradley v. I.B.E.W.* (1945), 325 U.S. 797); violation of compulsory arbitration provision of Labour Relations Act (*Therien v. Teamsters, in S.C.C., supra*, footnote 37.)

²⁹⁶ *Therien v. Teamsters, ibid.* To avoid circular reasoning, "tortious" in this context would have to refer to conduct commonly held actionable in non-labour cases (*e.g.* assault, defamation), since what is sought are

sistent with what the court understands to be the collective bargaining regime. In a very rough way, this was the technique of the *Smith Bros. Construction* and *Therien* cases.

To refine these standards, the example of a premature strike may be useful. On the surface, the syllogism is easy: all strikes before conciliation (or during the agreement) are statute-barred; to do (or procure others to do) what is statute-barred is unlawful; those who act unlawfully may be liable for (i) a conspiracy to do unlawful acts, (ii) unlawful interference with another's rights, or (iii) an actionable breach of the statute. If literal adherence to the statute is worth this much, perhaps one ought not to quibble about the name under which liability is imposed. But should it matter that the strike is provoked by the employer's own breach of contract? by an unfair labour practice? Perhaps the employer should be estopped from complaining of an injury he has brought upon himself. Should it matter that conciliation has bogged down because of the employer's delay? or that the report has been held back for weeks? Conciliation, after all, is to vindicate the public interest in industrial peace and resort to the process is secured by the threat of prosecution. When the employer himself has disrupted the process or it has broken down of its own weight, is the public interest furthered by compensating the employer for his own wrong or for acts done after the purpose of the statute has already been frustrated?²⁹⁷ Does picketing necessarily involve an invitation to strike illegally because the picket line is sure to be respected? Or does it merely constitute free speech to the public or employees on the job, who may then act upon their own convictions? The recent trend²⁹⁸ towards liability for picketing as procuring an illegal strike, if followed, would restrict picketing to employees legally on strike and thus deprive labour of a traditionally important organizational technique. Before finding the picketers liable, a court might well consider if the employer does standards divorced from the traditional judicial attitude towards labour disputes.

²⁹⁷ American cases dealing with strikes called prematurely in violation of National Labor Relations Act, s. 8(d) appear to be influenced by such considerations. See *Mastro Plastics Corp. v. N.L.R.B.* (1956), 350 U.S. 270; *N.L.R.B. v. Lion Oil* (1957), 352 U.S. 282. But see *Hammer v. Kemmis*, *supra*, footnote 125 and *Tuomi v. Carpenters* (1953), 2 Can. Lab. Serv. 76-387, *contra*.

²⁹⁸ *Smith Bros. Construction v. Jones No. 1*, *supra*, footnote 75; *Pacific Western Planing Mills v. International Woodworkers Association etc.*; *Bennett and White v. Van Reeder*; *Merloni v. Acme Construction*, *supra*, footnote 46, *Cf. Pappas v. Stacey* (1955), 151 Me. 36, 116 A. 2d. 497 (injunction against organizational picketing), *Park & Tilford v. Teamsters* (1946), 27 Cal. 2d. 599, 165 P. 2d. 891 (refused injunction against organizational picketing).

not have both legal and self-help remedies against illegal strikers and does not really require the protection of law to wage his battle.²⁹⁹

It is submitted that to attach automatic civil liability to economic strikes for failure to observe what often amounts to a merely formal compliance with the statutory conditions precedent is to make the Labour Relations Act a trap: compulsory collective bargaining is the bait with which the union is lured into the statutory scheme, only to be stripped of immunity for acts which were not formerly considered actionable. That the Act must have penal teeth to enforce obedience is at once conceded. But that these teeth should be available to redress the garden-variety losses of economic warfare is too much to assume without express legislative consideration.

The fault is not entirely that of the courts. The legislation is silent on many matters: jurisdictional disputes, secondary pressures, picketing, uncertified unions and the effect to be given to their contracts and the scope of pressure they may employ. To continue legislative silence is to invite the judges to make policy.³⁰⁰ It is only when the judges can speak with conviction on what public policy is that they can intelligently avoid the improper interest-balancing of which they are frequently accused.³⁰¹ Even given legislation, public policy has thus far been vindicated by penal sanctions and would likely continue to be so in the future. This type of formulation does not solve the courts' problem: it merely points to the further question of whether damages should be awarded. The enactment in the United States of sections 301 and 303 of the Taft-Hartley Act is a legislative determination that breaches of the collective agreement and injuries due to

²⁹⁹ The problem arises, typically, in the construction industry where union conditions are especially vulnerable to attack by unorganizable immigrant labour, and where certification, bargaining, and conciliation (even where an appropriate unit could be defined) would take far longer than the job itself, a problem to which the courts seem insensitive. See, e.g. *Merloni v. Acme Construction*, *supra*, footnote 46.

³⁰⁰ See, e.g. the conflicting inferences as to the legitimacy of recognition strikes drawn by Davey J.A. in *Hammer v. Kemmis*, *supra*, footnote 125, and Ritchie J. in *Merloni v. Acme Construction*, *ibid.*

³⁰¹ As Holmes notes: "No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbours." *The Path of the Law* (1896-7), 10 *Harv. L. Rev.* 457, at p. 466. For Canadian appeals for an appreciation of the interest-balancing nature of labour law, see Carrothers, *Recent Developments in the Tort Law of Picketing* (1957), 35 *Can. Bar Rev.* 1005, at p. 1011; Laskin, *op. cit.*, *supra*, footnote 273, at pp. 19-20. Case and Comment, (1942), 20 *Can. Bar Rev.* 636, at p. 637; Finkelman, *The Law of Picketing in Canada* (1937-8), 2 *U.T.L.J.* 66, at pp. 66-8.

specified objectionable practices deserve compensation. This solution, while inflexible, has the virtue of clarity, and represents a considered public judgment upon loss-distribution arising from the clash of social forces. This is quite a different notion than the usual Canadian judicial view of private litigation. Canadian legislatures might well be advised to articulate similar standards for the courts. If, however, this is not politically feasible, it remains for some part of the judicial hierarchy to set its face against what is submitted to be an unhelpful mode of analysis. The Supreme Court of Canada is the logical candidate. It is unembarrassed by a backlog of labour cases, and has shown a creative bent in recent years.³⁰² Hopefully, the court might point the way for the provincial courts towards a mode of analysis similar to the *prima facie* tort doctrine, and, indeed, may have begun to do so in the *Therien* case. (By way of *caveat*, it should be noted that *Newell v. Barker* has never been cited by a provincial court, and serious inroads have been made on *Williams v. Aristocratic Restaurants*).³⁰³

A further jurisprudential objection must be raised to the present resort by Canadian courts to English authority. The practice impedes a case-to-case refinement of the Canadian law. It is far easier to resort to dicta and reason deductively from a general "right to trade" to the vindication of a particular plaintiff's right, than to pursue the reverse mental process, more traditional in the common law.³⁰⁴

The second main objection to resort to the English cases is that they are based on a different experience with labour relations and different notions of economic policy. There has been little examination in Canada of the propriety of applying these cases, which again may reflect our positivistic attitude towards law. Some beginnings have been made, to be sure. Professor Carrothers, in discussing the Canadian application of *Thomson v. Deakin*, points to the rarity of union-led strikes in England at the time of the case which enabled the union fairly to argue that an adverse decision:

... would make illegal the use of the strike weapon in a country where a charge of abuse cannot reasonably be levied and where there being strictly speaking no compulsory collective bargaining . . . the right to

³⁰² For an exhortation to the court to "discharge a creative role of law-making through constant re-examination of previously accepted doctrine", see Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians* (1951), 29 *Can. Bar Rev.* 1038, at p. 1074.

³⁰³ See Carrothers, *Recent Developments in the Tort Law of Picketing*, *op. cit.*, *supra*, footnote 301.

³⁰⁴ Cardozo, *Nature of the Judicial Process* (1922), p. 23.

strike is of singular importance to the welfare of the trade union movement and the persons in whose interests the movement functions.³⁰⁵

But if *Thomson v. Deakin*—a 1952 decision—is out of joint with Canadian labour relations, what of *Quinn v. Leathem*, *Allen v. Flood*, and the rest, relics of the turn-of-the-century philosophy of *laissez faire* economics? That line of authority is based on the notion of the freedom of individuals to aggregate the factors of production in a competitive market governed by the laws of supply and demand. Combination and concerted union action is seen to thwart both the liberty of the worker to sell his labour, and of the employer to buy it.³⁰⁶ Yet, even in England, the “right to trade” appears to have withered on the vine. Friedmann notes that:

The *Harris Tweed* case not only shows more clearly than any previous decision the elusiveness of the ideal of freedom of trade, it demonstrates also the evolution which economic individualism has undergone in the last fifty years—the development from an almost pure Benthamism to a position where economic groups struggle with each other, with authority looking on as an umpire who attempts to interfere little and to be impartial.³⁰⁷

But to no avail. *Laissez faire* is as clearly visible throughout *Fokuhl v. Raymond* and *Therien v. Teamsters* (in the lower courts) as in the earlier English (and Canadian) cases, of which it has been said that they regarded *laissez faire* as a legal rule rather than a political maxim.³⁰⁸

In *Fokuhl*, Laidlaw J.A. makes much of the fact that Raymond, the international organizer, ordered plaintiff’s employees off the job, although there was no dispute between them, and although (as was held) there were no comprehensible grounds of dispute between Fokuhl and Raymond.³⁰⁹ In other words, the free exercise of the right to sell one’s labour was interfered with. He also stresses the fact that to fulfill his contractual obligations, plaintiff depended upon the services of employees who were members of the union.³¹⁰ Raymond interfered with his access to the labour market. He then resorts to *Mogul v. McGregor* to show that it is only in pursuit of his own competing interests that Raymond might

³⁰⁵ Carrothers *op. cit.*, *supra*, footnote 246, p. 83.

³⁰⁶ Finkelman, *op. cit.*, *supra*, footnote 301, at p. 355; Carrothers, *op. cit.*, *ibid.*, pp. 24-5; Hedges and Winterbottom, *Legal History of Trade Unionism* (1930), pp. 134-5; Commons, *op. cit.*, *supra*, footnote 196, pp. 298-306.

³⁰⁷ Friedmann, *op. cit.*, *supra*, footnote 97, at p. 2; *cf.* Cox, *op. cit.*, *supra*, footnote 177.

³⁰⁸ Finkelman, *op. cit.*, *supra*, footnote 301, at p. 355 (see cases cited therein at footnote 95).

³⁰⁹ *Supra*, footnote 137, at p. 154. ³¹⁰ *Ibid.*, at p. 155.

interfere without liability. As the learned judge so pointedly remarks:

. . . Raymond, acting as International Vice-President of the Union, presumed to assert a right to decide conclusively that the respondent did not possess proper qualifications or standing in his trade to make a contract with Austin company, and for that reason to forbid the parties to continue their contractual relations. It is simply inconceivable to me that any officer or officers of a trade union, or any other person or persons, without lawful authority, should attempt to exercise such a right. Every person is entitled to enter into whatever lawful contracts he may choose to make, with any other person or persons who are willing to make an agreement with him, providing such person or persons are not disqualified by law.³¹¹

Although by no means essential to the decision in *Therien v. Teamsters*, one cannot but be struck by the many references to the words of Lord Lindley in *Quinn v. Leathem*:

As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his living in his own way, provided he did not violate some special law . . . , and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law³¹²

Without defending the abuses of power by either Raymond or the Teamsters, these and similar dicta simply do not present a true picture of contemporary economic man. Individualism has given way to corporatism, in both labour and management,³¹³ and competition to oligopoly.³¹⁴

Even if the repudiation of Benthamism had not taken place in the English cases, it would still be improper for Canadian courts to use the "right to trade" cases and ignore their statutory repudiation in England.³¹⁵ Indeed, these cases may be considered inferentially repudiated by modern collective bargaining legislation.³¹⁶ The Labour Relations Acts are inconsistent with the traditional notion of individual labour transactions at any level, and encourage labour activity designed to take wages out of

³¹¹ *Ibid.*, at pp. 158-9.

³¹² [1901] A.C. 495, at p. 534, quoted in (1959), 27 W.W.R. (N.S.) at p. 57, per DesBrisay C.J.B.C., at pp. 66-7, per Davey J.A.

³¹³ Rand, Responsibility of Labour Unions, *op. cit.*, *supra*, footnote 6, pp. 41-2; Gregory, Labor and the Law (1st ed., 1948), pp. 416-20.

³¹⁴ See e.g. Commons, The Economics of Collective Action (1950), ch. xvii; Gregory, Labor and the Law (2d. ed., 1958), p. 514.

³¹⁵ Laskin, *op. cit.*, *supra*, footnote 273; Lalonde, *op. cit.*, *supra*, footnote 273, at p. 677.

³¹⁶ Which has been called a "most gallant, if Quixotic, invasion of *laissez faire*", Ward, The Economics of Collective Action (1940), 53 Harv. L. Rev. 754.

competition altogether.³¹⁷ In a sense, of course, the legislation presupposes a labour market, but one upon which sellers and buyers are put in a position of substantial parity.³¹⁸ This parity is achieved because the union stands between the employer and the labour market. The obligation of an employer to sit down and bargain with a union at all, and especially to surrender many of his "rights" to run his business as he sees fit, would have been as unacceptable in England sixty years ago as the helplessness of the individual worker in modern Canadian industrialism. If Canadian judges cannot be accused of bias (conscious or otherwise)³¹⁹ in imposing liability for strikes, at least they are often guilty of uncritical adherence to standards of a bygone age.

To the extent to which the Canadian courts are irretrievably committed to their present doctrines, parties may come to litigate labour disputes in other forums, better equipped and more inclined to deal sensitively with delicate policy issues. Arbitration, as has been suggested,³²⁰ may offer one such forum. A more effective Labour Board may offer another.³²¹ As presently provided in Ontario, the Board's only sanction is feeble indeed (a declaration of an unlawful strike under section 59), and the courts have quite properly refused to regard the Board's jurisdiction as exclusive.³²² But a scheme of legislation which would channel disputes through the Labour Board—at least in the first instance—could achieve a maximum of uniformity of result and foster the expertness that may develop from repeated handling of like cases. This could be achieved either by a common-law rule requiring exhaustion of administrative remedies as a condition precedent to suit, or by

³¹⁷ *Syndicat Catholique v. Compagnie Paquet* (1959), 18 D.L.R. (2d) 346 (S.C.C.).

³¹⁸ But see Cox, *op. cit.*, *supra*, footnote 77, at pp. 322-3. "The Wagner Act became law on the floodtide of the belief that the conflicting interests . . . can be adjusted only by private negotiation, backed, if necessary, by economic weapons, without the intervention of law . . . Congress turned to the policy of relying for the adjustment of industrial conflicts upon negotiation between employers and labour organizations strong enough to bargain effectively on behalf of employees . . ."

³¹⁹ Laskin, *op. cit.*, *supra*, footnote 13, at p. 780; Laskin, *op. cit.*, *supra*, footnote 181, at p. 298; Finkelman, *op. cit.*, *supra*, footnote 301, at pp. 67-9; Case and Comment, (1937), 15 Can. Bar Rev. 106, at p. 111; Some Aspects of Industrial Disputes (1938), 16 Can. Bar Rev. 286, at p. 290.

³²⁰ See *supra*, VIII: Arbitration An Alternative to Litigation.

³²¹ This would necessarily involve power to issue cease and desist orders, and the expansion of both legal and labour relations personnel to undertake more vigorous activities. See Bill 74, 1960, (Ont.), providing for enforcement of certain Ontario Labour Relations Board orders in the courts.

³²² *Oakville Wood Specialties v. Mustin, General Dry Batteries Ltd. v. Brigenshaw, Hallnor Mines v. Behie, Smith Bros. Construction v. Jones No. 2.*, *supra*, footnote 44.

requiring the Board to consent in writing to civil suit as it now must do to prosecutions for offences under the Act.³²³

³²³ R.S.O., 1950, c. 194, s. 65, am. S.O., 1957, c. 57, s. 8(1). This may raise constitutional queries as to whether the Labour Board would become a court requiring federal appointment under the British North America Act, s. 96.