Liability of a Trade Union for the Actions of Its Members: A Case for Strict Liability

J. GORDON PETRIE*

This article discusses the civil liability of a trade union for the actions of its members. It is submitted that, in view of provisions in the New Brunswick Industrial Relations Act *and* Judicature Act, *such liability should be strictly imposed. This would not unfairly burden the union and would clarify the requirement of pleadings, a difficulty often facing practitioners.*

Dans cet article, l'auteur examine la question de la responsabilité civile des syndicats du fait des actes de leurs membres et fait valoir qu'il y aurait lieu de les assujettir à un régime de responsabilité stricte au vu des dispositions de la Loi sur les relations industrielles *et de la* Loi sur l'organisation judiciaire. *Un tel régime n'imposerait pas un fardeau excessif aux syndicats et clarifierait les conditions de forme auxquelles doit satisfaire la rédaction des conclusions, tâche qui est souvent source de difficultés pour le practicien dans ce domaine.*

There has been in New Brunswick an observable increase in actions brought by employers, or groups of employers, against trade unions for damages resulting from alleged unlawful strikes and/or unlawful picketing. This paper briefly examines one of the fundamental issues which invariably arises in the majority of such litigation, namely, the extent to which the trade union is liable for the actions of its members who participate in such unlawful activity.

The existing state of the law is, at best, confusing and contradictory. It is the view of this writer that a clear delineation of the responsibility of the union is possible, without imposing an unfair burden on the union, by the application of the principle of strict liability.

Since the decision of the Supreme Court of Canada in *International Brotherhood of Teamsters etc., Local No. 213* v. *Therien*[1] it has been clearly established that, absent legislation to the contrary, a trade union is a legal entity capable of suing and being sued in its own right. This principle has been applied to a trade union as defined by the *Industrial Relations Act,* R.S.N.B. 1973, c. I-4 in *Rocca Construction Ltd. et al.* v. *Local 1279,*

*B.A., 1962, LL.B., 1964 (U.N.B.), LL.M., 1965 (Michigan). Senior Partner, Petrie and Richmond, Fredericton.

[1](1960), 22 D.L.R. (2d) 1 (Ont. C.A.).

Labourers International Union[2], where the New Brunswick Court of Appeal stated:

> In other words, it is a course of conduct carried on by the employees, not by the union itself, which, in this case, is the subject matter of the action. A union becomes involved and liable when it instigates, encourages, participates in, or fails in a duty to discourage, an illegal strike.
>
> There is no question in this case but that the defendant is liable in damages if the strike was illegal. See *Winnipeg Builders' Exchange* v. *International Brotherhood of Electrical Workers Local 2085* 57 D.L.R. (2d) 141 and *International Brotherhood of Teamsters* v. *Therien* 22 D.L.R. (2d) 1, [1960] 8 S.C.R. 265.[3]

The basis upon which liability was imposed in the *Therien* case is expressed by Mr. Justice Locke in the following manner:

> In the absence of anything to show a contrary intention — and there is nothing here — the Legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. *Qui sentit commodum sentire debet et onus.*
>
> In my opinion, the appellant is a legal entity which may be made liable in name for damages either for breach of provision of the *Labour Relations Act* or under the common law.[4]

The provisions of the *Industrial Relations Act* similarly provide that a trade union is the exclusive bargaining agent for all employees in the bargaining unit for which it has obtained bargaining rights.

It is this legislative direction of exclusiveness that ought, in this writer's opinion, to impose a heavy burden upon a trade union in the event of an unlawful strike in breach of a 'no strike' clause. It is, however, submitted that the rules have developed to date in such a manner that a trade union may escape liability in situations where, given the responsibilities of such exclusive bargaining rights, a different result should be necessitated.

The importance of this issue to a practitioner is illustrated in the decision of Stevenson J. in *Brunswick Contractors (1977) Ltd.* v. *United Brotherhood of Carpenters and Joiners of America, Local 1137.*[5] The Defendant moved to strike out the Plaintiff's statement of claim on the basis that it failed to disclose a reasonable cause of action. Specifically, the statement of claim did not allege any particular wrongful activities of

---

[2]N.B.C.A., unreported decision delivered October 12, 1979.

[3]*Ibid.*, at 4.

[4]*Supra*, footnote 1, at 11.

[5](1979), 26 N.B.R. (2d) 266 (N.B.Q.B.).

the officials of the union but rather it alleged that the union permitted the unlawful strike to occur without affirmative action to prevent same.

The decision of Stevenson J. states in part as follows:

> I do not propose, on an application of this kind, to attempt either an exhaustive or definitive review of the case law dealing with the liability of a union to an employer for damages the latter may suffer as the result of an illegal strike. I cannot accept, without qualification, the proposition of counsel for the plaintiff that the union is responsible for any breach of the collective agreement by its members. Paragraph 10 of the statement of claim assumes the existence of such an absolute responsibility or liability. In my opinion no such absolute or strict liability exists in the absence of some statutory rule or presumption as was present in *Pacific Press Ltd.* v. *Vancouver Typographical Union Local 226* (1970), 15 D.L.R. (3d) 212. . . .
>
> Liability has not been limited to cases to where union officers or officials have actively participated in or condoned the strike action (acts of commission) but has also been found when such persons have failed to take prompt and affirmative action to bring strikes to an end (acts of omission).[6]

The appropriateness of pleadings in litigation of this nature thus assumes a most important status. The difficulties inherent in succeeding in a representative action brought against the employees in the bargaining unit, and not the trade union, are revealed by the decision in *Heath Steele Mines Ltd.* v. *Kelly et al.* The following statement by Limerick J. A. is illustrative of the problems:

> The subject matter of this action must depend on a common interest and, on the facts of this case, must depend on the intent of each member of the class to enforce his will on the employer to revoke the dismissal of a fellow employee fired for disciplinary reasons. If actionable, the plaintiff's claim must rest on a conspiracy by the members of the described class to cause the employer's business to be shut down or adversely affected by an illegal strike. In such event there could be different defences available to different individuals in the group. A number of the group may have actively participated in a conspiracy to force the employer to shut down his business. A further number of employees may not have engaged in the active conspiracy but refrained from reporting for work when they learned the strike had been called by others. A third group of the employees may not have been sympathetic with the strike and opposed to it but, stayed off work because of a reluctance (union inspired) to cross picket lines and other employees, who wished to work, may have been intimidated by the presence of the pickets. Each such group of employees would have an arguable defence not available to other persons included in the class sought to be sued.[7]

The following provisions of the *Judicature Act,* R.S.N.B. 1973, c. J-2, are relevant to the issue of liability and the appropriate formulation of the action:

> 35(1) A trade union, a council of trade unions, an employer and an employers' organization, as defined in the *Industrial Relations Act,* are legal entities capable of suing and being sued.

---

[6]*Ibid.*, at 268-269.

[7](1978), 22 N.B.R. (2d) 7, at 13-14 (N.B.C.A.).

> 35(2) No representative action in tort shall be brought against members of a trade union as defined in the *Industrial Relations Act* 1971, c. 42, s. 3.[8]

An arbitral award by Professor Laskin, as he then was, established the applicable rules regarding the role and responsibility of officers and stewards respectively. In *Canadian General Electric Co. Ltd.* it was stated:

> It need hardly be said that in order to discharge its affirmative obligation it is not enough for the Union to go through the motions of giving back-to-work orders without more. In the case of a strike or stoppage called by the Union, its liability is fixed at the very time the prohibited act occurs. In the case of a spontaneous or wildcat strike or stoppage, liability of the Union depends on the action taken by it, having regard to its responsibility for its members and for non-members. There must be prompt attempts to get the employees back to work. The nature and extent of these attempts will depend on the circumstances and the situation with which the Union is confronted. It may well be necessary for the Union, if uncoordinated efforts by its stewards and officers to terminate the stoppage are unsuccessful, to make concerted efforts and to obtain the permission of management to call a meeting on the premises for that purpose. It may be necessary to threaten, and even to take, disciplinary measures against particular members of the Union. At all events, it would seem that the initial obligation of the Union should be to make known to management that the Union has not authorized or encouraged the stoppage and thereafter to give continued evidence of this postion by manifest steps to bring the stoppage to an end. It may, of course, be finally necessary for the Union to report to management that it cannot control its members or other employees, thus leaving it to management to take such action as it sees fit. Such a procedure, in the Board's view, is consistent both with Union responsibility for contractual undertakings and with employer responsibility for directing the working force. It does not throw an absolute liability on the Union but enables it to exculpate itself by tangible evidence of its good faith in meeting its undertaking. . .[9]

The New Brunswick Supreme Court, Appeal Division, adopted this line of reasoning in *Re New Brunswick Electric Power Commission et al.* Hughes C.J.N.B. stated as follows:

> Certainly a trade union cannot be held either criminally or civilly liable for an illegal strike which it has neither authorized nor encouraged through the acts of its officials or agents, and which it has endeavoured to terminate by affirmative action: *R.* v. *International Brotherhood of Electrical Workers, Local 1818* (1972), 31 D.L.R. (3d) 607, 10 C.C.C. (2d) 88, 4 N.S.R. (2d) 556 (N.S.C.A.). In my opinion the same principle should be applied where a strike is carried on in violation of a Court order. To render a trade union criminally responsible for disobedience of such an order there must be evidence which incriminates the union.[10]

The basis of an action for damages against a trade union with bargaining rights most frequently arises out of a breach of the 'no strike' clause. The *Industrial Relations Act* by section 53(1), requires that every

---

[8]For a similar provision see the *Industrial Relations Act*, R.S.N.B., 1973, c. I-4, s. 114(2).

[9](1951), 2 L.A.C. 608 at 611-612; see also *Re Oil and Atomic Workers and Polymer Corporation Ltd.* (1958), 10 L.A.C. 31, at 39-40.

[10](1977), 73 D.L.R. (3d) 94, at 101 (N.B.C.A.).

collective agreement contains such a provision or else it is deemed to be present.

It is a breach of this very provision that has been held to constitute an appropriate basis for the issuance of an injunction, the terms of which require the termination of an unlawful strike: see *International Brotherhood of Electrical Workers, Local Union 2085 et al.* v. *Winnipeg Builders' Exchange et al.*[11] The Supreme Court of Canada specifically rejected the argument that the issuance of an injunction in such circumstances was tantamount to compelling employees to work for a particular employer contrary to the long-established rule of equity set out in *Lumley* v. *Wagner.*[12] It is submitted that a further judicial determination bears most importantly on the role and responsibility of a trade union. In *McGavin Toastmaster Ltd.* v. *Ainscough et al.* Chief Justice Laskin stated:

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.[13]

Finally, the Supreme Court of Canada in *International Longshoremen's Association, Local 273 et al.* v. *Maritime Employer's Association et al.* considered the propriety of an injunction issued against trade unions which obtained bargaining rights under the *Canada Labour Code,* R.S.C. 1978, c. L-1 as amended. It was held by Estey J.S.C. that:

> The language of the contract placed an affirmative duty on the union acting through its leaders at all levels of the organization so as to reveal an intent through appropriate overt acts to abide by and to promote the terms of the collective agreement. The evidence on the record in these proceedings is quite the opposite. Not only is there no evidence on the part of the union through its agents, that is its officers, to perform the undertaking given in the articles set forth above, but, on the contrary, the leaders of the Locals themselves failed to respond to the request by the association to report for work. In the same way, the Locals violated their covenants in the collective agreements to supply the numbers of employees requistioned by the employers in the manner prescribed in the agreements. . . . It may be said that the addition of the "officers, members and servants" is superfluous because the Locals, like other legal entities, may only act through such persons.[14]

---

[11](1968), 65 D.L.R. (2d) 242 (S.C.C.).

[12](1852), 42 E.R. 687 (Ch.D.).

[13](1975), 54 D.L.R. (3d) 1, at 6 (S.C.C.).

[14](1979), 89 D.L.R. (3d) 289, at 306 (S.C.C.).

The Supreme Court further approved the following comment by Robertson J.A. in *Pacific Press Ltd.* v. *Vancouver Typographical Union, Local 226:*

> In the case at bar, each of the unions covenanted with the respondent that the respondent "shall be protected by the Union against walkouts, strikes or boycotts by members of the Union and against any other form of concerted interference by them with the usual regular operation of any of its departments of labour". For the Court merely to require the union not to "cause" any of those things would fall far short of requiring the union to perform its undertaking to "protect" the respondent therefrom; the words "permitting" and "allowing" are — or one of them, for I think they are synonymous in this context, is — essential to ensure that the union performs what it has covenanted to do. There is no good reason why each of the unions should not be ordered to do what it agreed to do.[15]

The Courts have thus displayed a proper identification of the responsibility of the trade union for a breach of a 'no strike' provision and, where appropriate, have displayed no reticence in issuing an injunction to prohibit such a breach. The related issue of the responsibility of a trade union for a breach of the same clause due to the actions of its members has not, however, received a similar clear treatment.

The definition of "strike" in the *Industrial Relations Act* is set forth in Section 1:

> "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, but no act or thing required by the provisions of a collective agreement for the safety or health of employees shall be deemed to be an activity intended to restrict or limit output; 'to strike' has a corresponding meaning;

The necessity of "concerted activity" presupposes the involvement of more than one person. The provisions of most collective agreements, however, relate to the contracting parties (*i.e.* the trade union and the employer) undertaking that during the life of such agreement there will be no strike or lockout. It is submitted that, at the very minimum, such a provision ought to impose strict liability upon the parties. For a discussion of the principles applicable to strict liability and absolute liability in the quasi-criminal field see *R.* v. *City of Sault Ste. Marie.*[16]

The trade union has acquired rights and privileges under the relevant labour legislation which have been recognized as sufficient to constitute such bodies as legal entities. The undertaking by contract that there shall be 'no strike' during a specified period is an act of that entity, albeit executed through its officers or their bargaining representatives.

---

[15](1971), 15 D.L.R. (3d) 212, at 225 (B.C.C.A.).

[16](1978), 85 D.L.R. (3d) 161 (S.C.C.).

The breach of such a fundamental term of a collective agreement has been recognized to impose a certain burden upon the trade union.

The troublesome aspect of certain judicial decisions is that it would appear that liability would not be imposed upon the union for the breach of the 'no strike' clause, unless the employer is able to establish the appropriate acts of commission or omission by the officials of the union. For example, on the one hand, if an unlawful strike occurs and all officials of the union nonetheless continue working, does the union thereby escape liability? Is the mere sending of a telegram ordering members to return to work (a most popular practice, it appears) an effective device to exculpate the union? On the other hand, does the absence from work of the union officials during the period of an unlawful strike create liability?

The various illustrations of difficulties created by the existing principles are too numerous to recount. As can be readily recognized, the court's finding of liability will depend upon the facts of each case and the degree to which the court may be satisfied that a real effort was made by the union, through its representatives, to restrain the commencement and curtail the continuance of the unlawful activities.

To a practitioner the real difficulty may arise in the initial stage of properly formulating pleadings in an action against a trade union. As illustrated by the *Brunswick Contractors*[17] decision, if the action is founded upon a breach of contract it may not be sufficient to allege the existence of the contract and the 'no strike' clause, the activities of the members of the trade union in breach of such clause, and the liability of the trade union therefore. Specific particulars of the actvities of the officials of the trade union may not be then known.

Would it be sufficient, therefore, to plead that the officials did not, if applicable, attend at work as scheduled? Certain difficulties are immediately apparent when consideration is given to construction trade unions where one local may exist for the entire Province and the officials thereof are full-time union employees. Does that mean that liability could not attach to a construction trade union because there are no *officials* employed by a particular contractor?

It is submitted that the courts should, in keeping with the various precedents set forth previously in this paper, impose the rule of strict liability upon trade unions in circumstances where a strike has occurred contrary to a collective agreement.

Pursuant to *McGavin Toastmasters*[18] the collective agreement is the relevant consideration. Following *Winnipeg Builders*[19] the negative

[17]*Supra*, footnote 5.

[18]*Supra*, footnote 13.

[19]*Supra*, footnote 11.

covenant is being enforced against the very party that has contracted with the employer. In accordance with the *Therien*[20] decision, the union as a legal entity must assume a responsibility to match the privileges granted to it under the labour legislation.

The imposition of strict liability upon a trade union would clarify the issue of pleadings. The trade union would assume a prima facie liability for the breach of its undertaking, as was recognized by the Supreme Court in the *Maritime Employers*[21] decision.

The effect of the adoption of a strict liability approach would be that a trade union, acting through its authorized officials, would carry the burden to establish that it was in fact, and not in fiction, not responsible for the commencement and continuance of the unlawful strike. The breach of a 'no strike' clause would impose the burden of proof upon the only party which, in reality, possesses the knowledge of the facts sufficient to answer the allegation.

The imposition of such a burden would, it is submitted, be entirely consistent with the intention of the legislature in empowering trade unions with extra-ordinary powers of contract. For example, the inclusion of a 'union shop' clause in a collective agreement is permissable although the result may be the loss of employment by an employee.

The application of strict liability would thereby not require an employer to place itself in the minds, if not the bodies, of the trade union officials. It would also eliminate the need that presently exists for constant surveillance of union officials during an unlawful strike. It would furthermore place a real, and not an imaginary, obligation upon the trade union to take internal disciplinary action against those members who may be, in fact, the instigators of the unlawful activity.

Most importantly, strict liability of a trade union for breach of a 'no strike' clause would create a climate of accountability. It would not be sufficient for union officials to appear to be directing the membership to return to work. The rule of strict liability would require positive and real actions by those who should be responsible.

---

[20] *Supra*, footnote 1.

[21] *Supra*, footnote 14.