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The Origin of the Freedom of Association and of the Right to Strike in Canada

An Historical Perspective

Claude D'Aoust
et
François Delorme

The authors first relate the circumstances surrounding the adoption of an important piece of our labour legislation and examine the effect of the 1872 legislation on the legal status of union activities.

The right to form and join a trade union and the right to strike were recognized by the Dominion Parliament in 1872, by the adoption of two pieces of legislation¹. Both statutes were the direct result of the mass demonstrations in favor of the "Nine hour movement", sponsored by the Toronto Trades Assembly. The effects of these early laws and the immediate events that gave rise to their enactment call for further analysis and explanation.

This essay is divided in two parts. The first is essentially historical in nature and relates the circumstances surrounding the adoption of an important piece of our labour legislation. Some historians have covered this topic quite extensively and therefore we concentrate our attention on a neglected aspect of it, namely the judicial outcome of the printers' arrest.

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¹ *An Act Respecting Trade Unions*, 35 Victoria, S.C. 1872, chapter XXX, assented to 14th June, 1872; *An Act to Amend the Criminal Law Relating to Violence, Threats and Molestation*, 35 Victoria, S.C. 1872, chapter XXXI, assented to 14th June, 1872.

Part two is devoted to the exemplification of the effect of the 1872 legislation on the legal status of union activities. As a consequence, it may appear technical to a reader with no legal training. Every effort shall be made to simplify the argument, and highly technical points shall be relegated to footnotes. An important by-product of this inquiry is that a few labor disputes, as related in the Court decisions, are reported. This gives an idea of the way labour conflicts were solved one hundred years ago.

THE HISTORICAL SETTING OF THE 1872 LEGISLATION

There is no doubt that the year 1872 marks the beginning of full legality for "combinations of workingmen" (unions, collective bargaining and strike action), although it must be added that this acceptance *de jure* had a negative undertone.

There is a lack of precise information regarding the series of events that led to the adoption of the two Bills in 1872. Those familiar with the literature on the history of labour relations in Canada will agree that some points need further exploration². This is particularly true of the so-called printers' "trial".

The general background of the two pieces of legislation of 1872.

The events which brought about the enabling legislation related to union activity are closely linked to the "Nine Hour Movement". Beginning around 1864 in the United States and 1871 in England³, the reduction of the workday became increasingly an issue of concern and the subject of demands for working people. In Canada, the Toronto Typographical

² Among the main sources, see especially Richard DESROSIERS and Denis HÉROUX, *Le travailleur québécois et le syndicalisme*, 2nd revised edition, corrected and updated, Les Presses de l'Université du Québec, Montréal, 1973, 156 p.; Charles LIPTON, *The Trade Union Movement of Canada 1827-1859*, 3rd edition, NC Press, Toronto, 1973, 384 p.; H.A. LOGAN, *Trade Unions in Canada*, The Macmillan Company of Canada Limited, Toronto, 1948, 639 p.

³ On this subject, see D.G. CREIGHTON, "George Brown, Sir John MacDonald, and the workingman", *Canadian Historical Review*, Vol. XXIV, no. 4, December 1943, p. 364; Richard DESROSIERS and Denis HÉROUX, *op. cit.*, p. 30. It must be noted that the reduction of hours of work had long been an objective of the English labour movement; thus, in 1833, an Act was passed establishing the ten hour day for women and young workers.

Union, one of the oldest and most active Canadian trade unions⁴, had, since 1869, strongly pressed the Master-printers to reduce the work week.

In 1871, both the Toronto Trades Assembly and, in Hamilton, the Nine Hour League came into being, thus giving new life to the Nine Hour Movement in Ontario. At its very first meeting in April 1871, the Toronto Trades Assembly discussed the reduction of hours of work and in January 1872, it adopted a resolution in favour of the 55-hour week without reduction of pay. According to a well-known historian of the Canadian labor movement⁵, this demand was rather premature since the nine-hour day was only in the process of being obtained in England. Nevertheless, the Toronto Trades Assembly, at its regular meeting on March 12, 1872, accepted and supported the Toronto Typographical Union's intention to undertake industrial action against the master printers in order to obtain the nine-hour day⁶. The assembly also arranged, for March 15, 1872, a mass meeting of Toronto workers at which Richard F. Trevellick, president of the "National Labour Union of the United States" delivered a speech on the natural right of every worker to have a nine-hour workday.

Following the success of that demonstration, a number of unions took action by sending "memorials" on the nine-hour day to their employers and in certain cases, as in Hamilton and Montreal, by striking to support their

4 Chronologically, the first Canadian union came into being in the province of Quebec. This first union was composed of the printers of Quebec City and appeared in 1827 but its existence was rather sporadic until 1855 when it was named the Typographical Society of Quebec. From then on, it was more stable and was finally affiliated to the International Typographical Union in 1872. On this question, see Noël BÉLANGER et al. (under the direction of Jean Hamelin), *Les travailleurs québécois 1851-1896*, Les Presses de l'Université du Québec, Montréal, 1973, pp. 65-66; Charles LIPTON, *op. cit.*, p. 3.

The Typographical Society of York (Toronto) seems to have appeared in 1832, a few years after the first Canadian union. However, as soon as 1844, its existence showed much more stability and it joined the International Typographical Union in 1866, then becoming Local 91. On this question, see J.M.S. CARELESS, *Brown and The Globe*, Vol. 2, *Statesman of Confederation 1860-1880*, The Macmillan Company of Canada Limited, Toronto, 1963, p. 288; D.G. CREIGHTON, *loc. cit.*, pp. 6 and 16.

5 FORSEY, Eugene, "The Toronto Trades Assembly, 1871-1878", *Canadian Labour*, Vol. X, nos 7-8, July-August 1965, p. 21. FORSEY states: "In Britain, from which many of the early Toronto unionists came, and in whose union movement they maintained a lively interest, the nine-hour day was only in process of being won. To attempt to go farther and faster than the world's leading unions must have seemed, to most, completely impracticable, as indeed it was."

6 Eugene FORSEY underlines the fact that the Assembly was in effect endorsing an already existing situation, as the Typographical Union had already taken steps in that direction since the end of February of the same year. See Eugene FORSEY, *loc. cit.*, p. 22; for more detailed information concerning the steps taken by the Typographical Union upon the employers, see J.M.S. CARELESS, *op. cit.*, p. 289.

demands⁷. The Nine Hour Movement reached such important centers as Sarnia, Guelph, St. Catharines, Oshawa, Hamilton and Montreal. This general movement for the reduction of working hours holds an important place in the history of the Canadian Labour movement both because of its effect on the legislation dealing with the legal existence of trade unions and for its political importance. Several authors⁸ have characterized the movement's role as a unifying agent of Canadian Labour, in bringing the trade unions of central Canada to rally around a common cause and in developing closer contact between labour leaders of different cities. Furthermore, this movement initiated the young unions in a kind of non partisan political action⁹, whereby the labour movement strove to promote specifically "economic" objectives, for example, the reduction of hours of work. Shortly after, these aims became overtly "political" following the developments which took place in Parliament.

The Nine Hour Movement reached its peak in March and April 1872 with mass meetings, demonstrations, strikes, and finally the arrest, on charges of seditious conspiracy, of a number of strikers from the Toronto Typographical Union. These events led Prime Minister Sir John A. MacDonald to present a Bill preserving union activities from the doctrine of illegal conspiracy derived from the British Common law. Such legislation was necessary since the English statutes of 1824, 1859 and 1871 — protec-

7 On this subject, see Charles LIPTON, *op. cit.*, p. 289.

8 See for instance Jacqueline FLINT-CAHAN, "A Survey of the Political Activities of the Ontario Labor Movement, 1850-1935", a thesis presented as partial fulfillment of the requirements for a Master of Arts degree in Political Science at the University of Toronto, May 1945, p. 2; Doris FRENCH, *Faith, Sweat and Politics*, McClelland and Stewart Ltd., Toronto, 1962, pp. 22, 24.

In his study of the history of the Knights of Labour and their influence on the Quebec society during the years 1882 to 1902, Fernand HARVEY observes that the Nine Hour Movement proved to be an important attempt to unify the labor force of Quebec. See Fernand HARVEY, «Les Chevaliers du Travail, les États-Unis et la société québécoise», in *Aspects historiques du mouvement ouvrier au Québec* (under the direction of Fernand Harvey), Les Éditions du Boréal Express, Montréal, 1973, p. 39.

9 For a typology of forms of union politization, see Léo ROBACK, «Les formes historiques de politisation du syndicalisme au Québec», in *La Politisation des relations du travail* (published under the direction of Gérard Dion), XXVIII^e Congrès des Relations Industrielles de l'Université Laval, Les Presses de l'Université Laval, Québec, 1973, pp. 21-22.

In Quebec, part of the labour movement, under the instigation of Médéric Lanctôt, had favored a type of partisan political activity. Thus, the «Grande Association» (1867) an "umbrella" organization of some 26 skilled trades of Montreal, promoted the concept of equality of labour and capital and advocated profit sharing for the workers, among other things. This social aim is political in that it stems from a new global concept questioning the repartition of power between labour and capital. However, even though Lanctôt ran in the provincial and federal elections of 1867 to fight for his ideas and against Confederation, we cannot really link his name to any organized political party. On Lanctôt's action, see Richard DESROSIERS and Denis HÉROUX, *op. cit.*, pp. 24-27; Fernand HARVEY, *op. cit.*, pp. 39-40.

ting unions from the sanctions of the Common law — did not apply in Canada because they were adopted after the British conquest¹⁰.

The Immediate Context

It will be recalled that this strike was declared against the master-printers of the city of Toronto of which George Brown, publisher of *The Globe* and Liberal leader, became more or less the chief spokesman. Brown's personal importance in the dispute was due, in part to his very active role in the Master Printers' Association — an organization established in order to prevent the union from attaining its goal on reduction of hours¹¹

¹⁰ To add to the historical context, it should be recalled that since the British conquest, English law was in force all over Canada, in civil as well as criminal matters. In 1774, the Quebec Act changed the situation and restored in the Province of Quebec the civil law in force before 1760. However, the Quebec Act stated that, in the province of Quebec, criminal matters would still be subject to the English laws in force at that moment. Later on, section XXXIII of the Constitutional Act of 1791 which separated the colony into Upper Canada and Lower Canada, stipulated that the laws in effect as of the date of the coming in force of the Act, would remain in effect until they were amended or repealed by the legislatures of either province.

The exact titles and sources of the above mentioned Acts are: *An Act for Making More Effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. III, (U.K.) 1774, chap. 83; *An Act to Repeal Certain Parts of an Act, Passed in the Fourteenth Year of his Majesty's Reign, Intituled, An Act for Making More Effectual Provision for the Government of the Province of Quebec, in North America; and to Make Further Provision for the Government of the Said Province*, 31 Geo III, (U.K.) 1791, chap. 31. These statutes are reproduced in the Revised Statutes of Canada, 1970, Appendix II, pp. 131 et seq. and 139 et seq., respectively.

The English laws of 1824, 1859 and 1871 pertaining to the legal status of trade unions referred to a criminal matter, that of the crime of conspiracy in restraint of trade. Because those laws were adopted after the coming in force of the Constitutional Act of 1791, it is easier to see why the three pieces of legislation aforementioned could not be applied in Canada, since the Act maintained the criminal laws then in force until the provincial legislatures amended or repealed the said laws.

This question is discussed at length in John D. WHITE and William R. LEDERMAN, *Canadian Constitutional Law*, Butterworths, Toronto, 1975, pp. 29 et seq. See also André MOREL, *Histoire du droit*, La Librairie de l'Université de Montréal, 1975, (mimeographed lecture notes), passim.

¹¹ On Brown's role during this conflict, see particularly Bernard OSTRY, "Conservatives, Liberals and Labour in the 1870's", *The Canadian Historical Review*, Vol. XLI, no. 2, June 1960, pp. 93 et seq.

An influential Liberal, Brown established this Association in order to urge the Toronto newspapers to refuse Union demands by assuring them, in the event of a strike, of an active cooperation by way of a supply of the material and manpower required for the publication of these newspapers.

— and to the impact of the dispute on his own business¹².

On the other hand, the owner of *The Leader*, James Beaty, of Conservative allegiance, was the only newspaper owner in Toronto to agree to the Typographical Union's demands for better working conditions. He even went so far as to provide space in his paper to the strikers, and to write editorials in favour of the typographers¹³. Beaty thus became a popular symbolic figure throughout the conflict since his image was linked to the defence of workers' rights. This image gained him political capital and a much-needed boost for *The Leader*, whose influence and circulation were dropping at the time.

Under these circumstances, the typographers' dispute became an increasingly important *political* event, both in the broad context of a struggle between Capital and Labour, and in the narrower partisan one in the light of the approaching General Election.

The dispute turned into a strike early in the year.

On March 13 the Union received, once again, a negative answer from the master-printers in reply to their demand for a nine-hour day. The Union replied by an ultimatum: either hours of work should be reduced without loss of pay, or else the Union members would go on strike. On March 19, a negative counter-ultimatum by the master-printers was published in *The Globe*¹⁴. As a result, the Typographical Union membership took a strike vote on March 23, in favour of a work stoppage effective on March 25, at 2 o'clock in the morning¹⁵.

On April 15, a mass demonstration was held at Queen's Park in favour of the nine-hour day¹⁶.

¹² To the eyes of the workers, Brown became the symbol of repression by the management. This is why the conflict soon centered on his enterprise. Besides, Brown had favoured in a way this concentration on his business when, at the beginning of March, he conceded a raise and a reduction of working hours for night compositors while refusing these benefits for the less skilled workers. On this subject see Bernard OSTRY, *loc. cit.*, p. 95. CARELESS states that Brown had accepted the principle of a raise for night compositors but that he refused the reduction of hours. See J.M.S. CARELESS, *op. cit.*, p. 291.

¹³ On the role played by Beaty in this conflict, see D.G. CREIGHTON, *loc. cit.*, p. 368.

¹⁴ *The Globe*, March 25, 1872, p. 2.

"We further agree that in the event of the threatened action of the Typographical Society, taken on Wednesday, 13th March, being carried into effect, and our hands strike work, we shall declare all our establishments non-union offices." (Dispatch dated March 19).

¹⁵ The strike became effective during the night of March 24th, probably because the workers did not work on Sunday the 24th, and work only began at night, in order to prepare the Monday edition.

¹⁶ *The Globe*, April 16, 1872, p. 1; *The Leader*, April 16, 1872, p. 2.

Later on, a certain number of strikers from the "Toronto Typographical Union" were arrested on a charge of seditious conspiracy, on the master-printers' initiative. This dramatic development calls for some precision and clarification on details as to the precise date of the arrest, the number of persons taken into custody, the charges and the source of the warrants.

First, the date of the arrest is set variously at the 14th, 15th or 16th of April, whereas Desrosiers and Héroux prudently place it in the course of the next few days¹⁷.

The evidence points to the day after the demonstration¹⁸.

It still remains to be explained why Forsey mentions the 14th of April and Logan the 15th. The latter is consistent in choosing the 15th since he dates the demonstration at April 14. This sticks to the logic according to which the arrests followed the Queen's Park demonstration. This does not explain why Forsey holds for April 14th since he correctly dated the demonstration at April 15. One possible explanation might be that Forsey sees the arrests as a normal stage in the escalation of the conflict without linking it chronologically or causally to the aforementioned demonstration; in that perspective, the error would be nothing but a mere slip.

Second, the number of persons actually arrested on this occasion is not settled. The figures vary from 14 to 24. As a matter of fact, warrants for the arrest of the 24 members of the Union Vigilance Committee were issued, *but only 14 of the latter were actually arrested and the remaining warrants were never executed*¹⁹.

The reason generally put forward to justify the arrest of many members of the Union Vigilance Committee, i.e. that of seditious conspiracy,

¹⁷ CARELESS, *op. cit.*, pp. 294-95 (April 76); CREIGHTON, *loc. cit.*, p. 369; DESROSIERS and HÉROUX, *op. cit.*, p. 31 (April 76); FORSEY, *loc. cit.*, Vol. X, no. 9, p. 32 and Vol. X, no. 10, p. 23 (April); LIPTON, *op. cit.*, p. 30 (April 16); LOGAN, *op. cit.*, p. 40 (April 15).

¹⁸ *The Globe*, April 17, 1872, p. 1; *The Leader*, April 17, 1872, p. 4.

¹⁹ The Wednesday April 17th edition of *The Globe* reveals the names of the 14 arrested strikers. It seems that the 14th culprit, John H. Lumeden, was arrested on April 17 rather than on April 16. At least, that is what OSTRY implies and his opinion is corroborated by CARELESS and FORSEY. See B. OSTRY, *loc. cit.*, p. 99, in footnote 18:

"By next morning the number of 'conspirators' had grown to 14; the other ten warrants issued by the magistrate were never acted upon."

Although FORSEY initially referred to 13 (Vol. X, no. 9, p. 32), he refers to 14 arrested strikers in a subsequent article (Vol. X, no. 10, p. 23):

"The fourteen arrested men were still out on bail, and the warrants against the ten others had not been executed."

also needs a further explanation. We must recall that George Brown had published in the March 30 edition of *The Globe* the legal opinion of a lawyer, Mr. Robert A. Harrison, Q.C. He stated:

“The law of Canada as regards labour combinations is the same as was the Common Law of England before the passing of the English Statutes, 5 Geo. IV, C. 95, 6 Geo. IV, Cap. 129 and 22 Vic. Cap. 34, none of which are in force in this country.

While the law to the fullest extent provides for the protection and preservation of individual or personal liberty, it is equally against combinations for the purposes of raising or affecting wages. A man may, by his own individual efforts, raise or attempt to raise his wages. But that which is lawful for the individual to do, or as an individual, is not lawful for individuals to do as a body, or in combination. A combination on the part of workmen, either to raise their wages or shorten the hours of labour, is I think, by the Common Law of England, and therefore by the law of Canada, an indictable conspiracy.”²⁰

Participating in a “combination of workingmen” was one count in the indictment on which the issue of the warrants of arrest was based. But the Toronto *Globe* refers to a second count, namely, the use of intimidation and violence on individuals by union members in order to compel the master-printers to accept the work conditions determined by the typographers²¹. Since Brown and most of the Toronto editors continued to publish their own newspaper with the help of scabs, it is easy to picture the strong tensions this situation brought between the strikers and these new workers. The existence of a second count helps to understand the proceedings of the preliminary inquiry held later before a magistrate of the city of Toronto.

According to Creighton and Lipton, the warrants against the 24 strikers were issued by a magistrate called McNab/or MacNabb, depending on the spelling used. The Provincial Archives of Ontario²², identify a certain McNabb, appointed as of June 1866 as police magistrate for the Counties of Peel and York, and for the city of Toronto. Hence, it is indeed likely that the McNab (or MacNabb) mentioned by some historians is the same person as the McNabb found in the provincial Archives.

The authors referred to above generally agree that the strikers appeared before Police Magistrate McNabb on April 18 for their preliminary inquiry, which is to be distinguished from their trial²³. At that stage the magistrate

²⁰ *The Globe*, March 30, 1872, p. 2.

²¹ *The Globe*, April 17, 1872, p. 1.

²² Provincial Secretary's Department of Ontario, *Magistrate Book*, 1864-1878, Vol. IV, p. 672 (manuscripts, unpublished).

²³ The strikers were released on bail from the time of their arrest until April 18. It is, at least, what can be inferred from the newspapers; see *The Globe*, April 17, 1872, p. 1 and *The Leader*, April 17, 1872, p. 4.

had to decide whether the whole of the evidence warranted the committing of the accused to trial.

Our explanation is supported by the course of the proceedings as well as by McNabb's conclusion to the proceedings, which was to send the accused to trial before the appropriate court²⁴.

At the preliminary inquiry it seems that McNabb took the prosecution by surprise by being both uncompromising and highly expeditious with regard to evidence. He declared that there was *prima facie* evidence that the strikers had taken part in a labour combination. He then refused to hear many prosecution witnesses on the second count, that of molestation and violence by the strikers. This twoheaded accusation as well as the surprising turn that the case took in the eyes of the prosecution, have perhaps not been stressed enough. Creighton, for one, has noted, most pertinently, this remarkable aspect when he studied the *verbatim* accounts of *The Globe* and *The Leader*. He states:

"The master printers had triumphed — triumphed easily. In fact, had they not triumphed too easily — so easily that their success scarcely looked like a triumph at all? They had been required to prove virtually nothing. The court had not even given them the chance to establish those scandalous overt acts of "intimidation" and "molestation" on the part of the strikers which had so horrified George Brown..."²⁵

The subsequent unfolding of the case shows that this too easy victory will prove to be not so advantageous for the master-printers in the long run, and that they were not really allowed to support the second count in the indictment.

Be that as it may, Magistrate McNabb adjourned the preliminary inquiry at the request of the defence, until May 6th and the accused were once again released on bail²⁶. In the meantime, Prime Minister MacDonald promptly announced his intention to present a Bill similar to the English legislation passed in 1871 under Gladstone. As early as April 19, the

²⁴ See *The Globe*, May 20, 1872, p. 1, where Magistrate McNabb is quoted: "I therefore commit the prisoners for trial at the next court of competent jurisdiction, in, and for the County of York. I will take each one's own bail in \$400.00." On the same matter, see *The Leader*, May 20, 1872, p. 1.

²⁵ CREIGHTON, D.G., *loc. cit.*, p. 371; J.M.S. CARELESS, *op. cit.*, p. 295. Follows the same course in similar terms: "As soon as Kenneth Mackenzie, A.C. Q.C., acting for the master printers, had substantiated the obvious facts that there was a union and it had struck, MacNabb briskly declared that no more was necessary: a trade union was an illegal combination, and that was that Mackenzie, rather taken aback, *responded that the prosecution wished to prove overt acts by the strikers*. They were separate offences, returned the magistrate flatly... The masters had won, hands down; yet *it was not a victory they had planned for*. It could prove empty indeed." (Italics supplied).

²⁶ See *The Globe*, April 19, 1872, p. 2; *The Leader*, April 19, 1872, p. 4.

Toronto Trades Assembly was informed of this move and adopted a resolution to thank the Prime Minister on his promptness in dealing with this problem²⁷. This change of policy was to affect magistrate McNabb's attitude during the second session of the preliminary inquiry, on May 6. In fact, the magistrate seems to have become more conciliatory towards the strikers, going so far as to consider their alleged violation as a misdemeanour, rather than a crime. The cause of this turnabout is rather simple: the learned magistrate was well aware that the government was about to propose a Bill on the modification of the legal status of trade unions. This is probably the reason why McNabb adjourned once again the inquiry until May 18²⁸, when he had to give his final decision.

In the meantime, between May 6 and May 18, MacDonald introduced in Parliament a Bill to legalize trade unions. The Bill was introduced to Parliament on May 7, together with the *Act to amend the criminal law pertaining to violence, threats and molestation*²⁹.

On May 18, at the third session of the preliminary inquiry, Magistrate McNabb reiterated that there was *prima facie* evidence of the strikers' participation in an illegal combination, and remanded them for trial at the next Assizes. McNabb released the accused on *personal* bail of \$400.00. The attorney for the prosecution, Mr. McKenzie, added that the strikers should provide sureties, to which the Magistrate retorted: "It is a misdemeanour. It is a new case, and the law will perhaps be changed before that."³⁰ Reading this reply, one can measure the change that took place in the magistrate's attitude since the beginning of the inquiry, as he knew that the Trade Unions Bill had just been given first reading a few days earlier, on May 7.

The crucial point of all this matter concerns the judicial fate of the prosecution. There is a general agreement that the accused were never tried³¹.

²⁷ *Minutes of the Toronto Trades Assembly*, April 19, 1872, p. 53.

²⁸ *The Globe*, May 7, 1872, p. 3; *The Leader*, May 7, 1872, p. 1. In both cases, it is stated: "The case was adjourned until next Saturday week", which corresponds to Saturday, May 18.

²⁹ Concerning the dates of introduction of the bills to Parliament see *Chambre des Communes, Journaux de la Chambre des Communes de la Puissance du Canada du 11 avril au 14 juin 1872*, Vol. V, I.B. Taylor, Ottawa, 1872, pp. 88-89, 315, 330-331. Both bills received second reading, were returned to a General Committee and were passed on third reading on June 12, 1872. They were adopted quickly by the Senate and came into force the day of their proclamation, Friday, June 14, 1872.

³⁰ *The Globe*, May 20, 1872, p. 1; see also, on the same matter, *The Ontario Workman*, May 23, 1872, p. 4.

³¹ See CARELESS, *op. cit.*, p. 296; CREIGHTON, *loc. cit.*, p. 374; FORSEY, *loc. cit.*, Vol. X, no. 9, p. 33; LOGAN, *op. cit.*, p. 42.

Two different hypotheses can be made to explain the judicial outcome of the case. First, the Attorney General may have dropped or given up the case by issuing a *nolle prosequi* before or during the trial. This would have caused a complete stoppage of the proceedings or of the trial itself, if it had been already under way³². A second possible outcome is that a motion for non-suit may have been granted by the Court at the conclusion of the case for the Crown. The latter would imply a complete absence of evidence by the prosecution.

Both hypotheses remain very plausible. We were unable to settle the debate, due to the destruction of certain court records necessary to support definitely either point of view.

On the one hand, the authors concur in stating that the trial never took place, which supports the hypothesis of a cessation of the prosecution or of a definitive stoppage of proceedings by way of *nolle prosequi*. Besides, both issues are not mutually exclusive. It is indeed conceivable that the Crown decided to stop the prosecution because of the imminence of MacDonald's Bill, while Brown obstinately chose to prosecute the strikers via private prosecution on the counts of intimidation and violence allegedly perpetrated by the strikers. In the latter case, Brown would have dropped his prosecution voluntarily, realizing how slim his chances were of obtaining a conviction.

On the other hand, the hypothesis of a motion for non-suit rests on the time elapsed between the date of the remand to the Assizes (May 18, 1872) and the date at which discussion or comments on the case is found in the newspapers of the time. One issue of *The Ontario Workman* published at the end of November 1872, *that is, seven months later*, reads:

"Thus the matter stood till the Assizes, just closed, when the case was to have been tried, and according to the *Globe* confirmation given of their assertion that the arrests were not made under the obsolete law, but for 'acts of intimidation' committed. And now, what has been the result? *Simply that the case has been allowed to go by default for want of sufficient evidence*, because nobody, who has any knowledge of the animus of the prime mover, will believe that if there had been a shadow of a chance to prove the statements made in the *Globe*, the case would have been so quietly dropped."³³

³² A variant of this hypothesis would be that George Brown had undertaken a private prosecution and abandoned it at some point before the trial. This hypothesis is reinforced by the fact that Mr. Harrison, who had acted as legal advisor for Mr. Brown, also acted as counsel — together with Msrs. Cameron and McMichael — at least at some stages of the preliminary inquiry.

³³ *The Ontario Workman*, November 21, 1872, p. 4. This text is reprinted in full in *The Leader*, November 23, 1872, p. 4. (Italics supplied).

This text implies that the judge in charge of the case could have granted a motion for non-suit, for want of sufficient evidence or that Brown would have desisted and stopped his prosecution. We should also note that the text mentions explicitly the acts of intimidation imputed to the strikers and that, during the preliminary inquiry, the prosecution had tried in vain to present evidence on the alleged intimidation and molestation, since McNabb only considered the first count of seditious conspiracy. This orientation, first established during the preliminary inquiry, would have directly influenced the judicial ending of the case, whether because the prosecution had failed to prove, to the judge's satisfaction, the acts of molestation or intimidation, or because Brown dropped his first prosecution before the case came to trial, in the light of the slim possibilities of proving the acts of violence.

Does this mean that the judicial outcome of the whole matter would have been completely different had the second count been considered during the preliminary inquiry? This remains a nice question to which it is still impossible to find an answer, considering the difficulties encountered in settling even simpler issues.

THE LEGAL STATUS OF TRADE UNIONS AT THE END OF THE NINETEENTH CENTURY

In the preceding part, we have dealt with the circumstances surrounding the adoption of the enabling legislation, in 1872. But what were the effects of the change in the legal rules? One way to answer such a question is to examine relevant judicial decisions. Thus we will report and comment a few early court cases. Apart from their purely legal interest, these decisions carry an historical flavour, as they provide information about the tactics and spirit of unionized workers at that time.

These cases have been selected on two criteria: age and availability. The former is justified by the end sought, since we try to illustrate the immediate effect of the new law on the legality of union activity. And once this first criterion is set, the second is indeed a constraint limiting our choice.

Two observations must be added here. First, the facts reported below are those reported in the Court decisions. They must be considered true from the legal standpoint although they are not necessarily true from the historical point of view. Since our aim is to exemplify the legal effect of the

1872 legislation, no effort has been made to trace the details of the strikes (and combinations) which have given rise to the legal proceedings referred to³⁴.

Second, one must be conscious that the 1872 amendments constitute only the first act of the history of modern labour law. Some further developments can be viewed legitimately as a reversal of policy towards unionism³⁵. We do not discuss this point but attention had to be called to it. Yet, we think one is justified to christen the 1872 laws "enabling legislation".

The Toronto Plasterers' case³⁶

This case illustrates how workers could enforce wage agreements by striking against a recalcitrant employer, and how a craft union could resist the retaliation of the employers' association. The legal rules then in force are to be compared to those applicable nowadays in similar disputes.

In or around 1883, the Operative Plasterers' Association entered into an agreement with the Master Plasterers' Association providing for a wage rate of 25 cents per hour. Early in the autumn of 1883, one of the master-plasterers, a Mr. Ward by name, hired a plasterer called Higgins, but after twenty-nine hours of work he paid him only fifteen cents per hour. His four fellow workers protested and told Ward that he had violated the agreement and that they would quit if he did not comply with the agreed wage rate. Ward refused, arguing that Higgins was not fully skilled, and the men quit.

³⁴ Every judgment rests implicitly on a syllogism, the premises of which are the legal rule and the particular facts that gave rise to the trial. When the legal rule is correctly construed, one cannot question the validity of the conclusion by asserting that the Court has misapprehended some facts. That is what is called "judicial truth".

This remark leaves aside the whole question of appeals to higher courts.

³⁵ Without discussing the question in depth, mention can be made of it. Thus, the Webbs argue that the Taff Vale decision almost erased the gains that trade unionism had realized on the legislative front. See Sidney and Beatrice WEBB, *The History of Trade Unionism*, Revised edition, Longmans, Green and Co., London, 1920, pp. 600 et seq.

The name and reference of the case are: *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, (1901) A.C. 426 (House of Lords).

In Canada, a similar situation developed as the employer could fight a union by bringing civil actions against it. For instance see *The Metallic Roofing Company of Canada v. The Local Union No. 30, Amalgamated Sheet Metal Workers' International Association and others*, (1903) 5 O.L.R. 424; (1905) 9 O.L.R. 171; (1905) 10 O.L.R. 108; (1905) 5 O.W.R. 709; (1905) 6 O.W.R. 41; (1905) 6 O.W.R. 283; (1906) 7 O.W.R. 709; (1907) 9 O.W.R. 786; (1908) A.C. 154 (House of Lords). In this judicial war, the House of Lords ordered a new trial.

It should be noted that at that time, and until recently, the question of the civil liability of unions was intermingled with an intricate problem of procedure involved when actions were brought against quasi-corporate bodies such as a union. Hence the many episodes of the Sheet Metal Workers case.

³⁶ *Hynes et al. v. Fisher et al.*, (1884) 4 O.R. (Queen's Bench Division) 60.

On the 12th of October (Friday), the MPA retaliated. The four striking workmen were placed on a black list and any MPA member employing them after the following Saturday night was subject to a \$25.00 fine. The ban would stand “until a suitable apology is sent to Mr. Ward”³⁷. On the 16th, the union replied, demanding the withdrawal of the MPA’s resolution, otherwise all the OPA members would strike on the 18th, at 7 a.m. No answer was given and a general strike against the MPA followed.

On November 7, Mr. Hynes, a co-plaintiff and president of the MPA hired one Moriarty, on behalf of the Association. According to Mr. Lockwood, also a co-plaintiff and member of the MPA, the situation turned out as follows:

... “I accompanied the said Moriarty to a hotel on York street, in Toronto, in order that he might get his tools and commence his work under the said agreement.

When we arrived at the hotel a number of men on strike against the master-plasterers assembled, and a large number of them, who are members of the defendants’ union, took forcible possession of Moriarty, catching hold of him and thrusting their fists in his face, and uttered loud threats against him if he would go to work on the terms offered by the plaintiffs.

The said members also took forcible possession of Moriarty’s tools and wrested them from him, Moriarty telling them all the while that he intended to go to work for the plaintiffs as he had agreed; but they shouted that he should not.

The said members also seized hold of me and dragged me violently from the said Moriarty, and also with great violence carried him down to the corner of King street and Work street, and there put him in a hack and drove off with him.

Moriarty has never returned...”³⁸

Naturally, the defendants presented a slightly different version, asserting that Moriarty was convinced to leave the city by friendly persuasion.

The Court accepted the employers’ version and an *ex parte* interim injunction issued on November 9. On the 13th, the plaintiffs’ counsel moved to continue the injunction. This motion was rejected. Among many interesting points, the following are noteworthy:

- i) Oddly enough, the 1872 legislation was not mentioned explicitly, neither in the arguments (as summarized in the Ontario Reports) nor in the judgments;

³⁷ *Ibid.*, p. 74.

³⁸ *Ibid.*, pp. 62-63.

- ii) Mr. Justice Wilson affirmed the unquestionable right of the four workmen to quit their master, Mr. Ward, in a protest against the breach of the agreement³⁹;
- iii) As to the general strike the Court's opinion was more elaborate. First, the masters "had no right to send the letter or resolution" to the Union. It was "an unjust and indefensible act upon the part of the masters' association". In so doing, they "made that which was a workshop squabble a matter of trade war, and the subject one of class strife". "They aggravated the difficulty by arraying masters against men, with all the accompanying bitterness, resentment, ill feeling, and determination for victory engendered in such a contest; and they provoked the strike which followed their ill-judged act"⁴⁰.

Mr. Justice Wilson concluded that the resolution of the MPA was a kind of moral violence equivalent to the very intimidation and threat of physical violence alleged against the Union. In consequence, the motion to continue the injunction was dismissed.

The Hamilton Bricklayers' and Masons' case⁴¹

Let us now turn to a union tactic designed to promote "union security", as we call it in current use. Provided unionized workers were sufficiently strong in number, the method consisted in refusing to work with non-union employees. This was considered legal, unless the action was vitiated by malice or other irregularities. As will be seen, the concept of unfair labor practices (by unions as well as by employers) has not been in operation from the beginning of the era of modern labour law.

In this case, Gibson and his co-defendants were members of the Bricklayers' and Masons' Union No. 1 of Hamilton. One of the rules of the constitution stated that "no member of this union will be allowed to work more than two days with any journeyman bricklayer or stone mason that is not a member of this union where there is a two-third majority or more of union men working, unless such person or persons consent to become a member

³⁹ The collective action of the four plasterers is unquestionably a strike, in plain language as well as in modern legal meaning. Mr. Justice Wilson referring to that action, writes:

... "Four others of his men struck work with him because he would not pay that man the full wages. That they had a perfect right to do..." (p. 74).

Later he adds:

... "Up to the time of that resolution the disagreement was confined to the men working for Mr. Ward, in which the men did nothing more than they were justified in doing..." (p. 76).

⁴⁰ *Ibid.*, pp. 74-75.

⁴¹ *R. v. Gibson et al.*, (1888-1889) O.R. (Queen's Bench Division) 704.

of this union. In case of refusal to do so, all union men shall cease working with such person or persons. Any member or members violating this section shall be liable to suspension or expulsion.’⁴²

Edward Buscombe, who had previously belonged to a union in Buffalo for about three weeks, was employed by the Corporation of the City of Hamilton as a foreman. In the fall of 1887, the city was building a bell tower. The union workers threatened to stop all work on the tower until Buscombe was discharged. Under that pressure, the city suspended him even though he was not himself employed on the bell tower.

In the spring of 1888, Buscombe was again in the employ of the city as a supervisor on a sewer construction project. At the same time, Piggott, a private contractor, was building a new city hall. On the 19th of April, the union held a meeting and a resolution was adopted: no member would be allowed to work either on the city hall or any city work, on pain of a fine of \$50.00, until Buscombe was discharged again.

This time, criminal charges were laid against Messrs. Mitchell, Littlejohn and Gibson who had moved, seconded and spoken in favour of the resolution respectively. They were found guilty of an indictable misdemeanour. One reason for the verdict was that none of the union members involved in the affair were working with Buscombe nor even for the same employer. Therefore the above quoted rule in the Union Constitution could not apply.

In addition to that, subsection 2 of section 13 of the *Act respecting Threats, Intimidation and other Offences* was invoked⁴³. That subsection was an exemption clause in favour of union activity. In the circumstances of the case however, the Court decided that the union action was not aimed at altering the relations between an employer and his employees (i.e. was not a trade combination within the meaning of the act). The workers had rather

⁴² *Ibid.*, pp. 707-708.

⁴³ R.S.C. 1866, chap. 173. Section 13 had its source in 39 Vict., S.C. 1875, chap. 37, Section 4, assented to April 12th 1876, and 38 Vict., S.C. 1875, chap. 39, assented to April 8th 1875, both amending the *Act to Amend the Criminal Law Relating to Violence, Threats and Molestation* referred to in footnote 1.

Section 13 read:

13. In this section the expression “trade combination” means any combination between masters or workmen or other persons, for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman, in or in respect of his business or employment, or contract of employment or service; and the expression “act” includes a default, breach or omission;
2. No prosecution shall be maintainable against any person for conspiracy to do any act, or to cause any act, to be done for the purpose of a trade combination, unless such act is an offense punishable by statute.

conspired to deprive Buscombe of his employment and to injure him. In other words, they were inspired by malice and they were convicted of conspiracy.

The Montreal Stone Cutters' case⁴⁴

This third case illustrates that unions were well aware, decades ago, of the importance of controlling the labour market. In the absence of formal recognition at the firm level, barriers were erected to protect workers of a given region against competition from "outsiders". Such barriers were not contractually agreed to — as in a closed shop clause — but rather an unilateral rule: contractors were faced with an all — or — nothing proposition. Either one used cut stone from a specific area only or the unionized workers would refuse employment with him. Of course, complying with a given wage schedule could be included in the package, as can be seen in the Perrault case.

The plaintiff, Jacques Perrault, was a member of the «Union ouvrière des tailleurs de pierre de Montréal» in 1890. In the spring of 1891, the Montreal stone cutters decided not to work for contractors using stone imported from the country. At that time, Perrault was employed by a contractor named Lyall, who was building the Royal Victoria Hospital. On one occasion, two loads of stone were brought from the country and all the men quit work with the exception of two or three men, including Perrault. According to the rule, he was expelled from the union, in May 1891. However, he was able to keep his job for some time, but when he sought employment a year later, Lyall refused to re-hire him.

From July to November 1891, he operated his own quarry in the country. Union officers tried to enroll local workers without success. They attempted to enforce the union rates with the same result. Perrault was finally forced to close down due to the price cutting practiced by city quarries.

On November 9, 1892, he got a job in the stone yard of Perrault & Riopel, the former being his brother Clovis. He had just joined a rival union, the «Union progressive». His fellow workers immediately quit work, without even saying a word. The foreman told Perrault that he could stay, that other workers would be hired, but he left *voluntarily*.

⁴⁴ *Perrault v. Gauthier and others*, (1897-1898) 28 S.C.R. 241, affirming (1897) 6 Q.B. 65, reversing (1896) 10 C.S. (Court of Review) 224, and affirming (1894) 6 C.S. (Superior Court) 83.

Perrault then took legal proceedings against the «Union ouvrière». As a result, he was expelled from his own union⁴⁵. Afterwards he was unable to find employment due to his suit against the «Union ouvrière des tailleurs de pierre de Montréal».

The Supreme Court, as well as the other courts, considered only the third incident when twenty workmen or so left the stone yard operated by Perrault & Riopel. Its decision was unanimous, Taschereau and Girouard JJ. delivering a written opinion. The former, in his brief notes affirmed the right of anybody to refuse to work with other people of a given characteristic e.g. colour, race, etc. The sole restriction was that every worker had to respect his own contract of employment with his employer. This meant that they could quit work any time if their employer did not contest their breach of contract. This latter point was also stressed by some judges of the lower courts.

Mr. Justice Girouard delivered detailed reasons for judgment. First of all, he relied heavily on the English jurisprudence, mainly on the *Allen v. Flood* case reported below. He wrote:

... “The reasons why we should be guided by the English jurisprudence are plain. In 1872, the Parliament of Canada, which has jurisdiction over a matter of this nature, introduced into Canada the Imperial Legislation of 1871, legalizing trade unions...”⁴⁶

He then quoted sections 2, 3, and 22 of the revised version of the *Trade Unions Act*⁴⁷. These sections set the new rule according to which a trade union was no longer considered an illegal conspiracy, liable to criminal prosecution, for the sole reason that its activities were in restraint of trade.

Thereafter, he examined the facts, and concluded that Perrault had not been subject to violence or intimidation. His fellow workers had merely exercised a right of their own. As this right was exercised without malice, there was no offence within the meaning of article 1053 of the Civil Code and Perrault’s action was dismissed.

The Thames Shipwrights’ Case⁴⁸

Preserving the monopoly of the trade (i.e. controlling the amount of work available in the trade) is a major economic goal of trade unions. The

⁴⁵ It appears from the notes of various Judges that both unions merged around that time. One can reasonably conjecture that, in view of the contemplated merger, the «Union progressive» found it appropriate to expel Jacques Perrault.

⁴⁶ *Loc. cit.*, p. 249. See also p. 246.

⁴⁷ R.S.C. 1886, chap. 131.

⁴⁸ *Allen v. Flood and Taylor*, (1898) A.C. 1. This English case is summarized here for two reasons. First, the Supreme Court relied heavily on that precedent in the *Perrault v. Gauthier* decision. Second, it has a significant illustrative value in itself.

latter is aimed at, and attained by, the inclusion of featherbedding clauses in collective agreements for instance, by restriction on contracting-out, etc. In the nineteenth century — as well as was done earlier by medieval guilds — unions had designed other devices to protect the jobs of their members, as will be seen instantly.

On April 12, 1894, the Glengall Iron Company hired Flood and Taylor as shipwrights for the woodworking part of a ship repair job. There were also some 40 boilermakers doing the ironwork on the same ship.

As soon as the ironworkers heard of Flood's and Taylor's hiring, they began to talk of leaving their employment, because some time before the two shipwrights had done ironwork for the Mills and Knight firm. Such encroachments were condemned and strongly opposed by the boilermakers' union. One of the ironworkers telegraphed Allen, a London union officer, who arrived by on the 13th.

He was able to calm down the men, telling them they would be fined and lose their benefits in the Society if they undertook a strike on their own. He then met the manager of the company and one of the foremen and told them that the two shipwrights had to be discharged, otherwise all the men belonging to the Society would stop work in all the yards on the Thames. He added they had no ill-feeling against the Glengall Company nor even against Flood and Taylor but that there was a firm policy on the part of the union to stop any ironwork being done by shipwrights. As a result, the manager told his foreman to discharge the two men, and in the future to refrain from hiring shipwrights known to have done ironwork.

Flood and Taylor brought an action against Allen on the grounds that he had induced their company to break their contracts, that he had coerced them by intimidation to leave their job and that he had conspired with others to do the said acts. In consequence they claimed damages for lost wages.

When the case came before the House of Lords, eight judges were called upon as assessors to give their advice. Six of them were in favour of the plaintiffs together with three Law Lords. Four judges of the lower courts had unanimously decided in the same way. On the whole this makes a count of thirteen judges to eight, but the House of Lords decided six to three in favour of the Union.

Lord Herschell wrote:

... "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. At all events, I cannot doubt that this would have been so. I cannot

doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out" ..."⁴⁹

It can thus be seen that workers could quit their work either on their own or at the instigation of someone else, whenever such action was deemed appropriate to the furtherance of their own interest. Again, one reservation to such action is that each could be sued individually, for breach of contract, an eventuality which was not open in the circumstances of the case. But are there other limits to the right to strike?

A strike would certainly be illegal if its sole aim were to injure someone else in his trade or maliciously deprive him of his employment. But the same could be said of the slander of a man in the way of his trade. As Lord Herschell put it:

... "I do not doubt that everyone has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply *some act in itself wrongful*. This is only a branch of a much wider proposition, namely, that everyone has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act *not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified*, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. *A man's right not 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 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 which I have already spoken. That wider right embraces also the 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. Unless he is thus shown to have *abused his right*, why is he to be called upon to excuse or justify himself because his words may interfere with someone else in his calling?..."⁵⁰

Therefore, a strike is legal if its purpose is to obtain control over a greater part of the labour market and hence (as a secondary effect) to attract new members eager to get a job. This is far from the rules of the game prevailing nowadays.

Cases of Collusion Between Unions and Employers and of Cartel Organizations⁵¹

So far, we have devoted a lot of space to the exposition of the legal status of trade unions in and after 1872 and to the exemplification of the use

⁴⁹ *Ibid.*, pp. 129-130.

⁵⁰ *Ibid.*, p. 138. Italics supplied.

⁵¹ *Perrault et al. v. Bertrand et al.*, (1873) 5 R.L. (Superior Court) 152.

As will appear clearly in the text, and for obvious reasons, these cases break the chronological order of presentation followed so far.

unions have made of their newly acquired rights. This discussion leaves aside the fundamental policy question of the appropriateness of the 1872 legislation. We cannot give full treatment to such a question here. However, a comparison with the legal status of business combinations provides a hint in that direction⁵². The next case illustrates how unions and employers can control *jointly* the labour market as well as the product market, for the mutual benefit of both groups.

In the *Perrault v. Bertrand* case, the plaintiffs claimed damages from the defendants who were accused of having conspired against the Perrault firm⁵³. The defendants were masonry contractors. In March 1872, they allegedly set up an association of contractors, quarry owners, lime suppliers, carriers and stone cutters. The whole scheme was allegedly aimed at depriving the plaintiffs of raw materials and manpower.

Some years before, in 1868, an association of master masons had been organized to protect the members from strikes and from the demands of the quarry owners. An association of carriers had also existed since 1862. On January 12, 1869, the carriers agreed with the stone cutters that they would not supply any contractor with stone imported from the country; as a *quid pro quo*, the stone cutters would not work for contractors using stone from outside of Montreal. That was a very ingenious scheme indeed since both categories could earn their living only by carrying or cutting stone from or at the Montreal quarries. After some resistance (mainly designed to protect the interests of Perrault & Perrault, then members) the association of contractors finally surrendered to the clause imposing a ban on "country" stone. It appears from the record that the plaintiffs did not accept that agreement personally nor were present at the meeting when it was adopted, on March 13.

Three years later, in March 1872, a new association was founded and the contractors tried again to get free to buy their stone wherever seemed fit. The plaintiffs joined the group. Finally, the contractors came to terms with the association of quarry owners and carriers. The contractors agreed not to use "country" stone unless the quarry owners and carriers were unable to supply Montreal stone, in which case a permit should be issued by the two associations jointly. On April 30, both societies met in a joint meeting. One

⁵² Employers and employees are sub-categories of producers, as opposed to the consumers. It is certainly relevant to compare the freedom of both sub-categories to combine in order to protect and foster their group interests. On this see Adam SMITH, *The Wealth of Nations*, Cannan edition, The Modern Library, New York, 1937, pp. 66-67 and p. 128.

⁵³ The Court reports do not allow to link this case with the first Perrault case referred to in footnote 54.

of the plaintiffs, David Perrault attending the meeting, was asked to justify his breach of the rule and thereafter was sent out of the meeting hall. In a letter dated the same day, the plaintiffs were advised that they would have to pay a fine of \$200.00 in order to be allowed to use the stone they already had received on their job site. They were also ordered to refrain from buying country stone in the future. A second letter was sent to two carriers, — presumably those who had delivered the country stone — advising them that Perrault & Perrault were suspended until further notice, and enjoining them to cease delivering *any kind of stone* to the plaintiffs. On May 14, a third letter was sent to the stone cutters' union, in which the master-masons advised that all union members working for Perrault & Perrault would be considered as “scabs”⁵⁴. Finally, on June 17, all the above resolutions were rescinded, presumably because of the legal proceedings forthcoming.

In his judgment, Mr. Justice Mackay did not consider the Trade Unions Act. In his own words:

... “As to the Trade Unions Act of 1872, it is not pertinent to this case and accordingly was not referred to at all...”⁵⁵

This *dictum* appears at best, categorical, and at worst, erroneous. It leaves aside entirely the question as to whether the collusion between *workers' unions* and *employers' associations* was in itself illegal and indictable and whether it was *per se* sufficient cause for recovering damages. An examination of that question would have been interesting, in view of sections 2, 3, 4 and 22 of the Trade Unions Act, 1872.

It is true that the action was directed against the contractors and the quarry owners only and not against the employees and their unions. The argument of the Court lacks clarity. The whole judgment appears to rest on the following two paragraphs:

... “Considering that although in general a man has the right to refuse to deal with another person or with a particular class of persons and that in general a group of men can decide together not to work for a particular person, for a certain class of men or for a certain price, it is not permitted that these combinations or arrangements go so far as to trouble these persons or classes of persons in their own businesses, and it is expressly forbidden to intimidate them with fines or other levies in case these persons or classes do not come to terms with these combinations or agreements.

Considering that an organization of persons aimed at one man to obtain money from him under the name of fine or tariff which he is not compelled by law to pay, and this by inducing his workmen to quit or traders not to do business with him, is illegal; and if in consequence of this combination he suffers in his business, he is entitled to damages...”⁵⁶

⁵⁴ The word “scab” was used in the french text and is italicized. An odd word in a letter from an employers' association!

⁵⁵ *Loc. cit.*, p. 159.

⁵⁶ *Ibid.*, p. 159. Free translation.

On the whole, therefore, the wrong committed by the defendants is to have restrained Perrault & Perrault in their trade by illegal means. Had other means been used, the action could have known a different outcome. By the standards of the times, this was a severe decision.

CONCLUSION

As was illustrated in the second part of this paper, the right to strike has long been recognized in Canada. It does not stem from the various provincial Labour Relations Acts. As Locke J. once strongly put it:

... "I do not agree (...) that the right to strike is expressly given by s. 3 of *The Labour Relations Act*. That section, saying that every person is free to join a trade union, and to participate in its lawful activities, and s. 4 giving a similar right to persons to join an employer's organization, are equally meaningless. No statutory permission is necessary to participate in the *lawful activities* of any organization. Furthermore, it is not the union that strikes but the employees. The statute, however implicitly recognizes that employees may lawfully strike by restricting that undoubted right during currency of collective agreements, during the period in which conciliation proceedings are being carried on and for a defined period after an award. Section 57 (2) refers in terms to a lawful strike. The objections to the legality of strikes on the ground that they are unlawful conspiracies or in restraint of trade which might formerly be made the subject of criminal charges have long since disappeared by reason of the provision of the *Criminal Code*, and combinations of workmen for their own reasonable protection as such are expressly declared to be lawful by s. 411 of the *Criminal Code* and the predecessors of that section..."⁵⁷

We have reported this quotation for two reasons. First, it asserts clearly that the freedom of association and the right to strike *do not* stem from modern statutory labour legislation. Their roots go much deeper into the common law. Second, these rights are now regulated in detail by the Twentieth century labour law.

These rights were recognized *negatively*, so to speak, in the first instance. This means that, starting in 1872, the legislator did nothing or rather ceased from doing anything to prevent union organization and activities, *but at the same time enacted no provisions to promote them*. Later on, we entered into a *positive* phase. In the spirit of the *Wagner Act*, federal and provincial legislation were passed. Unfair practices were defined to prevent employers from interfering with union organization. Statutory recognition and institution of the duty to bargain theoretically rendered so-called recog-

⁵⁷ *Canadian Pacific Railway Company v. Onofrio Zambri*, (1962) 30 D.L.R. 609, at pp. 620-621.

The Labour Relations Act referred to can be found in R.S.O. 1960, chap. 202. (Italics from the original text).

dition strikes obsolete. As a counterpart however, new rules were drawn to curtail the use of economic pressure, that is strikes were prohibited except in specified periods and circumstances.

Whether that evolution was for the better is not for us to say. Let us simply notice how far back, in some cases, the old rules have been pushed, letting unanswered the question whether the "golden age" is the ancient or the new era⁵⁸.

Such question can be related to unions as well as to business. If one places himself from the standpoint of either category, the alternative to be considered is the almost complete freedom of yesterday as opposed to present day government regulation or control coupled with positive help. For business the latter means anti-combines legislation on the one hand, and a variety of government programs designed to help entrepreneurs, including grants in cash in some instances. For labour, it means legal restrictions to striking, and a variety of devices which are substitutes for that weapon, e.g. compulsory bargaining, grievance arbitration, etc.

Mention should also be made that salaried people who are not employees within the meaning of the various "labour relations acts" are still governed by the old rules explained above. This is the case for managerial personnel in Quebec, for instance. Therefore, the cases summarized and commented above could be analyzed in a way wholly different from the one we have chosen.

⁵⁸ For an illustration, see *Koss v. Konn et al.*, (1962) 30 D.L.R. (2nd) (B.C. Court of Appeal) 242.

In this case, Koss, a building contractor, was engaged in building a service station in Vancouver. As his employees were not unionized, a representative of the Carpenter's union told him that either his employees would have to join the union or that they should be replaced by union members. The employer refused, replying that his men were not interested in joining the union.

In the following days, the union officer Hercy Konn started picketing on the sidewalk adjacent to the job site, holding a placard which read: "Non-Union men are working on this job". It was admitted that the information was true. Konn was alone on the "picket line" except in a few instances when he was accompanied by another person. There was no evidence of nuisance or of any other tort. No connection was shown to exist between Konn and the union.

As a result, some suppliers refused to cross the "line", resulting in delay in the work and damage to the plaintiff. An injunction was granted in his favour, based on subsection (2) of section 3 of the *Trade Unions Act*, R.S.B.C. 1960, chap. 384. Briefly stated, this section allows union members and people authorized by the Union to engage in "persuasive" picketing, provided that the strike is not illegal or that a lock-out is going on. Such picketing must not be "otherwise unlawful", i.e. must be peaceful, etc. The validity of that section was upheld by Lord, J., of the British Columbia Supreme Court, upon an application to continue an interlocutory injunction. On May 2, 1961, the motion was granted, and the injunction was continued to trial. An appeal was then taken to the Court of Appeal and dismissed by a majority of 4 to 1, Norris J.A. dissenting. The latter decision was affirmed by the Supreme Court of Canada, without comment, in (1962) S.C.R. vii.

To summarize, the year 1872 is a turning point as the state abandoned the juridical assumption of economic equality between master and servant. The new policy recognizes that employers have monopolistic (or more precisely monopsonistic) power in the labour market. Workers are therefore allowed to acquire more power by acting *jointly*, thus countervailing their opponent's forces. The 1872 legislation granted the working class the fundamental right of acting collectively in the market, although it is not explicitly stated in some of the cases that we have reported.

ABBREVIATIONS

A.C.	Appeal Cases
C.S.	Superior Court (Quebec)
D.L.R.	Dominion Law Reports
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports
O.W.R.	Ontario Weekly Reports
Q.B.	Queen's Bench Reports
R.L.	Revue Légale
R.S.B.C.	Revised Statutes of British Columbia
R.S.C.	Revised Statutes of Canada
R.S.O.	Revised Statutes of Ontario
S.C.	Statutes of Canada
S.C.R.	Supreme Court Reports

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Droits d'association et de grève au Canada: quelques aspects historiques

Le droit des travailleurs de se regrouper en syndicat et de faire la grève a fait l'objet, en 1872, de deux législations adoptées par le parlement canadien: l'*Acte concernant les associations ouvrières* et l'*Acte pour amender la loi criminelle relative à la violence, aux menaces et à la molestation*. Il s'agit, dans cet article, de mettre en relief quelques aspects historiques reliés à l'adoption de ces deux lois et d'illustrer, à l'aide de certaines décisions judiciaires rendues à la fin du 19^e siècle, quelques effets de ces lois sur l'évolution du statut légal des activités syndicales.

Le contexte historique des législations de 1872

La première partie de l'article relate, dans cette perspective, la trame des circonstances liées à l'acquisition du droit de grève en 1872. On y décrit d'abord le *contexte général* ayant donné lieu à l'arrestation, au motif de conspiration séditeuse, de plusieurs grévistes appartenant au Syndicat des typographes de Toronto. Le mouvement en faveur de la journée de neuf (9) heures sert ici de catalyseur, non seulement parce qu'il a permis de mobiliser une partie importante de la classe ouvrière canadienne, mais également parce qu'il fut à l'origine de l'arrestation de certains militants typographes, en grève au printemps de 1872, précisément pour appuyer leurs revendications en vue d'obtenir, sans perte de salaire, une réduction de la durée quotidienne de travail.

Le *contexte immédiat* ayant conduit le premier ministre Sir John A. MacDonald à déposer à la Chambre des communes les deux projets de loi mentionnés antérieurement, révèle quelques imprécisions relatives aux détails de l'affaire et une interrogation plus fondamentale sur la solution juridique mettant un terme à cet épisode de l'histoire du mouvement ouvrier canadien. À propos de certains détails secondaires sur lesquels les historiens ne s'accordent pas tous, on note, à titre d'exemple, le nombre de militants effectivement mis sous arrestation. Un examen minutieux de quelques quotidiens de l'époque, notamment *The Globe* et *The Leader*, montre que 24 mandats d'arrestation auraient été émis, à la requête de l'association des maîtres-imprimeurs de Toronto, mais que seulement 14 militants, furent effectivement mis sous arrêt. Quant à l'aboutissement des poursuites intentées aux motifs d'appartenance à une conspiration illégale et de recours à la violence, le dépouillement des quotidiens désignés plus haut et le recoupement avec les sources historiques usuelles permettent de déduire le déroulement suivant. Les prévenus auraient comparu, lors de l'enquête préliminaire, devant un magistrat torontois du nom de McNab ou MacNabb, selon l'orthographe rencontré. Ce dernier aurait ajourné à deux reprises, la seconde fois jusqu'au 18 mai, cette enquête préliminaire et il aurait décidé, sur la base d'une participation, évidente à première vue, à une conspiration illégale, d'envoyer à procès les militants arrêtés. Du même coup, le magistrat aurait ainsi ignoré les accusations portées en vertu d'un second chef d'accusation, en rapport avec des gestes présumés de molestation et de violence posés par les grévistes.

Ces derniers n'auraient jamais été condamnés, soit que le procureur général ait tout simplement décidé d'abandonner l'affaire ou encore qu'une décision de non-lieu ait été rendue par le tribunal, faute de preuve suffisante produite par la partie demanderesse. Il n'a pas été possible de trancher le débat à ce niveau mais on doit conclure que ces deux hypothèses ne s'excluent pas l'une de l'autre.

La légalité des activités syndicales vers la fin du 19^e siècle

Quelles furent les conséquences de ces lois adoptées pour soustraire les activités syndicales de la notion de coalition illégale, héritée de la "common law" britannique? Ces modifications législatives produisirent-elles un effet immédiat sur les pratiques syndicales? La deuxième partie du texte tente d'apporter un éclairage à ces questions, en soumettant à l'examen quelques décisions judiciaires rendues vers la fin du 19^e siècle. Les cas décrits dans cette partie ont été retenus en fonction de deux critères complémentaires, c'est-à-dire le moment où ces jugements furent rendus ainsi que l'accessibilité des décisions.

LE CAS DES PLÂTRIERS TORONTOIS (1884)

Le jugement rendu dans cette affaire qui met en cause une association d'employeurs et un syndicat, soucieux de voir au respect d'un taux horaire négocié avec l'association d'employeur, ne fait aucune mention des dispositions des lois de 1872, ce qui ne manque pas de surprendre dans les circonstances.

LES BRIQUETEURS ET LES MAÇONS DE HAMILTON (1888-89)

Il s'agit d'un cas où les ouvriers syndiqués, en nombre suffisant, refusèrent de travailler avec des ouvriers non-syndiqués, à moins que ces derniers n'adhèrent au syndicat. Malgré les dispositions du paragraphe 2 de l'article 13 de l'*Acte concernant les menaces, l'intimidation et d'autres infractions* qui protège les activités syndicales, le syndicat fut condamné parce que le geste du débrayage était entaché de malice.

LES TAILLEURS DE PIERRE DE MONTRÉAL (1897-98)

Cette affaire illustre le fait que les syndicats étaient conscients, depuis longtemps déjà, de l'importance de contrôler le marché du travail. Ils s'opposèrent en effet, sous la menace de retenir leurs services, à l'utilisation par les employeurs, de la pierre taillée à l'extérieur d'un territoire donné. La décision judiciaire rendue en cette occasion revêtit une importance toute particulière puisque, pour la première fois au Québec, on fait mention explicite de l'*Acte concernant les associations ouvrières*.

LES CONSTRUCTEURS DE NAVIRE (1898)

Bien que de source britannique, cette décision est examinée parce qu'elle est citée dans l'affaire précédente. Sous réserve des possibilités de poursuite pour bris de contrat individuel et dans la mesure où la grève n'a pas pour objectif premier de priver l'autre partie de son travail, le geste collectif de faire la grève peut, de l'avis du tribunal, légalement être posé.

LES COLLUSIONS ENTRE EMPLOYEURS ET SYNDICATS (1873)

Dans une perspective comparative, le cas suivant illustre comment, en certaines circonstances, syndicats et employeurs tentaient conjointement de contrôler les marchés du travail et du produit. La décision présentée ici laisse de côté la question de savoir si la collusion entre employeurs et syndicats est illégale et si de telles pratiques contreviennent aux dispositions des articles 2, 3 4 et 22 de l'*Acte concernant les associations ouvrières*.

Conclusion

Les droits d'association et de grève ne tirent pas leur origine de la législation statutaire récente. Ces droits furent d'abord reconnus, de manière négative en quelque sorte, en 1872 après que le législateur eut soustrait les activités syndicales de la notion de coalition illégale mais il n'adopta aucune mesure pour encourager l'exercice de ces droits. Les législations plus récentes permirent d'entrer dans une phase davantage positive mais il n'est pas assuré que le bilan soit lui aussi positif: l'intervention législative a réduit la liberté de manoeuvre des parties et du point de vue syndical, cette intervention a régularisé et restreint l'exercice du droit de grève.