## NOTES

*Symposium on the labour injunction*†

### THE APPROPRIATENESS OF THE INJUNCTION IN LABOUR DISPUTES

An understanding of the question whether injunctions are appropriate in labour disputes requires a few preliminary remarks on the nature and purpose of the injunction and the circumstances under which it is used in labour disputes.

#### Nature and Purpose of the Injunction

The injunction, as we all know, is an order of the Supreme Court ordering a person to comply with the law where the plaintiff establishes that damages is an inadequate remedy. It is a remedy developed by the courts of equity and is discretionary in that it is granted only when the court is satisfied that the circumstances indicate that injunctive relief is necessary.

As well as being granted in the normal course of an action, injunctions are granted on an interlocutory basis where the plaintiff establishes a strong *prima facie* case in his favour and is suffering immediate and irreparable damage so that it is inequitable to compel him to await a trial without obtaining interlocutory relief. The courts maintain the *status quo*. In strong *prima facie* cases where there is immediate and irreparable damage the court will grant an interlocutory injunction *ex parte*. Under the New Brunswick Judicature Act such injunctions in labour disputes may not be made for a period longer than 5 days.

Clearly the right of the courts to enforce compliance with the law by the issue of injunction orders is one of the cornerstones of our legal system.

#### In what circumstances is it used in labour disputes?

The most frequent use of injunctions in labour disputes is to restrain unlawful picketing by strikers or others at the place of business of an employer or some other person. Picketing injunctions may be issued on at least six grounds, or, usually, a combination of more than one ground. Generally these are: —

1. To restrain nuisance or an unlawful interference with persons seeking peaceful egress and regress to and from premises. The usual example of this is mass picketing where the picket line, in effect, barricades the premises with a human wall.

† Symposium held during the proceedings of the mid-winter meeting of the Canadian Bar Association (N.B. Branch), Feb. 9, 1968.

2. To restrain violence or threats of violence. Not infrequently mass picketing is accompanied by threats, and sometimes actual violence, and injunctive relief is necessary to prevent its continuation.

3. To restrain the unlawful inducing of a breach of contract such as where a picket line of some employees at a work site is carried on for the purpose of inducing other employees who are not on strike to breach their contracts of employment or collective agreements still in force.

4. To restrain an unlawful conspiracy to injure, with or without tortious acts. In this connection it should be noted that it is not an unlawful conspiracy for union members to further their own legitimate interests provided they do not commit any tortious act while doing so.

5. To restrain secondary picketing or picketing of the premises of someone against whom there is no strike or labour dispute for the purpose of causing that person to exert pressure on the employer against whom the union has a dispute.

6. To restrain commission of the tort of intimidation, a recent development in the law by the English House of Lords.

The court has no jurisdiction to issue an injunction against peaceful picketing, defined as attending at a place of business or elsewhere for the purpose of communicating information that a strike or other labour dispute is in progress. Thus the right of free speech, the right to inform the public and the right to peacefully persuade others to sympathize with the picketers is fully protected.

A further recent Canadian development is the use of the injunction to restrain the illegal strike itself. Although this type of an injunction has come to the fore through some recent Canadian cases it is merely an extension of the age-old right of the courts to prevent a violation of the law, in this case the Labour Relations Act and collective agreements.

The taking out of injunctions in labour disputes is not confined to management. In recent years unions have begun to exercise their clear rights to prevent management from carrying out unlawful acts such as causing immediate and irreparable injury by the immediate alteration of working conditions where the union has initiated grievance procedure to contest management's right to do what it is doing; in such cases the courts may issue an injunction, in an appropriate case, to retain the *status quo* until the matter has been settled under the provisions of the collective agreement. Violations by management of the Labour Relations Act may also be enjoined in exactly the same manner as such violations by unions.

**Labour disputes are the same as any other dispute**

A preliminary conclusion can therefore be reached that whenever the injunction is used in a labour dispute it is used to stop unlawful acts and the reasons for its use and the principles followed in using it are precisely the same as in any other type of dispute.

Viewed in this light, labour or management are no different than any other citizens in respect to their duty to obey the law or in their susceptibility to court orders such as injunctions if they fail to do so. It is fundamental that the right of the courts to enforce the law must be governed in all cases; the parties to a labour dispute do not and should not enjoy any special status before the law with respect to injunctions merely because the unlawful activities against which the injunction is granted are committed in the course of a labour dispute.

**Reasons advanced for restricting the use of injunctions**

Among the reasons which have been advanced by unions to support the claim that injunctions should not be used in labour disputes are that the use of injunctions upsets the balance of power between management and labour, that the courts are management-inclined and grant injunctions against unions with insufficient evidence, that unions should be permitted to engage in mass or coercive picketing to support a strike and that, if injunctions are to be granted in such cases, they should not be granted *ex parte*.

The argument as to the alleged upsetting of the balance of power is not an acceptable reason. It is only unlawful acts which are enjoined, not lawful acts, so that if the balance of power is upset, as alleged, it is because the party against whom the scales tilt has violated the law, not because an injunction has been issued. If strikers conduct themselves within the law they are more likely to attract the respect of the public than if they engage in the type of unlawful activity against which an injunction can issue.

It is unnecessary to point out to a group of lawyers the fallacy of the argument that the courts are management-oriented. The impartiality of the courts either as between labour and management or as between any other protagonists is well known and is another one of the cornerstones of our legal system. Any management counsel who has appeared in an injunction case well knows the extensive amount of preparation necessary to convince a judge that an injunction should be issued; our judges are loath to make such extraordinary orders unless the case is clear cut and well-documented with all the facts, including those which are against the interests of the party making the application.

The argument that unions should be permitted a free hand in coercive picketing is, in effect, a plea in favour of anarchy. The

actions of unions in the case of a strike, like the actions of management in the same situation and like the actions of all citizens in any type of dispute, must be regulated by law. There is no case for suspending the law of the land in a case of union members simply because they are on strike.

The argument against the issue of *ex parte* injunctions rests on the reasonable-sounding argument that it is unjust to issue any order without hearing both sides. It must be realized, however, that the courts take this extreme procedure only when the application is supported by very strong evidence that the plaintiff is suffering immediate and irreparable damage. Moreover, an *ex parte* injunction in a labour dispute is limited in that it can only be given for a maximum period of 5 days after which time it can only be extended after giving the defendant an opportunity to appear. Is it reasonable that an employer whose premises are being barricaded by mass picketing accompanied by violence or threats of violence must stand idly by without the protection of the courts while notice of an injunction application is being given to the law breakers? Although that question states an extreme position it is not an unusual case. It serves to point out the need of retaining the right of the courts to immediately prevent acts which are clearly unlawful. It is only in an extreme case that the courts grant *ex parte* injunctions. The reason why *ex parte* picketing injunctions have become so commonplace is that it has become commonplace for unions to openly flout the law in cases where the injunctions have been granted. Contrary to the suggestions of some union members, management lawyers do not have a set of ready-signed injunction papers in their desk drawer ready to serve upon filling in of the names. Preparation for such an application is a difficult task.

Further as to *ex parte* injunctions, I quote from a paper prepared in August, 1966 for the Select Committee of the Legislature on the Labour Relations Act: —

> It has been charged that management counsel can obtain an *ex parte* injunction order with the greatest of ease and that injunctions against unions are issued as a matter of course. An examination of the complete and lengthy affidavits which must be prepared to make out a case for an *ex parte* injunction will show that it is not a simple job to prepare such an application and place before the judge sufficient facts and argument to warrant the granting of an injunction in the face of the certain knowledge that the affidavits, prepared in a rush, will be subject to the most searching scrutiny of opposing counsel within a few days.

The same paper reviewed thirteen New Brunswick picketing injunction cases from 1955 to 1966. These may not be all such cases during those years but are a sufficiently large number as to be representative of the New Brunswick practice. In ten of the cases

the *ex parte* injunction was made permanent after a hearing, in the presence of both parties, held a few days after the original injunction was granted; in three of the ten the extension was by mutual agreement of the parties. In the remaining three cases out of the thirteen reviewed, the injunction was dissolved by mutual consent, the parties having resolved their differences. This indicates that there has not been any abuse of the *ex parte* injunction in New Brunswick. If it were the practice of the New Brunswick courts to grant *ex parte* injunctions in improper cases one would expect there to be at least one case where the injunction was set aside when it came on for hearing; there are none.

**Conclusion**

The conclusion, therefore, is inescapable that injunctions are and always will be appropriate to restrain breaches of the law in labour disputes in the same manner as any other disputes.

If unions consider the law unduly restricts their actions in disputes with management, their proper course is to attempt to use the democratic process to have the law changed, not to engage in emotional appeals and mass demonstrations of civil disobedience against the use of one of the most important tools used by the courts to maintain law and order.

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## THE *EX PARTE* INJUNCTION — USE AND ABUSE

The use of the *ex parte* injunction in labour disputes is as a general rule a weapon given to the employer to seriously damage the effectiveness of a labour strike without any effective recourse by the employee or labour union.

While there are exceptions to this rule, as a whole I firmly believe the injunction is used, under the guise of preventing irreparable damage, as the most effective legal weapon to strip a striking union of its power to bring effective economic pressure upon the employer as a means of effecting a collective agreement acceptable to the union.

It is not the role of the law to take sides between two disputing parties, and it is important that the law should not appear to be taking sides. The courts must be in a position where public respect cannot be undermined by what may appear to be controversial and one-sided positions—whether that side is management or labour. I

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