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.

E. Neil McKelvey, Q.C.‡

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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think any objective observer would agree that in recent years the use of the injunction in strikes has led to attacks not only on the law as it stands but upon the courts themselves. This is an important area calling for the most careful attention and corrective legislation.

The Supreme Court of Canada has recntly set forth in clear terms the approach to be made toward labour legislation. Mr. Justice Hall speaking for the Court stated:

> . . . it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of Legislatures which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century.[1]

There are three parties to any labour dispute—management, labour and, most important of all, the general public. When two determined forces are ranged on opposite sides of a dispute then the third and most important interest, that of the public, may be overlooked. Labour legislation has been enacted to ensure the general public interest is protected while giving the greatest scope possible to efforts to advance the individual purposes of unions and management.

The purpose of the Labour Relations Act is to preserve industrial peace, to provide the mechanics whereby the employee through an appropriate organization, may bargain collectively with his employer, and, in the event such bargaining fails, exercise his right to join collectively in a strike, and also inform the public of his actions, with the object of persuading his employer through economic pressure or public opinion to meet his requests.

The specific problem which seems to create the greatest amount of bitterness and misunderstanding is the prevailing use of the injunction.

We all recognize that the law, as approved or enacted by the legislature or Parliament, must be enforced by the courts as it is written. We also must recognize that the law must, if it is to be respected, reflect the prevailing social conditions and opinions.

There has been a growing trend in the use of injunctions by the employer for purposes never intended. Historically injunctions were

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1 *Local 195, B & C.W.I.U.A. v. Salmi* (1966), 56 D.L.R. (2d) 193, at pp. 201-202.

most difficult to obtain. For many years the courts granted *ex parte* injunctions only on the strongest grounds and often would require the other side to be notified before any injunction was granted. In more recent years *ex parte* injunctions against striking or picketing were granted with such increasing frequency and use that the legislature recognized there was defect in the legal procedures and enacted the provision that in labour matters an *ex parte* injunction cannot last longer than five days.

However, it is submitted that this provision has proven to be insufficient and has not been accepted in the spirit in which it was intended in many cases.

It is essential to look at injunctions within the total concept of collective bargaining, rather than in any separate context. It is fundamental to recognize that when an injunction has been granted, whether granted properly or improperly, it can seriously injure the bargaining rights of the Union or any employee for the period in which it has been granted.

A reasonable approach to labour matters was enunciated in the Editorial note to the Quebec case of *Shane v. Lupovich*,[2] which said in part:

> The use of the injunction in labour disputes very often falls little short of being an abuse of legal process. The purposes of an injunction is lost when, in advance of a decision on the merits, union activity is enjoined while an employer is left free to pursue anti-union policies . . . Such acts aside, Courts are hardly able to justify a greater regard for the rights of employers than for those of employees. To clothe such regard in terms of nuisance or intimidation or conspiracy to injure does not alter the fact that social as well as legal principle is invoked if an injunction is granted.[3]

In the case itself, Archambault J. stated:

> The legal existence of labour unions, of collective agreements, and of the right to strike are now recognized by law. It is no longer a crime to watch and to beset an industrial establishment with a view to giving or obtaining information, to peaceably soliciting and attempting to persuade workers to join a union and even to attempt, without threat or violence to convince workers that it is to their interest to stop working for certain employers.
>
> The time is happily past when workers were considered as human goods and the right to organize in order to better their lot is even sanctioned and encouraged by our provincial laws. The Fair Wage Act, 1937 (Que.), c. 50, s. 23, amended by 1938, c. 53, decrees that it is an offence to prevent or attempt to prevent, directly or indirectly, by threats or otherwise, an employee from becoming a member of an association; that it is also an offence to make an attempt upon the freedom of labour of an employee, by dismissing him,

2 [1942] 4 O.L.R. 390 (Que., C.A.).

3 *Ibid.*, at p. 391.

> causing him to be dismissed, or preventing or trying to prevent him from obtaining work, because he is a member of an association, or because he is not a member of any association, or because he is not a member of a particular association.[4]

And later he states:

> The Courts should use their power to grant an injunction only with great circumspection, and the restraints set out in the injunction should relate only to illegal acts and should not deprive workers of their legitimate rights. In the present case, after having read the evidence, I wonder if the petition for an injunction of December 1937 was motivated by the serious fear that the appellants would go much further than the law permitted or simply by the desire to kill, at its origin, the organization of the workers into an association and the strike which was sure to follow the violation by the respondents of their employees' recognized rights.[5]

Under our present law, before employees are legally in a position to strike they must become certified and go through a procedure of collective bargaining. It is submitted that when such procedure has been followed, no injunction should be granted *without notice to the union*. Too often the employer will make representations of fact which are one-sided or inconsistent or do not truly represent the situation; and the judges are apt to grant injunctions far in excess of what is needed or required principally because there is no one present at the initial application to make representation for the other side as to what would be fair and reasonable. Almost invariably in New Brunswick, when *ex parte* injunctions are granted, at the subsequent hearing at which both sides are present, the injunction asked for has been modified.

Unfortunately the courts in this province have either felt bound by precedent or otherwise have failed to recognize the changes in society, and have continued to grant injunctions in the broadest terms on one-sided information. In many instances where the strikers have had a right to strike or to picket, injunctions have been granted which in effect have defeated these rights whereas the intent should have been to preserve the rights of both parties. The basic problem is that by granting injunctions, the Courts are altering the delicate balance which is essential to the preservation of free collective bargaining.

It is submitted that the effect of an injunction in labour disputes is quite different from that of an injunction issued to preserve the *status quo* until a trial can determine the rights of the parties in a dispute in a normal civil case. By the time a strike is over there is nothing left to litigate. The procedures of the courts are so slow in

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4 *Ibid.*, at p. 393.

5 *Ibid.*, at p. 393.

such matters that the union is placed at a tremendous disadvantage if any injunction is granted to restrain a strike or picketing.

The principal factor which is too often overlooked is the fact that the damage caused to the Union by the injunction is in fact irreparable in that it cannot be measured in terms of money. The business loss which may be occasioned to an employer is normally a matter of calculation by accountants. It is a farce to have an employer plaintiff file an undertaking to pay damages suffered by a union as a result of an injunction restraining picketing, when the employer and any knowledgeable person knows that the damage done to the union cannot be calculated by an accountant but is in the truest sense irreparable, being incalculable.

Employees have rights, yet these are upset by injunctions without the opportunity of argument being presented to the court for its assistance.

It is submitted, and it would seem practical, to make provision that when a union has been certified, in the event that it files with the registrar of the court the name of an agent within the province, to whom notice may be given, *that no injunction application should be heard in a labour dispute, without notice first being given to the agent of the union*. This would insure that when and if an injunction is applied for, there would be representations by both sides at the hearing. That would resolve many of the present difficulties facing the courts.

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