CASE AND COMMENT

Labour Law — Labour Relations Act — No-strike Clause — Injunction Involuntary Servitude — Due Process

The latest and most authoritative of a series of recent Canadian decisions, in which the equitable principles underlying the use of the labour injunction have been considered,[1] *I.B.E.W. Local 2085, et al. v. Winnipeg Builders' Exchange et al*,[2] is an interesting illustration of judicial moulding of the statute law to satisfy the contemporary needs of society. Cartwright, C. J. C., speaking for the unanimous Supreme Court, unequivocally held that breach of a no-strike clause of a collective agreement and violation of the Manitoba Labour Relations Act[3] is conduct which not only a union but its individual members may be restrained from continuing by an *ex parte* interlocutory injunction. The possible extent of this new and necessary development in Canadian labour law will be considered in relation to the relevant legal and equitable doctrines.

The appeal[4] was based on the equitable principle that Chancery will not permit the specific performance of contracts of personal service. Founded on the due process clause of *Magna Charta*, this principle has been reiterated on numerous occasions, notably in *Lumley v. Wagner*[5] and *Warner Brothers v. Nelson*.[6]

In dismissing the appeal, the predominant principle present in the judgment of the Supreme Court was that:

> ... the purposes of the *Labour Relations Act* would be in large measure defeated if the Court were to say that it is powerless to restrain the continuation of a strike engaged in in direct violation of the terms of a collective agreement binding on the striking employees and in breach of the express provisions of the Act.[7]

Chief Justice Cartwright continued:

> There is a real difference between saying to one individual that he must go on working for another individual and saying to a group bound by a collective agreement, that they must not take concerted

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1 Collected and discussed in *Winnipeg Builders' Exchange et al, v. I.B.E.W., Local Union 2085, et al.* (1966), 57 D.L.R. (2d) 141 (Man., C.A.).

2 [1967] S.C.R. 628, 65 D.L.R. (2d) 242, aff'g (1966), 57 D.L.R. (2d) 141 (Man., C.A.).

3 R.S.M., 1954, c. 132, s. 22 (1) (b).

4 To present this ground of appeal the appellants had to overcome the respondents' objections that as the strike was now over the case was of merely academic interest. The court held that this was a question of law sufficiently important to warrant a decision.

5 (1852), 1 De G. & Sm. 604, 42 E.R. 687.

6 [1936] 3 All E.R. 160 (K.B.D.).

7 [1967] S.C.R. 628, at p. 640.

> action to break this contract and to disobey the statute law of the province.[8]

By participating in a trade union upon which he has bestowed his bargaining rights, the modern industrial citizen has in effect waived the recognized rights of those whose contracts of service are unaffected by trade unions. This is because the complexity of modern industrial relations, the impersonal nature of big business, and the "space age" lateral mobility of employees have drastically altered the master and servant relationship.[9] Today, in most quarters, the negotiation of the master and servant relationship has been replaced by the rivalry of arch-enemies, gargantuan public corporations and powerful internationally organized trade unions. In a serious attempt by the state to supervise and control the bargaining process of these two mammoth forces in society, Labour Relations Acts have been implemented in most English-speaking jurisdictions.

S. 22(1)(b) of the Manitoba Labour Relations Act,[10] which is analogous to s. 21(1)(b) of the New Brunswick Act,[11] provides that:

> Except in respect of a dispute that is subject to subsection (2) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into, whether entered into before or after the coming into force of the Revised Statutes, shall go on strike; and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

Under s. 44(3) of the Manitoba Act, analogous to s. 39(3) of the New Brunswick statute, the penalty for violating s. 22(1)(b) is a fine of one hundred and fifty dollars for each day that the strike exists, payable by the union that declares or authorizes the strike.

Injunctive relief is available at the suit of a private plaintiff to prevent the violation of a statute, if the violation of the statute would cause the plaintiff damage greater than that suffered by society in general.[12]

Generalizations concerning the availability of injunctive relief to enforce a statute or no-strike clause are subject to the equitable

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8 *Ibid.*

9 "The complexity of labour-management relations in a highly industrialized civilization were presumably not even thought of [when *Lumley v. Wagner* was decided]": *W'peg. Builder's Exchange et al. v. I.B.E.W., Local Union 2085 et al.* (1966), 57 D.L.R. (2d) 141, at p. 157 (Monnin J. A.), approved on appeal, [1967] S.C.R. 628, at p. 639 (Cartwright C. J. C.).

10 *Supra*, note 3.

11 R.S.N.B., 1952, c. 124.

12 The cases are collected and discussed by Baxter C.J. in *New Brunswick Power Company v. Maritime Transit Limited* (1936), 11 M.P.R. 174 (N.B., Ch.D.).

principles which limit the use of the injunctive remedy.[13] These principles state that an injunction will not be granted where pecuniary damages would be adequate, constant supervision would be necessary, the contract sought to be enforced is harsh, ambiguous or against public policy, or involuntary servitude would result.

Equitable remedies are extraordinary and a plaintiff may obtain relief from Chancery only when no adequate remedy may be had at law.[14] In numerous cases this principle has been reaffirmed. The *Electrical Workers'* case effectively circumvented this contentious issue by holding that the injunction is the only adequate remedy in labour battles.[15] In circumstances where damages ought to be granted,[16] in the absence of enabling legislation,[17] no action for damages[18] for violation of a Labour Relations Act alone[19] can be maintained.

Neither an injunction nor an order for specific performance will be granted if adequate enforcement would entail constant super-

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13 "The mere fact that the contract or covenant in question is clear, and the breach is clear, is not of itself sufficient to warrant the interference of the court unless the contract or covenant is itself of such a nature that it can be enforced consistently with the rules and principles upon which the court acts in granting relief": Halsbury's *Laws of England* (3rd ed., Vol. 21), at p. 380.

14 *London & Blackwell Ry. Co. v. Cross* (1886), 31 Ch.D. 354, at p. 369 (C.A.).

15 [1967] S.C.R. 628, at p. 641. But see Lambert, *The Use of the Civil Injunction in Labour Disputes*, [1966] Can. Bar Papers 169; Kravetz, *Memorandum on the Labour Injunction*, [1966] Can. Bar Papers 183.

16 But see *Hodgson v. Duce* (1856), 4 W.R. 576, where the defendant was a pauper and the plaintiff was granted an injunction to restrain him from trespassing because against a pauper damages did not constitute an adequate remedy.

17 S. 18 of the New Brunswick Labour Relations Act, R.S.N.B., 1952, c. 124, is a good attempt at providing a covenant upon which an action could be brought.

18 There is an ancillary remedy in equity by injunction to protect a right which is being threatened: *New Brunswick Power Company v. Maritime Transit Limited* (1936), 11 M.P.R. 174, at p. 188 (N.B., Ch.D.).

19 Subject to the exception expressed in footnote 18, there is a general rule ". . . that where a new offence and a penalty for it [was] created by statute a person proceeding under the statute was confined to the recovery of the penalty and that no other relief could be asked for.": *Cooper v. Whittingham* (1881), 49 L.J. Ch. 752, at p. 755 (Jessell M.R.), quoted with approval in *New Brunswick Power Company v. Maritime Transport Limited* (1936), 11 M.P.R. 174, at p. 188 (N.B., Ch.D.). Thus the employer would have no right to obtain an injunction to prevent his employees from committing an unfair labour practice which was not contrary to the collective agreement or a tort at common law: *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435.

vision by the court.[20] Based on the premise that the court should never grant an injunction which is but an empty threat,[21] this rule is a result of the lack of available administrative machinery to enforce such orders.[22]

More than a century ago English courts developed an exception to this rule in cases where the defendant took land from a landowner on the condition that the defendant would build something upon the land. In such cases, at the suit of the landowner, courts have held that as damages would be completely inadequate, an order for specific performance is the only proper remedy.[23] In *Wilson v. Furness Ry.*[24] the court went to great lengths to supervise the specific performance of the particular undertaking.[25] This interesting exception suggests that the courts do have the discretion to grant an injunction where constant supervision would be necessary. Although this proposition was not referred to by the Supreme Court, the spirit of it is present in the judgement.

The age old maxim, "He who comes into equity must come with clean hands",[26] undoubtedly will apply in cases like the *Electrical Workers'*. In such instances, disrespect for a collective agreement which is ambiguous, harsh or against public policy will probably not be enjoinable as a breach of the agreement or violation of the statute.[27]

In distinguishing the involuntary servitude of an individual from the forced employment of union members, the Supreme Court reached a decision of considerable significance. Although the rule against involuntary servitude is readily identifiable with cases like *Lumley v. Wagner*[28] which involved a single individual, its origin is to be found in *Magna Charta*.

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20 *Kingston v. Kingston, P. & C. Elec. Ry.* (1898), 25 O.A.R. 462; *Ryan v. Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116 (C.A.).

21 An empty threat, or *brutum fulmen*, may be present when the proposed injunction is not beyond the jurisdiction of the court, but is only impractical to enforce. See *A.-G. v. International Bridge Co.* (1875), 22 Gr. 298.

22 Reminders that the military is available to enforce an order of the court, hardly make the fact that large scale disrespect of the law is bad *per se*, less obvious. In labour problems, the difficulty presented by mass contempt, is a subject which must not be oversimplified. See Kravetz, *Memorandum on the Labour Injunction*, [1966] Can. Bar Papers 183, at p. 188.

23 G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (6th ed., 1964), at p. 536.

24 (1868), L.R. 9 Eq. 28.

25 *Ryan v. Mutual Tontine Westminster Chambers Assocn.*, [1893] 1 Ch. 116, at p. 128 (Kay L.J.).

26 See, generally, Halsbury's *Laws of England* (3rd ed., Vol. 14), at p. 530.

27 *Kimberley v. Jennings* (1836), 6 Sim. 340, 58 E.R. 621.

28 *Supra*, footnote 5.

The Charter guaranteed in Chapter 39 that "... no freeman shall be taken and imprisoned or disseised or exiled or in any way destroyed ... except by the lawful judgment of his peers and by the law of the land." By a statute called *Confirmatio Cartarum*, the Charter was directed "... to be allowed as the common law ..." and all judgments contrary to it were declared void.[29] Blackstone said that *Magna Charta* "... contained very few new grants, but as Sir Edward Coke observed, was for the most part declaratory of the principle grounds of the fundamental laws of England."[30]

The controversial Canadian Bill of Rights was enacted in 1960.[31] It is a weak[32] attempt[33] to establish that parliament recognizes and declares that there have existed and will continue to exist in Canada certain human rights and fundamental freedoms. They include "... the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."[34] The Act was not entrenched in the Constitution. In extending the due process doctrine of *Magna Charta* to control parliament, at its own discretion,[35] the Bill of Rights also has the remarkable effect of being a Canadian statute, *Confirmatio Cartarum*.[36]

Blackstone thought the due process clause of *Magna Charta* enshrined civil liberties. He defined civil liberty as "... natural

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29 (1297), 25 Edw. 1, c. 29.

30 1 Bl. Comm. 127-128.

31 (1960), 8-9 Eliz. II, c. 44 (Can.).

32 See, Bora Laskin, *Canadian Constitutional Law* (3rd ed., 1966), at p. 976.

33 *Louie Yuet Sun v. The Queen*, [1961] S.C.R. 70; and *Rebrin v. Bird and Minister of Citizenship and Immigration*, [1961] S.C.R. 376: these cases show that thus far the Supreme Court has declined to strengthen the inherent metaphysical qualities of the phrase "due process of law".

34 (1960), 8 & 9 Eliz. II, c. 44, s. 1 (a).

35 Parliament may declare a law to operate notwithstanding the Bill of Rights: *Ibid.*, s. 2.

36 Because "... there is federal common or decisional law and provincial common or decisional law according to the matters respectively distributed to each legislature by the B.N.A. Act" (Laskin, *supra*, footnote 32, at p. 817), then the Canadian Bill of Rights is a statute *Confirmatio Cartarum* only within the sphere of the "federal common law". *Magna Charta* nevertheless is a part of the common law of the English speaking provinces of Canada. In *R. v. McLaughlin* (1830), 1 N.B.R. 218, and in the note following the case, the principles of the admission of the common law into the colonies are discussed.
In Quebec, *Magna Charta* probably does not apply, despite the contention that the words "with a Constitution similar in principle to the United Kingdom" in the preamble of the B.N.A. Act, so imply. In *Re Provincial Fisheries* (1895), 26 S.C.R. 444, the court held *inter alia* that *Magna Charta* is not part of the law of Quebec.

liberty as far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public."[37] The converse of this basic premise of Anglo-Canadian jurisprudence is that no one may be compelled to do anything unless it is necessary and expedient for the general advantage of the public.

The Supreme Court was not statute bound to decide the *Electrical Workers'* case. In making their decision to enjoin the illegal strikers and in distinguishing the rule in *Lumley v. Wagner*, the test which should have been applied was whether or not it was necessary and expedient for the general advantage of the public that the employees be subjected to involuntary servitude.

The proposed new Canadian Constitution, if enacted, will contain an entrenched due process clause. The Supreme Court may well find itself bound by the *Electrical Workers'* decision if it is asked to decide the constitutionality of a statute compelling employment. This might be undesirable.[38]

Undoubtedly exceptions will develop in the general principle that illegal strikers may be enjoined to return to work. The establishment of a procedure which will enable aggrieved parties to obtain damages for violation of the Labour Relations Act alone; judicial definition of which collective agreements are ambiguous, harsh or against public policy; reapplications of the law against involuntary servitude to the labour relations problem; and difficulties in the enforcement of injunctions all will lead to a more sophisticated method of enforcing Canadian labour law.

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37 1 Bl. Comm. 125.

38 In the United States involuntary servitude, or slavery, is expressly prohibited by the Thirteenth Amendment. Involuntary servitude has been held to encompass the effect of the injunctive enforcement of a no-strike clause: *General Electric Co. v. Int'l Union Etc.* (1952), 108 N.E. 2d 211, at pp. 222-223 (Ohio); but contrast *Nevins v. Kasmach* (1938), 18 N.E. 2d 294 (N.Y.). The U.S. Supreme Court has held that the only remedies against illegally striking employees are discipline, discharge and prosecution: *Atkinson v. Sinclair Refining Co.* (1962), 370 U.S. 238.

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