LABOUR LAW: DOCTRINE, DOGMA, FICTION AND MYTH *

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It may be well to preface the paper with a statement of the meanings with which the words in the title are used.

A legal doctrine is a proposition the rational base of which can be identified and examined, and an opinion can be formed as to whether the proposition is useful for the purpose for which it is intended.

A legal dogma is a proposition that is accepted without regard to its rational validity.

A legal fiction is an invention created in circumstances in which a doctrine is inadequate to meet the needs of a situation but it is concluded that the doctrine cannot be reworked, principally because of the restraining force of *stare decisis*. A fiction is invented to bring the situation under doctrine which is considered to meet the needs of the situation and gives that doctrine the appearance of having a rational base.

A legal myth is a fiction that is accepted without regard to its rational validity.

The thrust of this paper is that the reasons behind much common law doctrine applied to picketing and boycotting have vanished, as a consequence of which doctrine has been reduced to dogma; where dogma has not conveniently fitted the problem, fictions have been invented to make solutions appear to fit the rules; and that reasons justifying the fictions have been lost, leaving a bewildering dross of legal myth.

From the point of view of employees, an effective system of collective bargaining requires that they be free to engage in three kinds of activity: to form themselves into associations, to

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engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.

Association and negotiation are the twin footings on which the structure of collective bargaining is raised. The object of employee combination is to control the supply of, and hence the market for labour, with a view to obtaining more favourable terms and conditions of employment. The laws of supply and demand respecting the exchange of labour services do not work with the speed or objectivity that they do, for instance, in the areas of securities and exchange and the money market. Negotiation is the procedure by which competing economic forces communicate and arrive at a nexus of settlement.

But negotiation is a sluggish machine. It depends on a wide range of human elements—of needs, wants and weaknesses—that cannot be entered as a quantified factor into a bargaining equation. Behind negotiation, therefore, are sanctions: the employer's sanction to refuse to employ—the lockout; and the employees' sanction to refuse to work—the strike. The employees' refusal to work is an empty sanction if the employer is able to replace the strikers and to continue to produce and market as before: the whole object of controlling the supply of labour is lost. Combinations of employees, therefore, support the sanction of a strike by seeking to halt production and to cut off markets. The process is the picket, which in its essential nature is an act of persuasion. The object is the boycott, which may have, basically, three goals: to persuade persons not to go to work for the employer; to persuade persons not to supply goods used in the employer's production; and to persuade persons not to handle, consume or otherwise deal in the product of the employer.

Some or all of the three activities of uniting into labour associations, of engaging the employer in negotiation with the union, and of invoking economic sanctions, may appear to be obvious concomitants of collective bargaining. But as a matter of historical fact at one time all three were illegal, for the interests of employees in combination contend with other interests.

The first and most obvious interest in conflict with employee freedom of collective bargaining is freedom of entrepreneurial action, curbed by the very process of bargaining, yet involving the foundations of free enterprise and private ownership of property on which is built a justification for collective bargaining itself. Second is freedom of choice and action of the individual employee, whose individualism may be subordinated to or at

variance with the collective will of the group. Third is the interest of strangers to the collective bargaining relationship, who by their contiguity to the conflict may be prejudiced both by the use of economic sanctions and by the terms of the collective agreement. Fourth is the public interest, which at once claims as part of itself the policy of collective bargaining, yet may stand to lose by its methods and its results.

Current collective bargaining legislation in Canada secures to employees, subject to standards imposed by the statutes, the right to combine into trade unions, the right to engage the employer in negotiation of a collective agreement, and the right to strike. But the right to support the sanction of the strike with picketing and boycotting, and to support the picketing and boycotting with further sanctions, is at the mercy of a common law of unknown content and a few more or less piecemeal statutes whose scope remains to be tested in litigation. This area of labour law has since the end of World War II given rise to well over one hundred reported cases and an untold number of writs. The product is a marvel of confusion that would not be tolerated in any other area of the law.

Justice according to law is a stratagem through which man may pursue a higher justice in human affairs. Certainty is an element of legal justice. It behooves us, therefore, as responsible lawyers, to consider the state of confusion in this area of the law and to contemplate how that confusion might be resolved.

Decisions of the Supreme Court of Canada and the Privy Council are remarkably lacking in direction. In *Perrault's* case[1] the judgment of the Supreme Court of Canada turns on the reform legislation of the 1870's, much of which is of highly doubtful constitutional validity. Inasmuch as the Privy Council in the *Metallic Roofing* case[2] ordered a new trial we do not know how the courts would have applied the law to the facts, for we do not know what the facts were. The *United Mine Workers'* case,[3] holding that the threat of a strike to gain dismissal of non-unionists is illegal, is inconsistent in principle with *Newell v. Barker and Bruce.*[4] The judgment in *Reners v. The King*[5] was influenced in part by the deletion of the saving clause in what is now section 366(2) of the Criminal Code. Inasmuch as the clause has been returned

1 *Perrault v. Gauthier* (1898), 28 S.C.R. 241.
2 *Metallic Roofing Co. v. Jose et al.*, [1908] A.C. 514.
3 *United Mine Workers of America v. Williams & Rees* (1919), 59 S.C.R. 240.
4 [1948] 4 D.L.R. 64.
5 [1926] S.C.R. 499.

to the statute the value of the case as precedent is severely attenuated. One of the least durable decisions of the Supreme Court of Canada is the *Aristocratic* case.[6] The finding that might have stayed alive was the conclusion that picketing after a conciliation board had reported but before a strike vote was taken was lawful. But apart from *Todd v. Tomson,*[7] the cases have consistently denied the right to invoke the economic sanction of the picket prior to the exhaustion of the machinery of state regulation contained in the collective bargaining statutes. The *Poje* case[8] is concerned with the remedial law of contempt of court, not with the substantive law of picketing and boycotting. In the *Patchett* case[9] the Supreme Court of Canada was concerned primarily with liability of the defendant company under railway legislation, assuming incidentally that because the union whose picketing caused the interruption in service had no labour dispute with the plaintiff the picketing was illegal. In the *Therien* case[10] the court could not consider the law of picketing as such, for the defendant union did not engage in that line of conduct. Finally, in *Gagnon's* case[11] the court determined that picketing in support of an unlawful strike is *ipso facto* illegal. It is an important case inasmuch as it settles a controversial point of law. But with respect, it was a reasonably foreseeable qualification to the *Aristocratic* decision.[12]

The principal causes of uncertainty in this area of the law seem to be inconsistency in the perception, or absence of perception, of the nature of the legitimate interests in conflict, and the failure of the common law to accept or discharge responsibility for developing an appropriate and durable concept of tort law for the resolution of the conflicts. At one extreme the common law tries to pour the comparatively new wine of industrial conflict into such old bottles as the law of defamation, nuisance and inducing breach of contract; and at the other extreme it has invented and continues to use comparatively new and difficult containers such as the tort of conspiracy to injure and unjustified interference with freedom to trade. The result is a resort to doctrine in lieu of reasoning from first principles. The reason behind the doctrine becomes lost, whereupon the doctrine becomes dogma, learned for its own sake and applied with little regard

6 *Aristocratic Restaurants v. Williams et al.*, [1951] S.C.R. 762.
7 (1957) CCH Canadian Labour Law Reporter, para. 15,125 (B.C.S.C.).
8 *Poje v. A.-G. B.C.*, [1953] S.C.R. 516.
9 *Patchett & Sons Ltd.. v. P.G.E.* (1959), 17 D.L.R. (2d) 449.
10 *Therien v. I.B.T.* (1960), 22 D.L.R. (2d) 1.
11 *Gagnon v. Foundation Maritime Co.* (1961), 38 D.L.R. (2d) 174.
12 *Aristocratic Restaurants v. Williams et al.*, [1951] S.C.R. 762.

for its ineptitude. To fit dogma to new situations resort is made to fictions which add nothing but confusion to an already irrational body of law. Even the point of the fictions becomes lost, at which stage we are left with the enormity of legal myths.

Defective perception of the nature of industrial conflict and bias against both collective action and the institutions of collective action are not difficult to document. To begin with, the Supreme Court of Canada once asserted, in the *United Mine Workers'* case,[13] that striking as such may be illegal at common law. Other cases assert that there is no such thing as peaceful picketing—it is cleverly dismissed as a contradiction in terms.[14]

It is hard enough on the law to be misshapen by apprehension of the nature of industrial conflict and bias against collective action. But when there is added blind adherence to precedent, logical fallacy and the invocation of meaningless fiction, the law which Lord Mansfield perceived as being in a perpetual state of working itself pure by rules drawn from the fountain of justice[15] seems from time to time to degenerate into a witch's brew—what a member of the Supreme Court of Canada robustly described in *Perrault's* case[16] as "the glorious uncertainty of the law"—a law which unions are admonished they have an "imperious duty"[17] to obey. As an instance of blind adherence to precedent, in the *Rossland Miners'* case,[18] the court copied the action of the trial court in the *Taff Vale* case[19] in granting an injunction against the union itself and in following the precise language of the *Taff Vale* injunction, in spite of the fact that the statute law on which the *Taff Vale* action was founded did not prevail in this country. Again, in *Sellors v. Woodruff*[20] the court concluded that because the objects of the society were declared illegal by an English court in *Russell's* case[21] the Canadian branch should be so treated by a Canadian court. On the important issue of whether section 366 of the Criminal Code declares the enumerated acts to be wrongful and without lawful authority, as was held in

13 *United Mine Workers of America v. Williams & Rees* (1919), 59 S.C.R. 240.
14 E.g., *Hollywood Theatres v. Tenney*, [1940] 1 D.L.R. 452 (B.C.C.A.).
15 *Arguendo* in *Omychund v. Barker* (1744), Atk. 21; 26 E.R. 15.
16 *Perrault v. Gauthier* (1898), 28 S.C.R. 241.
17 *International Ladies' Garment Workers Union v. Rother* (1922), 41 C.C.C. 70; [1923] 3 D.L.R. 768; affirming 60 Que. S.C. 105 (C.A.), *per* Rivard, J.
18 *Le Roi Mining Co. v. Rossland Miners' Union* (1901), 8 B.C.R. 370.
19 *Taff-Vale Ry v. A.S.R.S.*, [1901] A.C. 426.
20 [1925] 4 D.L.R. 646 (Ont. C.A.).
21 *Russell v. A.S.C.J.*, [1910] 1 K.B. 586.

the *Lyons* case,[22] or whether there is a burden of proving not only the conduct but the wrongfulness of the conduct, as was held in the *Ward Lock* case,[23] two courts[24] deprecated the latter case in favour of the former, thus concluding that the lesser burden prevails, on the ground that the latter case was reported only in the Times Law Reports, even though it was a later decision of the same court.

Logical fallacy and the misuse of fiction, often flowing from semantic inconsistency, are most clearly illustrated in the cases concerning the law of nuisance and cases requiring inference regarding intent in the application principally of the law of civil conspiracy and inducing breach of contract. In this area the law stands challenged by obstructions to answering two disarmingly simple questions: "What did the defendants do, and why did they do it?" The curse of the law has been its obsessive concern over intent.

The tort of nuisance relates to interference, physical or otherwise, with rights respecting or usage of land. In some cases nuisance is said to be present in watching and besetting, in others watching and besetting is said to be a form of nuisance.[25] However the equation may be expressed, since neither factor bears precise legal definition, the equation throws little light on the meaning of either term. In other cases the court seemed to reason that because the picketing is an irritation or an annoyance or a nuisance in a colloquial sense, the picketing must be a nuisance in a legal sense.[26] But peaceful picketing doubtless is a nuisance, in a colloquial sense, relating to the enjoyment of property—that is what it is calculated to be—and equally doubtless it is not unlawful *per se*. The outer limits of the law of nuisance seem to have been reached in the *Nipissing Hotel* case,[27] where picketing was held to constitute a nuisance not because of the form it took (in spite of the fact that the decision purports to follow

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22 *Lyons & Sons Ltd. v. Wilkins et al.*, [1899] 1 Ch. 255.

23 *Ward Lock & Co. v. O.P.A.S.C.* (1906), 22 T.L.R. 327.

24 *R. v. Reners*, [1926] 2 D.L.R. 236 at p. 238, *per* Harvey, C.J.A.; *Aristocratic Restaurants v. Williams*, [1951] 1 D.L.R. 360 at p. 383, *per* Smith, J. A.

25 E.g., *R. v. Elford*, (1947), 87 C.C.C. 372 (Ont. Magistrate's Court); *Reners v. The King*, [1926] S.C.R. 499.

26 E.g., this seems to be the meaning with which the word is used in *Edland Construction (1960) Ltd. v. Childs & Sallafranque* (1963), 39 D.L.R. (2d) 536 at p. 539.

27 *Nipissing Hotel v. Hotel Employees' Union* (1963), 38 D.L.R. (2d) 675; CCH Canadian Labour Law Reporter, para. 15,457.

Lyons v. Wilkins)[28] but because the union was found to have acted in bad faith in picketing before the conciliation machinery of the Ontario Labour Relations Act had been invoked. The decision makes intent an integral facet of the law of nuisance.

The element of intent attains its highest order in the law of conspiracy to injure, which propounds the doctrine that "a combination of two or more persons wilfully to injure a man in his trade is unlawful, and if it results in damage to him, is actionable."[29] The rationale of the doctrine is far from clear. The doctrine itself has been repealed in the United Kingdom[30] where there is a trade dispute, and, in part at least, in four common law provinces: British Columbia,[31] Newfoundland,[32] Ontario[33] and Saskatchewan.[34] But it has had an active career in Canadian labour cases, and holds promise of continuing longevity.

The doctrine arose in *Quinn v. Leathem*[35] in which the House of Lords upheld a jury verdict against unionists who engaged in secondary action to force an employer to dismiss his employees, who were denied membership in the union, and to hire members of the union in their place. The doctrine was tempered in *Sorrell v. Smith*[36] by the recognition of the legitimacy of pursuing self-interest. It was refined in the *Crofter* case[37] by the recognition that a court may be required to select from a number of proven objects the predominant purpose of the defendants. That case propounds the proposition that justification for causing harm is to be found in the fact that the predominant object is the pursuit of self-interest, and that the court is not concerned with the reasonableness of the pursuit once it is found that self-interest is in fact the goal. The judgments try to make these points as clear as possible. But the doctrine requires such a subjective assessment of an essentially unprovable—indeed fictional—fact as to give little assurance as to how the doctrine may be applied in specific cases.

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28 *Lyons & Sons Ltd. v. Wilkins et al.*, [1899] 1 Ch. 255.

29 Headnote to *Sorrell v. Smith*, [1925] A.C. 700.

30 Trade Disputes Act (1906), 6 Edw. 7, c. 47.

31 Trade-unions Act, R.S.B.C., 1960, c. 384, s. 5.

32 Trade Union Act (1960), c. 5, s. 4.

33 The Rights of Labour Act, R.S.O., 1960, c. 354, s. 3(1).

34 Trade Union Act, R.S.S., 1953, c. 259, s. 22 (Am. 1954, 1955, 1956, 1958, 1961).

35 [1901] A.C. 495.

36 [1925] A.C. 700.

37 *Crofter Hand Woven Harris Tweed Co. v. Veitch et al.*, [1942] A.C. 435.

Latent deviations may be found in the statements in the judgments relating to the question of determining the object, particularly where there may be a multiplicity of objects. In *Sorrell's* case[38] the House of Lords rejected the standard of reasonableness in favour of the test of self-interest. But the weakness of the proposition is in the process of arriving at a conclusion as to what the object is. Were the issue to be left in fact to a jury, the verdict is very likely to reflect, not a rational application of the doctrine of civil conspiracy as stated in the *Crofter* case,[39] but a collective hunch of a group of men as to what is right, what is reasonable. The "object" of the union in *Quinn's* case[40] was to gain employment for its members. That fact is not altered by the existence, for whatever reason, of an animus against non-members in the trade. The jury doubtless thought it unreasonable that the unionists should gain their ends at the expense of persons already employed, and by putting economic pressure on innocent strangers. But the doctrine of civil conspiracy twists that rationale into a motivation to punish. It is a thesis of this paper that the application of the standard of reasonableness is inherent and inevitable in the application of the doctrine of civil conspiracy, and that it should therefore be recognized and consciously developed into a common law jurisprudence of picketing and boycotting.

The second feature of the doctrine is the necessity for making a subjective assessment of a non-existent fact: the predominant object of the group. The group as such has no object: the members do, and no two predominant objects may be the same. Further, in the course of a labour dispute objects may appear to change, as the object of any human being may change over a long or short period of time. Again, no matter how carefully one might endeavour to distinguish object from result, their affinity makes the distinction difficult to maintain.

But assuming the distinction between object and result is to be maintained, there lies the further question, is there in law any extrinsic test by which the object of the conspirators may be determined? In the law of contract where intention is to be determined the courts are concerned with the outward indications of consent. In other fields where the mental state of the wrongdoer is significant, it may be asked: did he know, or ought he to have known? No such guide seems to exist in the law of civil conspiracy.

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38 *Sorrell v. Smith*, [1925] A.C. 700.

39 *Crofter Hand Woven Harris Tweed Co. v. Veitch et al.*, [1942] A.C. 435.

40 *Quinn v. Leathem*, [1901] A.C. 495.

As was stated earlier, it is submitted that the standard of reasonableness is inherent in the practical application of the doctrine of conspiracy to injure, at the first stage of determining as a matter of fact the nature of the object or objects of the combination and at the second stage where necessary of determining the nature of the predominant object. It is also submitted that the standard is inherent in the test of justification which provides absolution for the torts of inducing breach of contract and interfering with favourable trade relations. It may also very well enter into the administration of the law of nuisance. It is further submitted that a constant in the judicial apprehension of what is reasonable is an assessment, generally unarticulated and perhaps on occasion unconscious, of the reasonable limits to the pursuit of self-interest where two or more interests conflict. This, it is submitted, is at the basis of the true nature of the jurisprudence of picketing to which judicial reasoning must turn if the doctrine of *stare decisis* is to be spared emasculation by fiction and *non sequitur*. In other words, judges make a choice between competing interests in the circumstances before them. When the choice is expressed in the language of civil conspiracy the true rationale of the choice rarely comes through.

The thesis may be illustrated through the situation of secondary picketing. The objects of the union are set out in series.

In the typical instance of secondary picketing the union locates persons called pickets at or near the entrances to the suppliers' (or customer's) premises, who carry signs bearing appropriate words, (1) in order to communicate information; (2) in order to persuade persons not to do business with the supplier (or customer); (3) in order to produce a boycott of the supplier (or customer); (4) in order to threaten the supplier (or customer) with economic loss; (5) in order to induce the supplier (or customer) not to do business with the employer with whom the union has a labour dispute; (6) in order to produce a boycott against the employer; (7) in order to threaten the employer with economic loss; (8) in order to induce the employer to agree to the terms of employment proposed by the union as being preferable to the threatened (or actual) economic loss; (9) in order to improve the welfare and interests of its members.

It is no less arbitrary for courts to categorize the picketing as a conspiracy to injure on the basis of the object of threatening the supplier (or customer) with (or actually causing him) economic loss on the basis of the object listed fourth in the above

series than it is for unions to categorize their conduct as constituting an "information" line on the basis of the first object. The ultimate and predominant object is the last, and this fact is not altered by temporary or incidental aberrations from lawful conduct by union officials or other union agents in pursuing objects precedent to the last. Such aberrations should be dealt with on their merits (or demerits) and not on the basis of conspiracy to injure, as propounded in *Quinn v. Leathem,*[41] which according to the *Crofter* case[42] requires the conclusion that the predominant object of the combination (i.e., the union) is to cause unjustified injury to the innocent supplier (or customer).

But all this is reflecting conceptual and doctrinal problems—it does not go to the fundamental issue of policy.

The real issue is whether at our present stage of social and economic development it can be said that the union has a legitimate interest vis-a-vis the person injured by the picketing. If the answer is "Yes" the picketing should be permitted unless it is being conducted in an unlawful manner. If the answer is "No" the picketing should be regarded as illegal irrespective of the fact that it is lawful in form and that the union has the ultimate or predominant or consistent object of advancing the interests of its members. This may be the conclusion reached by the courts either inarticulately or articulated in such deceptively cryptic passages as:

> The union had no dispute with the employer and had no earthly reason to picket it.

The Canadian cases on civil conspiracy show, with certain exceptions, distinct attitudes to the use of economic pressure through combination. Where the combination is an employers' association directing the sanction against a person in the same class of economic interest, the *Mogul* case[43] is followed to the conclusion that the combination is not unlawful.[44] Where the combination is an employers' association taking action against workmen, the combination is not regarded as unlawful.[45] Where the combination is a union refusing to work alongside non-unionists, there is now an attitude that the members are engaged

41 *Ibid.*
42 *Crofter Hand Woven Harris Tweed Co. v. Veitch et al.,* [1942] A.C. 435.
43 *Mogul Steamships Ltd. v. McGregor, Gow & Co.,* [1892] A.C. 25.
44 E.g., *Gibbins v. Metcalfe* (1905), 1 W.L.R. 139; affirming 23 C.L.T. 308.
45 *Mitchell v. Woods* (1906), 4 W.L.R. 371; *Lefebre v. Knott* (1907), 13 C.C.C. 223.

in the legitimate pursuit of self-interest.[46] Where, however, the pressure is directed against a specific individual away from the place of employment, the combination is regarded as a conspiracy to injure. Where the combination is a union engaged in a labour dispute with an employer, the action of the combination is regarded as legitimate so long as the union restricts the direct impact of its sanctions to the employer. If, however, it seeks to put pressure on the employer indirectly by taking "secondary action" against a supplier or customer of the employer or anyone else with whom the union has no direct dispute, the combination is regarded as a conspiracy to injure.[47]

In reaching these conclusions the courts sometimes misconceive the legal doctrine itself, sometimes infer that the object of the combination was to injure from the fact that the picketing was being carried out in an unlawful manner or from a perceived unfairness in the harm caused to innocent strangers to the dispute. Only in rare and recent cases have the courts attempted to state their conclusions in terms of their assessment of the merits of the claims of competing interests to the protection of the law.

Two cases will illustrate misconception of doctrine. In the *Metallic Roofing* case[48] the Privy Council ordered a new trial because the jury was misdirected on the law. And a passage in *Comstock Midwestern v. Scott*[49] seems in part to propound the strange proposition that if the union conveys information to people who already possess it, the object must be to injure.

A number of cases infer from the commission of unlawful acts that the object of the combination was to injure. The acts include violence and general disorder,[50] intimidation,[51] trespass,[52]

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46 E.g., *Graham v. Bricklayers' & Masons' Union* (1908), 8 W.L.R. 475; reversed, 9 W.L.R. 475; *Thompson v. Ryall & Cunningham*, [1924] 4 D.L.R. 778; *Newell v. Barker and Bruce*, [1950] S.C.R. 385; [1950] 2 D.L.R. 289; affirming [1949] O.R. 85; [1949] 1 D.L.R. 544, which affirmed [1948] O.W.N. 625, [1948] 4 D.L.R. 64. But *cf. Allied Amusements v. Reaney*, [1937] 4 D.L.R. 162; *Johnston et al. v. Mackey et al.*, [1937] 1 D.L.R. 443.

47 E.g., *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51.

48 *Metallic Roofing Co. v. Jose et al.*, [1908] A.C. 514.

49 *Comstock Midwestern Ltd. v. Scott et al.*, [1953] 4 D.L.R. 316 (B.C.S.C.).

50 *Hurtig et al. v. Reiss et al.*, [1937] 3 D.L.R. 426.

51 *Seaboard Owners v. Cross*, [1949] 3 D.L.R. 709.

52 *Ibid.*

nuisance,[53] defamation,[54] breach of contract[55] and inducing breach of contract.[56]

The consideration of competing interests became obvious in *Dusessoy's* case,[57] where the court enjoined secondary picketing on the ground, among other things, that freedom of trade is a proprietary right that can be curtailed only in the general interest and not for a limited group, and prevails unless the Legislature takes it away. The proposition became clear ratio in *Hersees'* case.[58] These two cases mark the beginning of a restatement of the precepts on which the common law in this field is or should be founded. The cases are perhaps more important for the approach which they state than for the substantive law which they propound. They are only a beginning, and are subject to three important qualifications.

First, the cases describe the right or freedom to trade as a proprietary right, one which is for the benefit of the community at large, and subject to curtailment only in the general interest. The union's right or freedom to picket, in contrast, is described as being for the benefit of a limited group or a particular class. But collective bargaining has been part of the public policy of this country since the reign of Queen Victoria. Both the criminal law and the common and civil law have recognized the legitimacy of the use of economic sanctions as an integral part of the process of collective bargaining. Furthermore, the law of restraint of trade, apart from combines legislation, seems to turn largely on who is being hurt and by whom. Restraint within the enterprise class of interest seems perfectly all right: witness the *Mogul* case.[59] Employer combinations against employees—effecting on occasion a form of secondary boycott against employees through the use of the black list—are acceptable.[60] Agreements involving commercial restraints generally are upheld. In contrast, employee restraints are regarded with a much more sceptical judicial eye.[61] And restraints by organized labour against the enterprise class of interest are regarded with less favour still.[62]

53 *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51; CCH Canadian Law Reporter, para. 15,359.
54 *Besler v. Matthews*, [1939] 1 D.L.R. 499.
55 *Hollywood Theatres v. Tenney*, [1940] 1 D.L.R. 452.
56 *Seaboard Owners v. Cross*, [1949] 3 D.L.R. 709.
57 *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51.
58 *Hersees Ltd. v. Goldstein* (1963), 35 D.L.R. (2d) 616.
59 *Mogul Steamships Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25.
60 *Schrader v. Lillis* (1885), 10 O.R. 358; *Mitchell v. Woods* (1906), 4 W.L.R. 371; *Lefebre v. Knott* (1907), 13 C.C.C. 223.
61 E.g., *Gordon v. Ferguson* (1961), 30 D.L.R. (2d) 420.
62 *Quinn v. Leathem*, [1901] A.C. 495.

Second, the two cases recognize the interest of the party being picketed, identifying his interest with the public interest; they recognize incidentally the interest of the employer engaged in a dispute whose "rights" are not contended in the litigation; and they recognize the interest of the union, the scope of which is regarded as being limited to the group. They do not give consideration to collective bargaining or the exercise of freedom of speech as part of the public interest. And they do not consider —they did not have to consider—the interests of other individuals, the sum of whose selfish interests contribute to the "public interest", such as employees and customers of the picketed person, who also stand to lose by the picketing.

Third, there is a general assumption in the two cases that secondary picketing is a clearly delimited circumstance of picketing. Indeed, in *Hersees'* case[63] the court concludes that the Supreme Court of Canada determined in the *Patchett* case[64] that secondary picketing is illegal *per se*. Antipathy to secondary action certainly is the trend in the decisions of this and other courts.[65] But the generalization takes the decision beyond the facts of the case. What the proposition in *Hersees'* case[66] overlooks is that the circumstances of secondary picketing are not constant. For instance, in the *Grosvenor Park* case[67] a union was enjoined from picketing adjacent to the employer with whom it was in dispute because the employer was located in a shopping plaza. Presumably the union in *Zeller's* case[68] could have been enjoined by the lessor. If the union is to have recourse to a

63 *Hersees Ltd. v. Goldstein* (1963), 35 D.L.R. (2d) 616.

64 *Patchett & Sons Ltd. v. P.G.E.* (1959), 17 D.L.R. (2d) 449.

65 *R. v. Russell* (1920), 51 D.L.R. 1; *General Dry Batteries v. Brigenshaw*, [1951] 4 D.L.R. 414; *Pacific Western Planing Mills v. I.W.A.*, [1955] 1 D.L.R. 652; *Patchett v. P.G.E.* (1959), 17 D.L.R. (2d) 449; *Midland Superior Express Ltd. v. Gen. Truck Drivers' and Helpers' Union, Local 31* (1956), 19 W.W.R. 618 (B.C.); *Verdun Printing v. Clicheurs; Sauvé Frères v. Amalgamated Clothing Workers of America*, [1959] Que. S.C. 341; *Pacific Coast Terminals Co. v. International Longshoremen's Etc. Union, Local 502* (1959), 29 W.W.R. 410 (B.C.C.A.); *Noé Bourassa Ltée v. United Packinghouse Workers*, [1961] Que. S.C. 604; *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51; *Coles Bakery v. Bakery etc. Workers' Union Local No. 468 and B. C. Fed. of Labour* (1962), 36 D.L.R. (2d) 772 (B.C.S.C.); *White Lunch Limited and Svend Nielsen et al.* (1962), CCH Canadian Labour Law Reporter, para. 15,453; *Evans, Coleman & Evans Limited v. Schone et al.* (1963), CCH Canadian Labour Law Reporter, para. 15,472.

66 *Hersees Ltd. v. Goldstein* (1963), 35 D.L.R. (2d) 616.

67 *Grosvenor Park Ltd. v. Cave et al.* (1963), 40 D.L.R. (2d) 1006.

68 *Zeller's (Western) Ltd. v. Retail Food Union* (1962), 40 W.W.R. 435.

meaningful economic sanction—a precept of effective collective bargaining—it must pursue a course of secondary action. Again, it is arguable that in cases such as *Dusessoy's*[69] and *Hersees'*[70] the customer of the employer party to the dispute is a major part of the total economic force of the employer against whom the union is "waging the contest".[71] On this ground alone secondary picketing may be justified in the name of the public policy of collective bargaining, in the same manner as the Supreme Court of Canada permitted the union in the *Aristocratic* case[72] to picket other operations of the same employer. The economic pressure entailed in the picketing is directly related to the interest of the union and the identity of the opposing economic interest. *A fortiori* if the customer insinuates himself into the dispute to give "aid and comfort" to the employer — for instance if in *Dusessoy's* case[73] Codville had contracted out the delivery service after the strike occurred, or, for that matter, if Codville did so in anticipation of a strike and to the knowledge of the contracting party—the party to the contract has aligned himself with the economic strength of the employer. Having voluntarily insinuated himself into the conflict he can complain with less justification that any picketing against him is secondary action and with much less justification that it is *per se* illegal. Further, in the interests of protecting the social policy of collective bargaining, courts may be called upon to lift the corporate veil to determine whether it conceals a more intimate relationship of superficially independent legal personalities.[74]

Much more remains to be said on the subject of the basis of the common law in this field than has emerged from *Dusessoy's*[75] and *Hersees'*[76] cases.

In the law of conspiracy to injure, the harm may be excused on a finding that it was justified. Justification appears to be no more than the obverse of the proposition that the harm caused to

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69 *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51.

70 *Hersees Ltd. v. Goldstein* (1963), 35 D.L.R. (2d) 616.

71 *Per* Rand, J., in *Aristocratic Restaurants v. Williams et al.*, [1951] S.C.R. 762.

72 *Ibid.*

73 *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51.

74 *Contra: White Lunch Limited and Svend Nielsen et al.*, (1962), CCH Canadian Labour Law Reporter, para. 15,453.

75 *Dusessoy's Supermarket v. Retail Clerks' Union* (1961), 30 D.L.R. (2d) 51.

76 *Hersees Ltd. v. Goldstein* (1963), 35 D.L.R. (2d) 616.

others by the pursuit of legitimate self-interest by lawful means is not actionable. The legitimacy of the object is said to provide justification, or just cause or excuse, for the harm inflicted by the combination. Much the same concept of justification seems to apply to interference with freedom to trade: if the object is legitimate, the harm is justified.

Obstacles to the application of the concept of justification are semantic, evidentiary and emotional. What does the word justification mean, what kind of evidence is really relevant to a determination of the object of the combination, and to what extent is the court's disapproval of the consequences of the action of the combination a probable or inevitable element in determining whether the action of the group is justified? If in the opinion of the viewer the object pursued by the combination is less important than the interest harmed by the combination, the action of the combination seems "unjustified". If the harm caused appears out of proportion to the gain, the conduct of the combination seems unreasonable and therefore "unjustified". If the combination pursues its objects in a spirit of antagonism or in an atmosphere of discourtesy it appears malicious, and therefore wilful, and therefore unreasonable, and therefore "unjustified". If the conduct contains acts in themselves unlawful, those acts must be taken to be intentional; therefore the object appears to be unlawful, and hence "unjustified". It is submitted that the concept of justification as stated in such cases as *Crofter*[77] and *Thomson v. Deakin*[78] has given way to a determination of the lawfulness of picketing according to the evaluation of the courts as to whether the interests prejudiced by the picketing should prevail over the interests which the picketing is calculated to advance, and that this evaluation has been confused, disguised and complicated by the invocation of the common law relating to civil conspiracy, inducing breach of contract and interference with favourable trade relationships, by the attribution of motive stemming from the use of question-begging adjectives, and from inferences based on tortious elements in the manner in which the picketing was being carried out.

Remarkably few cases consider the nature of justification in the law of civil conspiracy or seek to identify the kind of interest in the protection of which, or circumstance in which, justification might rest.

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77 *Crofter Hand Woven Harris Tweed Co. v. Veitch et al.*, [1942] A.C. 435.

78 *Thomson (D. C.) Ltd. v. Deakin et al.*, [1952] Ch. 646, 666.

The modern tort of inducing breach of contract is stated by Viscount Simon by illustration in the *Crofter* case:[79]

> If C has an existing contract with A and B is aware of it, and if B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract.

In the circumstances of industrial conflict, the application of the doctrine depends on the imputation to the defendant of intention to cause damage, of knowledge of the contract, of inducement of others to commit an unlawful act, and on a determination of whether there is justification.

The first imputation involves the same kind of problem as determining the object of a combination, and is loaded against picketers by the premise that a person must be taken to intend the foreseeable consequences of his actions. The second imputation is made less difficult by reason of the fact that the tortfeasors need not know the contents of the contract but only that a contractual relationship exists.[80]

The third imputation may be effected by judicial notice that as a matter of practice union members and sympathizers do not cross picket lines,[81] even though the refusal to do so may result in breach of contract of employment or other services or of supply.[82] Further, the imputation involves a distinction between advocating an end which could be obtained lawfully and advancing lawful means. The distinction raises the question whether it invites the piously fraudulent admonition "Don't throw him in the duck pond". But whether picketing advocates the means or the end is a question not of law but of fact, admittedly difficult, which may elicit different answers in different cases. What amounts to inducement is not clear.

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79 *Crofter Hand Woven Harris Tweed Co. v. Veitch et al.*, [1942] A.C. 435, at p. 442.

80 *Body v. Murdoch*, [1954] 4 D.L.R. 326.

81 *Hammer v. Kemmis* (1956), 20 W.W.R. 619; 7 D.L.R. (2d) 684; affirming 18 W.W.R. 673; 3 D.L.R. (2d) 565; *Hersees Ltd. v. Goldstein* (1963), 35 D.L.R. (2d) 616; *White Lunch Limited and Svend Nielsen et al.* (1962), CCH Canadian Labour Law Reporter, para. 15,453; *Re Canadian Air Line Pilots' Association et al. ex p. H. L. Bray et al.* (1963), 40 D.L.R. (2d) 125; *Island Shipping Ltd. v. Devine et al.* (1963), 41 D.L.R. (2d) 226; *Foundation Co. of Canada Ltd. v. McGloin et al.* (1963), 42 D.L.R. (2d) 209.

82 See *Comstock Midwestern Ltd. v. Scott*, [1953] 4 D.L.R. 316 (B.C.)

The issue of justification is as difficult as it is in the doctrine of civil conspiracy to injure,[83] and just as likely to be resolved against the defendants. None of the Canadian cases recognizes the pursuit of self-interest as providing justification for inducing breach of contract as it does, theoretically, in the civil conspiracy cases.

The major exception to the narrow view of justification is illustrated by the *Becker* case.[84] The court concluded that a union that was locked out could picket a construction project even after the subcontractor who had caused the lockout had terminated his contract with the master plumber. The decision is of first importance to building trades unions, who have been party to nearly thirty per cent of the reported cases of picketing and boycotting since World War II, mainly in British Columbia and Ontario. The litigation has related largely to picketing for recognition, but also has involved negotiation picketing. Were the union's right to picket defeasible by the insinuation of a new subcontractor into the relationship, the law of inducing breach of contract would take a strange twist. As it is, the *Becker* case[85] seems to support the tentative proposition that a person cannot be deprived of freedom of action by the creation of contractual relations which stand to be prejudiced by the action.

Although the distinction means very little to the cause of the satisfactory settlement of industrial disputes, the courts recognize the subtle difference between inducing a breach of contract and inducing the contracting parties to terminate the contract, for the breach, a unilateral act, is actionable, whereas termination, a mutual act, is not.[86] The settlement of a breach of contract wrongfully induced by a person not party to the contract does not of itself release the person inducing the breach from a claim against him for interference with the contract.

The systems of industrial relations in Canada, as a matter of deliberate public policy, are based on collective action, the use of market forces, and the concept of countervailing power. The burden of this paper is that the familiar torts of nuisance, conspiracy and inducing breach of contract have produced, in a sufficient number of cases to warrant serious attention, results that

83 *Divers v. Burnett*, [1930] 1 D.L.R. 930 at p. 937.

84 *Becker Construction Co. v. Plumbers' Union* (1958), 15 D.L.R. (2d) 354.

85 *Ibid.*

86 E.g., *Hay v. Local Union No. 25, Ontario Bricklayers etc. International Union*, [1929] 2 D.L.R. 336; *Klein v. Geneves & Varley*, [1932] 3 D.L.R. 571; *Newell v. Barker & Bruce*, [1948] 4 D.L.R. 64.

indicate that the law is out of touch with the realities of those systems. The issue to us as lawyers interested in keeping the law abreast of social reality is whether the salvation of the law is to be found in legislative reform or in a reworking of the common law itself.

The advantage of lawmaking by the legislature on this subject is that a complex issue of policy should be determined in a political forum, as was done in one direction in England by the Trade Disputes Act of 1906[87] and as was done in another direction in the United States by the Taft-Hartley Act of 1947[88] and the Landrum-Griffin Act of 1959.[89] The English Act virtually put trade unions above the law. The American statutes attempt to state in detail the circumstances in which persuasion is prohibited and the objects which may not be sought through economic pressure. Although the legislation is the product of the exhaustive machinery of Congress, it leaves many questions to be settled by litigation.

The British Columbia Trade-Unions Act of 1959[90] approaches the problem of restating the law in a third manner. It declares the right of a union to picket at the employer's place of business, operations or employment in support of a lawful strike. It then prohibits persuasion otherwise. But the statute does not articulate a philosophy relating to the nature and legitimacy of interests that come into conflict in industrial relations, nor does it state reasons why the conflict should be resolved in a particular way, for the opportunity to give such broad direction disappeared when the preamble to a statute fell into disuse; the statute also contains its own problems of interpretation.

Although a select committee on labour relations of the Ontario Legislature in 1958 recommended legislation that would have had the effect of outlawing secondary picketing, the legislation that materialized fell short of that objective. The statute[91] now merely prohibits conduct which is likely to induce an unlawful strike or an unlawful lockout. Where a union is on strike lawfully, it appears that it may engage in secondary action that causes an illegal work stoppage. But where the union does not carry its dispute to the strike stage that same secondary action is prohibited. The contribution of the section to industrial peace is difficult to assess.

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87 (1906), 6 Edw. 7, c. 47.
88 (1947), c. 120, 88th Cong., 1st Sess., 61 Stat. 136.
89 (1959) P.L. 86-259, 86th Cong., 1st Sess., 29 U.S.C., c. 7.
90 R.S.B.C., 1960, c. 384.
91 Rights of Labour Act, R.S.O., 1960, c. 384, s. 57.

The Alberta statute[92] also approaches the problems of picketing and boycotting piecemeal. It prohibits organizational and recognition picketing, picketing in support of an illegal strike, and the technique of declaring goods hot in order to insure that work done on goods is performed by unionized labour.

The Newfoundland statute[93] now contains a provision the same as section 3 of the British Columbia Trade-unions Act of 1959. However, it also includes a significant saving provision that "public expressions of sympathy or support, otherwise than by picketing, on the part of trade unions or others not directly concerned in the strike or lockout and persuasion and endeavours to persuade by the use of circular, press, radio or television will not be deemed to be a breach" of the statute. This provision would appear to meet to a large extent the criticism levelled at the British Columbia Trade-unions Act that in putting restraints on the device of the picket it incidentally put unwarranted restraints on general freedom of speech.

The questions which the present statutes create or leave unanswered demonstrate a severe limitation on the legislative process as a method of law reform in this area. It is virtually impossible to foresee all eventualities of circumstance or all manifestations of conflict or persuasive technique. If the interests actually or potentially in conflict can be identified they represent a wide disparity in strength or weakness, or even of legitimacy, at any moment in time or over a span of time. Consequently, any general declaration of the law that seeks to have universal application and durability, but which possesses a crystalline resistance to subtle distinctions and to change, as a statute tends to do, is destined to create anomalies, and perhaps imbalance and inequity, in the industrial scene. It is one more argument for a revivification of the common law.

The advantage of judge-made law over the product of the Legislature lies in the very quality of viability in the common law which seems so lacking in the picketing cases. The disadvantage, some would say the disqualification, of the common law is to be found in another great myth that it is not the proper function of judges to make or even to explain the law, but only to expound it. If the task of restatement of the tort law of picketing and boycotting is to be performed by the courts, the role of judicial creativeness must be recognized in order that the bases

92 The Alberta Labour Act, R.S.A., 1955, c. 167, ss. 64, 80(4), 95(2) (as enacted by 1960, c. 54, s. 31).

93 Labour Relations Act, R.S.N., 1952, c. 258, s. 43A (as enacted by 1963, No. 82, s. 4).

of the law may be stated in contemporary terms and the application of the law take rational account thereof. It is not too late to realign precedent with a recognition of the nature and legitimacy of the interests that compete for supremacy in industrial conflict. Reform is quite possible within the limits imposed by the nature of the judicial process, and without doing violence to legal doctrine.[94] The element of intent, the standard of reasonableness and the notion of justification—the very ingredients of the law which have estranged it from industrial society—offer a medium for effecting a rapprochement. They are the tools through which judicial creativeness may find expression in the best tradition of the common law.

But a conscientious reassessment of the law does not begin with the writing of judgments. It starts with the drafting of pleadings, the production of evidence, and the presentation of argument. The Bar itself must accept responsibility for performing a creative role. The threshold of the common law must be sought at the door of counsel's chambers.

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94 *Edland Construction (1960) Ltd. v. Childs & Sallafranque* (1963), 39 D.L.R. (2d) 536 at p. 537; *Foundation Co. of Canada Ltd. v. McGloin et al.* (1963), 42 D.L.R. (2d) 209.