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## The Task Force on Industrial Relations-Picketing

# THE TASK FORCE ON INDUSTRIAL RELATIONS—PICKETING

T. E. ARMSTRONG\*

The Woods Task Force Report's recommendations on the law of picketing contain at least one important internal contradiction. On the one hand, a vigorous and convincing plea is made to reduce the power now residing in the courts to control picketing through the equity injunction. On the other hand, in defining the area of jurisdiction to be transferred to a reconstituted Canada Labour Relations Board, the Task Force would leave control over the preponderance of important picketing cases with the courts. If this is a correct analysis, the Task Force is guilty of fostering a serious illusion.

The theme of this comment, then, is twofold: first, that the Task Force is correct in its suggestion that organized labour is profoundly disillusioned with the role of the courts in picketing disputes, and that if a breakdown in the system is to be avoided, there must be a transfer of jurisdiction to a specialist tribunal which has the confidence of both management and labour; and secondly, that the Task Force, in recommending that control over the "how" of picketing be retained by the courts, has failed in its presumptive purpose to effect a significant reduction in the court's role and to restore union confidence in the enforcement apparatus.

The Task Force has correctly identified organized labour's distrust of the courts and has warned against the damage to society at large should that feeling become a "pervasive conviction".<sup>1</sup> What the Report does *not* do is to explain, except in the most cursory way, the reasons for labour's attitude. It is surely important to attempt to do so. If, for example, it flows from an unthinking and biased hostility to the judicial establishment, the case for change is weakened, for it is surely a dangerous principle in a democratic society to effect change simply because a minority group is, without justification, distrustful. If, as I believe to be the case, the distrust flows from real, rather than imagined, defects, the imperative for reform gains strength.

No one denies — least of all the author of the Royal Commission Report on Civil Rights — that special reasons and circumstances may exist for conferring judicial powers on tribunals other than the courts. The reasons most commonly advanced are the need for specialization and expertise in the personnel of the tribunal to facilitate the administration of justice, and the need for a special procedure for greater speed, accessibility, economy and informality than can be provided by the procedure in the ordinary courts.<sup>2</sup>

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<sup>1</sup> Canadian Industrial Relations: *The Report of the Task Force on Labour Relations* (The Task Force) 1968, para. 423, p. 132.

<sup>2</sup> *Royal Commission Inquiry into Civil Rights* (McRuer Commission) Volume 2, Part 1, p.

How to be satisfied, and to satisfy the community at large, that there are justifiable reasons for ousting the jurisdiction of the courts in the field of picketing? The following are some of the arguments heard from trade unionists, and their supporters.

1. The most common contention — perhaps also the most superficial — is the “class” argument. Trade unionists, so it is said, have a deep-rooted conviction that the economic and social philosophies of most judges are in fundamental opposition to the goals of organized labour. Judges, because of their professional training, as well as their social and economic backgrounds, cannot reasonably be expected to be objective when the interests of management and labour clash. Moreover, so the argument goes, there is an innate hostility which those trained in the law, practicing lawyers as well as judges, feel for the collective bargaining system — a system which countenances the use of the strike and lockout, weapons of economic blackmail, to further the demands of the combatants. Instinctively lawyers strive for rational solutions; labour and management are engaged in a raw economic battle, where the one with the greater power to injure his opponent economically will prevail.

When the courts do become involved in this struggle, it is natural that a distaste for the system will be expressed. Typically, the involvement occurs in the strike situation. The court has no detailed knowledge of the history of the dispute nor the merits or reasonableness of the respective positions of the parties. Almost inevitably, at that stage, the union appears as the aggressor, the employer as the beleaguered defender of his plant and property. The irrationality of the system, the militancy of the union-aggressor, the predisposition to uphold the sanctity of private property concepts — all these factors conspire against the union and make it very difficult to sway a court with arguments about freedom of speech and peaceful assembly.

It must be said that labour’s analysis of the attitude of the legal and judicial establishment appears to be confirmed by the rhetoric of the Rand Report. There, aspects of the collective bargaining process are variously labelled as “irrational”, “barbaric”, “uninformed”, and “ultimately violent”. The strike is referred to as “an anarchic weapon”. The picket line is denounced in particularly provocative language:

“To non-striking employees, it may be an intimidatory warning; to a replacement, a message of malevolence; to the employer, an expression of detestation.”<sup>3</sup>

The unions claim that this ominous lack of sympathy reflects the court’s attitude. The result has been, as the Task Force observes, “a deepening of a feeling among labour leaders at all levels that there is a bias in favour of management interests in the substantive and procedural law and in the administration of justice”.<sup>4</sup>

2. A less emotional argument advanced by some labour leaders is that under the present system, unions do not have equal access to the courts. Specifically, they argue that injunctive relief is not available to them. A resourceful employer can construct a case for limiting or eliminating picketing, by

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<sup>3</sup> *Royal Commission Inquiry into Labour Disputes* (The Rand Report) 1968, p. 29.

<sup>4</sup> *The Task Force*, *op cit.* p. 132.

injunction, with relative ease. However, the existing statute and common law precludes a trade union from obtaining injunctive relief, even in those instances where employers are guilty of flagrantly illegal practices.

In *re Tilco Plastics Ltd. v. Skurjat, et al.*,<sup>5</sup> the court observed:

"It should also be noted that the use of injunctions is not limited to employers. Unions or individuals have an equal right to avail themselves of the law where employers or others create the necessary grounds. In the past, some unions quite properly have come to the courts for protection."

Is that so? It is a fact that unions, or dissident groups within unions, have, in the past, sought injunctive relief to protect property rights in internal disputes.<sup>6</sup> However, under existing law, unions cannot invoke the equity injunction to protect rights flowing from collective agreements. The 354th Chapter of the Revised Statutes of Ontario, somewhat euphemistically referred to as "The Rights of Labour Act", prevents a collective agreement being made the subject of an action in the courts. Accordingly, attempts to enjoin employers from violating clear collective agreement obligations have failed, without recorded exception: see, for example, *Shank v. The K.V.P. Company Ltd.*,<sup>7</sup> *Cummings v. The Hydro Electric Power Commission of Ontario*.<sup>8</sup> Equally, the courts are without power, under the present system, to enjoin employer infractions of *The Labour Relations Act*. Application may be made to the appropriate Labour Relations Board for consent to prosecute. If a prosecution ensues and the criminal onus can be satisfied, token fines may result which, because of their inadequacy, have no real deterrent effect. It is true that the *Industrial Relations and Disputes Investigation Act*<sup>9</sup> gives certain remedial jurisdiction to provincial courts if consent to prosecute is obtained from the Minister of Labour. Because of the difficulties and inevitable delays in obtaining consent and meeting the criminal onus, this is rarely invoked.

There appears to be substance, then, in the observation that the courts become involved, for the most part, only in those conspicuous situations where management is seeking to have restrictions imposed upon picketing rights. Management's parallel weapon — a lockout — is seldom used, and, when it is, there is rarely occasion for the court's intervention to restrict or limit its impact.

Simply because of the context of the court's involvement, it becomes easier to understand the origin of labour's stereotyped picture of judges as alien agents of obstruction and interference, meting out penalties which, consciously or otherwise, tip the balance in management's favour. On the other hand, the image of the administrative tribunals, in the eyes of labour, is less one-sided. Under the relevant statutes, labour relations boards are given the power to grant positive and meaningful remedies to complainant unions and aggrieved employees. If an employee is discharged for union

<sup>5</sup> (1966) 2 O.R. 547.

<sup>6</sup> *Re The International Nickel Company of Canada Limited; Shedden v. Kopinak* (1949) O.R. 765.

<sup>7</sup> (1966) 2 O.R. 847.

<sup>8</sup> (1966) 1 O.R. 685.

<sup>9</sup> R.S.C., 1952, C.152, S. 40 (2).

activity, the *Ontario Labour Relations Board* may reinstate him with full compensation.<sup>10</sup> If an employer is engaging in unfair bargaining practices, the board may order it to cease and desist. Moreover, these are not remedies which are rarely invoked or sparingly granted. An examination of the reports of the Ontario Labour Relations Board proceedings will indicate the nature and extent of the positive and continuous role played by the Board in regulating unfair practices.

Partly because of the scheme of the enabling statutes and partly, it must be said, because of the conscientious and even-handed administration of those statutes, the various provincial boards have gained general acceptance by both management and labour. This requirement of acceptability is one of the strongest grounds in support of the Task Force's recommendation to utilize an existing tribunal and confer upon it powers now exercised by the courts. More than in any other field, perhaps, acceptability is an essential prerequisite to the successful administration of labour relations.

3. Trade unionists point as well to what appears to them to be a bewildering lack of consistency in the jurisprudence defining the nature and extent of permissible picketing. Anyone practicing in the labour field must recognize the difficulty in advising a client, whether union or management, whether peaceful, mass picketing may be enjoined. The judicial ambivalence towards mass picketing is illustrated in several recent Ontario decisions. The prevailing view (at least until the *SCM (Canada) Limited v. Motley* case<sup>11</sup>) appeared to be that mass-picketing *per se* was intimidatory, and hence enjoined, the courts having tended to regard intimidation, coercion and violence as necessary concomitants of mass picketing. That view is echoed in the Rand Report, which speaks of "illegal action" as the "inevitable consequence" of mass picketing.<sup>12</sup> Some relaxation of this rigid view was indicated in the *SCM* case, where the court held that, absent evidence of obstruction, intimidation or interference with the delivery of goods or the entry of suppliers and customers, there is no justification for limiting the number of pickets. The same reason was apparently applied in the *Canadian H. W. Gossard v. Tripp* case<sup>13</sup> but a return to the earlier view that mere numbers may be objectionable is suggested in *Hanes of Canada Limited v. McConnell*.<sup>14</sup> There, a limitation on picketing was imposed on days when large numbers of employees congregated to receive their pay cheques at a trailer adjacent to the struck premises. The limitation was justified by the court to avoid the "atmosphere of intimidation" which was found to arise from the mere congregation of pickets.

Aside altogether from the merits of the mass-picketing argument, this lack of consistency has increased labour's scepticism about the role of the courts. Hopefully, a more uniform jurisprudence would emerge if jurisdiction were transferred to a specialist tribunal.

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<sup>10</sup> Ontario Labour Relations Act, R.S.O. 1960, C. 202, as amended, S. 65.

<sup>11</sup> (1967) 2 O.R. 323.

<sup>12</sup> *The Rand Report*, *op. cit.*, p. 32.

<sup>13</sup> (1968) 1 O.R. 230.

<sup>14</sup> 70 C.L.L.C. para. 14005.

4. Some trade unionists argue that the courts have failed to recognize the legitimate aims of picketing and have tended to enjoin picketing activities which go beyond the mere communication of information. One of the legitimate objectives of the picket line, they argue, is to persuade potential replacements, customers and others, from patronizing the struck employer. They contend, somewhat cynically perhaps, that a picket line is condemned by its own success, and that if it is shown to hamper the employer in his operation, it will be restricted or eliminated. In the *Tilco* case, Chief Justice Gale alluded to a misconception held by certain leaders and members of trade unions concerning the respective privileges of employers and employees. "Employees," he observed, "have the right to strike, but, by the same token, employers have the right to continue their operations and to protect their property."<sup>15</sup> Some trade unionists argue that this passage discloses a lack of appreciation of the process. It is misleading, they argue, to speak of a *right* in the employer to continue his operation during a strike; more accurately, it is a question of the employer's *ability* to continue in the face of permissible union sanctions and economic pressures. This important distinction is recognized in the Task Force Report:

"The employer's power reciprocal to the strike is his *ability* to continue his operations. It is in the employee's interest, therefore, to seek to countervail against this reciprocal power by persuading persons not to take employment or to do business with the employer or handle, deal with or consume the employer's product."<sup>16</sup>

Many trade unionists feel that the labour relations boards would be more inclined than the courts to accept the adversary context in which the strike occurs, and to give freer rein to its legitimate and intended impact.

5. Trade unionists claim that there is a tendency in the courts to assume that a picket line leads inevitably to violence. Support for this impression of the judicial attitude is found in the Rand Report:

"Sooner or later pent up emotions erupt leaving in their wake a trail of injury and damage."<sup>17</sup>

Elsewhere, the Report refers to the strike as an "environmental inconvenience" and analogies are drawn between the Canadian labour scene and violence and lawlessness in France (contemporary at the time the Report was written) and in the cities of the United States. Trade unionists ask for justification for those extravagant and provocative analogies, claiming that the Report fails to offer evidence to support them. They say that there is a failure in the courts, in the Rand Report, and, indeed, in the Task Force Report<sup>18</sup> to recognize that the vast majority of strikes are carried on without violence. When violence does occur there is no evidence that it cannot be contained and controlled within the provisions of the Criminal Code.

Will the Task Force's recommendations remove the effective control over picketing from the courts? The answer, it seems to me, is clearly "no". As I understand the recommendations, the "how" of picketing is to remain with

<sup>15</sup> *op. cit.* footnote (5) at p. 578.

<sup>16</sup> *The Task Force, op. cit.* para. 611, p. 177.

<sup>17</sup> *The Rand Report, op. cit.* p. 31.

<sup>18</sup> *The Task Force, op. cit.* para. 425, p. 133.

the courts, with the substantive law unchanged. All of the existing torts will remain: assault, battery, defamation, trespass and nuisance. On the other hand, the so-called "industrial torts" (those torts arising from the "why", "where" and "when" of picketing): conspiracy, inducing breach of contract, interference with favourable trade relations, and intimidation will be codified, with the common law repealed in respect of those situations where the new code applies.<sup>19</sup>

The Report's recommendation on the content of the new codification is, in some areas at least, vague. As to conspiracy (related to the "why" of picketing), the Report suggests that "its legitimacy be determined through the examination of legislative policy" and recommends that "picketing that runs contrary to the policies of collective bargaining legislation" be forbidden.<sup>20</sup> Concerning the "when" of picketing, the Report would merely confirm what appears to be the present state of common law: picketing would be restricted to those situations where the right to strike has been acquired, and organization and recognition picketing would be outlawed. Substantial changes are recommended in the "where" of picketing, which would legitimize secondary picketing in certain carefully defined situations. Only the "why", "where" and "when" of picketing would go to the reconstituted Canada Labour Relations Board, with the "how" remaining with the courts.

What is the effect of all this? First, it would be entirely illusory to expect that the courts would cease to play the major role in controlling picketing under the Task Force proposals. In practice, the preponderance of applications which seek to restrict picketing are based upon alleged commission of common law torts: nuisance, assault, etc. Under the Task Force's proposal, these applications would still come before the courts. The consistent refusal of our courts to countenance organization, recognition and secondary picketing has meant that cases involving that type of picketing have decreased in number and importance. Under the division of jurisdiction proposed, it is probable that the Canada Board, initially at least, would be active in administering the new codification related to secondary picketing. Surely, however, the important picketing disputes — *Tilco Plastics*, *Oshawa Times* and cases of that sort — would still be determined by the courts. How does this square with the Report's earlier observation that the courts are, at best, in an awkward and uncomfortable position, and at times, perhaps, an impossible one, in exercising control and responsibility over this area of industrial relations? How is the "acceptability" problem solved when the contentious cases remain in the courts?

Less important, but no less real, are potential problems of divided jurisdiction. Suppose, for example, that an employer wishes to move to enjoin picketing on alternate grounds, some falling within the jurisdiction of the courts (say, for example, allegations of assault and nuisance) and some within the jurisdiction of the Canada Board (relating, say, to the situs of the

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<sup>19</sup> *Ibid*, paras. 623-630 pp. 180-182.

<sup>20</sup> *Ibid*, para. 623 p. 180.

picketing or its timing). Would multiple proceedings be necessary? If so, there would be cumbersome problems of timing, as well as duplication of evidence and argument.

Is there any insuperable problem in conferring on a reconstituted Canada Labour Relations Board the control over *all* aspects of picketing? It is perhaps ironic — in view of the vigorous trade union opposition which the Report has provoked—that the Rand Report expresses a desire to remove the issuance of all injunctions in labour relations from the courts and to place that power wholly within the jurisdiction of the Industrial Tribunal which it proposes.<sup>21</sup> It is recognized that there may be a constitutional question as to the province's jurisdiction to clothe such an administrative tribunal with strictly injunctive powers. However, the same problem would not appear to be involved in implementing the Task Force's recommendations, limited as they are to labour relations within the Federal sphere.

If the Bill recently introduced into the Ontario Legislature<sup>22</sup> is any indication, there is no immediate prospect in Ontario that either Wood's or Rand's recommendations concerning the restriction or elimination of the court's role in picketing matters will be followed. When questioned why the Bill was silent on the subject, the Minister of Labour is reported in the press to have observed that the control of picket-line activity is something within the jurisdiction of courts of criminal jurisdiction. That comment, if accurately reported, ignores 25 years of jurisprudence concerning the use of the equity injunction in labour disputes. It is hoped that Parliament will react more creatively, and that the control over all picketing within the Federal sphere will be passed to an acceptable specialist tribunal.

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<sup>21</sup> *The Rand Report*, *op. cit.* p. 81.

<sup>22</sup> Bill 167, *An Act to amend the Labour Relations Act*, 3rd Session, 28th Legislature, Ontario. (1st Reading June 22, 1970).

