Legitimacy in Labour Relations: The Courts, the British Columbia Labour Board and Secondary Picketing

J. A. Manwaring
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By J.A. Manwaring*

I. INTRODUCTION

The scholarly literature on sympathetic strike actions offers a microcosmic recapitulation of most of the major themes of the ideology of labour relations in Canada: the bias of the courts against unions, the institutional incompetency of the courts and the relatively greater legitimacy1 of labour relations boards in regulating industrial conflict. Most of the literature is highly critical of the record of the common law courts. They are portrayed as prejudiced against unions, ignorant of labour relations reality and just plain incompetent.2 On the other hand, the labour relations boards are portrayed as objective tribunals steeped in an awareness of the realities of labour relations and capable of flexible, imaginative problem-solving in this difficult and often tumultuous area of social relations. Indeed the legitimacy of our labour relations system has been established largely through a critique of the performance of the common law courts.

The objective of this article is to examine critically the argument advanced by many observers and scholars that labour relations boards would develop a jurisprudence substantively different from that evolved by the common law courts. In the past it has been impossible to test this argument because the courts and the labour boards had adjoining, but distinct, jurisdictions in the field of labour relations. The labour boards administered the certification procedures, ensured that there were no unfair labour practices and determined whether or not the union had the support of the majority of the persons in the proposed bargaining unit. The courts, on the other hand, regulated the exercise of the right to strike through the use of tort and criminal

1 Legitimacy is used here in the sense of the claim of a political order, of which the judicial system is a subcategory, to be right and just. If the citizens of a political order are to accept and comply with the decisions of its judges they must believe that those decisions are just, especially when the decision goes against their interests. The adage "Justice must not only be done, it must appear to be done" captures some of what is meant by the legitimacy of a decision. A strategy of legitimation is the means by which a political order convinces its citizens that laws and decisions are just and must be obeyed. For a more detailed discussion of this concept which is used extensively in sociology, see Habermas, Legitimation Crisis (Boston: Beacon Press, 1975) and Habermas, Communication and the Evolution of Society (Boston: Beacon Press, 1979) at 178-205.

2 This literature will be discussed below in detail; see Part II, infra section III.
law and the injunction. They came the closest to deciding the same issues when the courts, as superior tribunals, exercised their powers of judicial review.

Until recently, the various legislatures seemed to be content with the division of power. Unlike the scholars, the legislators, who establish labour relations policy in this country, were not troubled by the fact that the ideological presuppositions of the various forums were quite different. With the evolution of our labour relations system, however, the distinctions in jurisdiction have become obscured. Labour relations legislation has been amended to increase the powers of the labour boards. The result has been the development of competing bodies of case law regulating the same labour relations subject matter.

This has been the case in the field of secondary union activity since 1973. In that year British Columbia adopted its new Labour Code giving its labour relations board explicit authority to regulate secondary union activity. In the last seven years that board, under the guidance of Paul Weiler and his successor, Don Munroe, has developed a body of decisions interpreting the relevant sections of the Labour Code. This jurisprudence can now be compared to the common law rules applied elsewhere in Canada in order to test the claim that substantive rights will differ when sole jurisdiction in labour relations is given to the labour relations board.

This comparison, in itself, does not resolve the issues of institutional bias and competency; rather it seeks to situate the debate about institutional bias in a more realistic context. The choice between the judicial system and an administrative tribunal was, for unionists, a choice based on their perceptions of the biases of the courts. The legislators were more pragmatic in making their decision. They did not necessarily seek a change in the substance of labour policy. They sought a more efficient means of regulating industrial conflict which would also be acceptable to the union movement. From that point of view the choice of an administrative tribunal could, and did, make a great difference. The issue of administrative efficiency, however, is not the same as that of substantive rights, and the confusion of these two issues has created many illusions about the nature of the change accomplished by labour legislation.

II. THE SECONDARY BOYCOTT: A BRIEF DEFINITION

Before proceeding, it is necessary to establish a preliminary definition of the term "secondary boycott" since that form of strike-related activity is the focus of the study which follows.

The secondary strike or boycott is an important weapon in the tactical arsenal of unions in strike situations. It is designed to increase the economic pressure on the strikebound employer to settle rapidly on terms favourable

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3 S.B.C. 1973 (2d sess.), c. 122.
to the union. Typically, it takes the form of a picket line at the plant or offices of another employer, usually a client or supplier of the principal employer.

The form of economic pressure can vary. A picket line may convince the third party’s employees not to report for work. It may result in a disruption of deliveries to the third party. The picketing or other form of pressure may be directed towards consumers, the objective being to convince them to shop elsewhere, or at least to not buy certain products. These variations do not normally change the character of the picketing in which the union is involved.

The most important variable in the secondary strike situation is the role of the third party. That role can vary from total neutrality or non-involvement in the primary strike, to direct implication. The third party may be affected solely because it has rented space in the same building as the struck employer. This is sometimes known as the “common situs” problem. Involvement grows with awareness that the third party has a direct economic interest in the outcome of the strike, or has voluntarily become involved in helping the struck employer to resist the strike through financial assistance or the performance of struck work. Involvement can reach such a point that the third party becomes, in effect, the struck employer. In some cases, the third party is a part of the struck employer’s operation or, at least, part of the same corporate structure. At this end of the continuum, the third party is sometimes said to have become the “ally” of the primary employer.

The picketing of the third party by the union exerts economic pressure on that party because employees, truckers, and consumers decide to respect the picketline or are persuaded by the pamphlets and pleas of the strikers to boycott or embargo the third party’s goods. The disruption of supplies, production and sales often imposes significant losses on the third party.

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4 One well-known definition of secondary boycott is as follows: By secondary action I mean the exertion of economic pressure either through picketing or some other medium, on an employer or other person, to induce him in turn to use his influence, usually of an economic kind (for instance, the maintenance, or severance of trade relationships, contractual or otherwise), on an employer with whom the union is engaged in a labour dispute. Carrothers, *Secondary Picketing* (1962), 40 Can. B. Rev. 57.

5 The way in which economic pressure is organized can, of course, affect the legal status of the secondary action. A consumer boycott organized through newspaper ads may well be permissible: *Hersees, infra*, note 7. See *Alberta Labour Act*, S.A. 1973, c. 33, s. 134; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 104; *The Labour Relations Act*, S.N. 1977, c. 64, s. 124.

III. THE ROLE OF BIAS IN LABOUR RELATIONS IDEOLOGY

In a long line of cases the common law courts restricted the range of potential strike weapons available to the union through the development of such tort doctrines as inducing breach of contract and civil conspiracy. These causes of action justified, in the eyes of the courts, the granting of injunctions and the awarding of damages. In developing the tort doctrines of inducing breach of contract and civil conspiracy, the courts set as their principal task, the protection of the procedures for exchange in a capitalist economy. The right to trade and the certainty of contractual obligations are legal notions central to the functioning of an economic system based on private ordering by individuals.

This concern to protect the integrity of the market reflects the influence of the common law in Benthamite utilitarianism and Ricardian economics. The ideology of market or laissez-faire economics permeates all of the decisions of the English courts regarding the regulation of economic activity and unionism. The role of the courts was to ensure that the right to trade was defended so that contracts could be freely entered into and that, once entered, the contracts would be respected.

There is little scope for unionism within this paradigm of the market. Unions are monopolistic associations designed to increase the bargaining power of employees through the curtailment or elimination of competition within the labour market or a sector of it. As such, unions are by definition intruders in the free market seeking to fetter the contractual liberty of workers and employers. Operating within the mindset of liberal ideology, the judiciary could find no "profit" from unionism that could offset its costs.

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9 For an excellent study of liberal ideology see: Unger, Law in Modern Society: Toward a Criticism of Social Theory (N.Y. Free Press, 1976); Atiyah, id.

10 E.g. see: Rees, The Effects of Unions on Resource Allocation (1963), J. Law & Econ. 69, esp. at 77, where he states:
Since the allocation of resources by perfectly competitive markets is known to be optimal, by this standard the impact of the union is necessarily adverse....
If the entire impact of unions on our society could be subsumed under the
The evolution of the tort doctrines of inducing breach of contract and civil conspiracy culminated in the *per se* prohibition of secondary picketing by the courts. Commentators are virtually unanimous in condemning the courts' efforts to regulate strike activity.

The reasons for this hostility vary. One branch of criticism focuses on the lack of impartiality of the courts.

[The notion that there exists a right to trade has coloured the whole interpretation of the legal principles relating to trade unions and has often beguiled the courts into resting judgments on vague generalizations relating to freedom of trade and individual liberty, rather than on the relevant legal principles. In fact, anyone reading the voluminous judgments relating to trade union activities cannot but feel that the approach of the courts has been instinctive (the act complained of is abhorrent to their economic, social and political predilections: such conduct must be circumvented) rather than properly judicial and impartial.]

Stated differently:

The modern tort of conspiracy stands condemned, almost universally, as the vehicle of judicial anti-unionism. Authors throughout the common-law world have denounced it as a "weapon... wielded with transparent partisanship to counter the aspirations of the trade union movement".

Another argument is that the jurisprudence has been so poorly reasoned that it is incoherent. More recent developments of the jurisprudence governing secondary boycotts have been characterized as "sporadic, often inconsistent and incomplete, and on all occasions without any unifying rationale to support it." Indeed, the reasoning may be incoherent because it is premised on bias rather than legal principle.

The foregoing analysis of the Canadian cases has been calculated to demonstrate two qualities: first, that there is a fundamental judicial indisposition to secondary picketing, and second, that the characterization on the basis of common-law principles as they stand at present presents a colourful confusion of fact, inference, assumption, law and policy that would be kaleidoscopic in quality had it the saving grace of internal order.

Why are the courts unable to deal impartially and coherently with unions? Judges, it is said, do not understand the realities of contemporary society. They adhere to "turn-of-the-century philosophy of laissez-faire economics..." and tend to regard *laissez-faire* as a legal rule rather than a political maxim... "If Canadian judges cannot be accused of bias (con-
scious or otherwise) in imposing liability for strikes at least they are often
guilty of uncritical adherence to standards of a bygone age.”

It seems, the argument continues, that the problem arises because judges have the wrong
bias. They favour the right to trade and individual liberty, rather than the as-
pirations of the trade union movement. They should recognize that com-
petitive capitalism has been replaced by an economy controlled by large corpora-
tions. In this context, workers need bargaining power, and for that they need
collective organization. The courts should recognize the need for unions.

Thus, the argument which began with a criticism of judicial bias against
unions has been refined by succeeding commentators into an argument that
impartiality is impossible. The courts should promote unions because they
are socially desirable. This refinement of the critique of the judicial approach
to union cases entails the rejection of some of the fundamental tenets upon
which the legitimacy of our judicial system has been built. After all, according
to the orthodox “declaratory theory of law” judges do not make law. They
simply apply existing law to new situations through a process of mechanical
reasoning in which the personal values, prejudices and notions of correct
social policy have no role. Since the proper forum for law making is the legis-
lature, any rule that no longer corresponds to contemporary reality must be
changed by the legislature and until the policy makers speak, the courts must
apply the existing law. Judicial decisions are therefore legitimate because the
proper forum for change is the political arena.

Most of the critics, however, have approached the issue differently. They reject this formalist conception of the role of the courts that limits the
courts to a purely passive adjudicative function. Judges do make law
whether or not they admit it. There may be a central core of cases in which
the reasoning is mechanistic because no question of law is raised. The differ-

18 Id.

19 See also: Laskin, *Picketing: A Comparison of Certain Canadian and American
Doctrines* (1937), 15 Can. B. Rev. 10; Wright, *The English Law of Torts: A Criticism*
(1955), 11 U.T.L.J. 84; Carrothers, *Recent Developments in the Tort Law of Picketing*
(1947), 35 Can. B. Rev. 1005; Palmer, *The Short Unhappy Life of the “Aristocratic”
Doctrine* (1959-60), 13 U.T.L.J. 166; Christie, supra note 3; Paterson, *Union Secondary
Conduct: A Comparative Study of the American and Ontario Positions* (1973), 8
U.B.C. L. Rev. 77.

20 For a more thorough discussion see: Kennedy, *Legal Formality* (1973), 2
Journal of Legal Studies 351; Stevens, *Law and Politics: The House of Lords as a

21 The most articulate account of this critique by a Canadian scholar is found in
is further elaborated in his book *In the Last Resort* (Toronto: Carswell, 1974) esp. ch.
2. A recent addition to the Canadian literature is Tacon, *supra* note 7. See also Ack-

Although it is never stated explicitly by the Canadian commentators, this critique
of the common law courts is heavily influenced by the realist movement in the U.S.
which developed in response to the U.S. Supreme Court decisions striking down New
Deal legislation including labour legislation. See generally, Klare, *Judicial Deradicaliza-
tion of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*
ent cases, however, require a policy choice of which doctrines to apply to a novel situation. By definition, the result is judicial legislation because no previous rule could perfectly apply:

[The Court cannot really remain neutral—for it cannot decide not to decide. The common law of torts includes a set of doctrines—purportedly of general application but as a practical matter confined to, and developed almost solely within, the labour context—which can be utilized, especially by management, in limiting the economic and tactical leverage of its opponent...the doctrines are verbally expressed at a very high level of abstraction which leaves ample room for judicial elaboration of the law, in the light of the judges’ personal attitudes towards the parties in conflict.]

Judges, the critics maintain, may indeed use highly technical modes of reasoning in reaching a particular result, but their eventual decision is determined by their policy orientation which, in the area of labour law, is anti-union. If this view is accepted it is impossible to accept an explication of the development of the common law premised on judicial neutrality.

The argument offered by the commentators, then goes through a further refinement. Judges may, indeed, not be biased against unions at all. Certainly, attitudes vary among the judges, but contemporary judges no longer manifest the once all-pervasive and virulent opposition to unions. Even if this is true, the change comes too late. Unions regard the courts as class-biased and, whether or not the charge is true, the courts can no longer effectively regulate industrial relations:

Perhaps a more important deficiency of judicial policy-making in the field of labour law is the lack of legitimacy it inevitably exhibits. The nineteenth century and early twentieth century judges had strongly favoured employers in their bid to stem the development of union power and had gradually and grudgingly moved to a stance of non-intervention when unions rode other social forces to a position of strength.

A further problem involves the nature of the adversarial process which is ill-suited to discovering and resolving underlying causes of industrial conflict. It is designed to choose a winner rather than to encourage compromise and accommodation. The courts do not have a corpus of jurisprudence or a past history of involvement in industrial relations that would furnish the expertise necessary to facilitate the innovative problem-solving required in the sphere of labour disputes. Finally the majority of cases require more expeditious and less expensive procedures for conflict resolution.

The solution according to these observers is to replace the courts as the forum for the regulation of strike activity and to place the adjudication of labour disputes in the hands of specialized bodies. A regulatory body made

22 Weiler, The ‘Slippery Slope’ of Judicial Intervention, id. at 35.
23 Id. at 10-11.
24 Id. at 3-4.
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up of persons experienced in the labour relations field will understand con-
temporary reality and recognize the validity of the aspirations of the trade
union movement. It will thereby permit the evolution of a body of juris-
prudence which is rational, coherent and fundamentally different from that
evolved from the common law courts.

The critique of the common law courts represents one of the principal
rationales of the Canadian labour relations system.26 The bias in favour of the
right to trade or the employer class, which has led the courts to impose so
many restrictions on the scope of legitimate strike activity, should disappear
because the boards, aware of industrial relations realities, would develop a
jurisprudence in tune with the new social conditions.

An examination of the jurisprudence developed by the courts and by the
labour boards in Canada refutes this assertion. In fact, the courts and legis-
latures share a common set of assumptions about the role of unions in society.
This makes the statutes a logical outgrowth from, rather than a radical re-
form of, the situation which existed in Canada prior to the second world war.
Statutory reform of the common law may have been an effective way of deal-
ing with union perceptions that the courts were biased. It may have provided
procedures of dispute resolution accepted by unionists as legitimate and there-
fore worthy of respect. From the standpoint of the practical problem of ad-
ministering industrial relations, the statutory mechanisms may be more so-
phisticated, subtle and systematic. They certainly facilitate the administration
of the large number of routine certification cases. Nonetheless, the legislation
embodies essentially the same policy objectives which existed in the realm of
industrial relations prior to the creation of the elaborate regulatory mechan-
isms. That policy is the control and limitation of union power, or, in indus-
trial relations' parlance, the promotion of industrial peace. Unions must be
restrained from attempting to assert their economic and political power at the
expense of "society as a whole" or "the public interest." "Society as a whole,"
according to the courts or the labour boards, benefits from maximization of
production. Production requires investment. In a capitalist economy, the
incentive to invest is the guarantee of reasonable profits. Unions operate as a
disincentive to investment when they threaten to disrupt production through
strikes. They create uncertainty about the profitability of long-term investment
and reduce the profitability of enterprise through their demands for higher
wages and increased benefits. This analysis leads inexorably to the conclusion
that union activity must be restrained in the interests of "society as a whole." The
courts enforce policy through repressive mechanisms such as the injunc-
tion, which expose those who defy the court order to the risk of fine and im-
prisonment, and by imposing liability for damages caused by interference with

26The other important strand in the labour relations ideology is that of industrial
democracy: "...collective bargaining is today...the means of establishing industrial
democracy as the essential condition of political democracy, the means of providing for
the workers' lives in industry the sense of worth, of freedom and of participation that
democratic government promises them as citizens...." Shulman, Reason, Contract and
Law In Labour Relations, (1955), 68 Harv. L.R. 999 at 1002. See also, Selznick, Law
Society and Industrial Justice, (Russell Sage Foundation, 1969). A complete critique of
labour relations ideology would require a discussion of this aspect as well.
contractual rights. The legislatures adopted a more sophisticated regulatory approach. The fundamental policy remains the same: confining the effects of worker organization to forms which can be handled within the context of the existing economic system. As a result secondary picketing remains prohibited in all Canadian jurisdictions.

IV. THE COURTS AND THE SECONDARY BOYCOTT

For a short while after the enactment of labour legislation, it appeared that there was to be a substantial revision of the judicial analysis of unions. The preoccupations with the right to trade and with the certainty of contractual obligations would be set aside in favour of a new realism in the face of evolving social conditions. In Williams v. Aristocratic Restaurants (1947) Ltd.,27 a case involving secondary picketing in front of non-unionized restaurants not included in the bargaining unit for which the union was certified, a majority of the Supreme Court of Canada held that the right to picket was an aspect of freedom of speech. As such, it could not be per se illegal, but required some additional illegal activity to expose the union to criminal and civil sanctions. Thus, the union could picket in order to communicate information regardless of the effect of the information communicated.

This new-found deference towards the right of free speech did not survive long. In subsequent cases, the lower courts continually limited the exercise of the right to picket. The right to trade gradually regained its former pre-eminence28 and, at the same time, there was a re-evaluation of the picket line as a means of communicating information. In the eyes of the judges, the power of unions in the community and the ethos of union solidarity meant that picketing was no longer limited to the mere communication of information. With the growth of solidarity the union would know, and hence intend, that other employees would necessarily refuse to cross such picket lines in breach of their employment contracts.29 In turn, their refusal would necessarily force their employer to breach the contract it had with the picketed business.30


29 There is an obvious parallel between this reasoning and that adopted by the Supreme Court of Canada in International Longshoremen’s Ass’n v. Maritime Employers Ass’n, [1979] 1 S.C.R. 120, 89 D.L.R. (2d) 289, 23 N.B.R. (2d) 458.

This trend culminated in the decision of the Ontario Court of Appeal in 
*Herses of Woodstock v. Goldstein*31 in which it was decided that secondary 
picketing was *per se* illegal regardless of the merits of the union's cause. This 
case reaffirmed the primacy of the right to trade over the right to picket. The 
traditional justifications for this position were all invoked. Innocent third 
parties have a right to carry on their commerce without the interference of out-
siders who have no interest in the contracts of the third party with its sup-
pliers or clients. It was this decision that provoked much of the criticism of 
the courts outlined in the first part of this article. The *per se* prohibition, it 
is argued, epitomizes the bias of the courts in their fidelity to out-dated con-
ceptions of the market. It shows their inability to comprehend the complex 
realities of industrial relations. It demonstrates their incompetence, depriving 
their decisions of any legitimacy in the eyes of unionists.

The *Herses* decision marked the high point of this traditional common 
law approach to unions. Since that decision the courts have been forced to 
reassess this approach to decision-making because its lack of legitimacy has 
become too glaring especially given the wave of criticism. There has been a 
major shift in the jurisprudence away from the traditional preoccupation with 
the market and the right to trade. The result has been a change in the strategy 
of legitimation in cases involving secondary union activity.

Since the *Herses* case, secondary strike activity has remained prohibited 
in all jurisdictions. The prohibition has either been perpetuated by the courts32 
or embodied in the labour legislation.33 The rule, however, has been refined 
and its harshness mitigated since that stark statement by the Ontario Court 
of Appeal. The common law courts have taken cognizance of modern social 
conditions by defining the concept of “secondary employer” in light of the 
complex interconnections of corporate structure and economic activity in a 
late-capitalist economy. The codification of the rules governing picketing in 
the *British Columbia Labour Code*34 accomplished exactly the same task al-

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31 Supra note 11. For an excellent critique of this decision see Arthurs, Comment (1968), 41 C.B.R. 573.
33 See Alberta Labour Act, S.A. 1973, c. 633, s. 134; Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 104; The Labour Relations Act, S.N. 1977, c. 64, s. 124.
34 R.S.B.C. 1970, c. 212, Part V.
beit by another route. None of the common law or statutory developments overruled the per se illegality rule enunciated in the Hersees case. But these modifications have served to legitimate decision-making in this area and they reflect the impact of the criticism of Hersees and preceding judgments.

A. The Evolution of the Per Se Illegality Rule in Ontario

The post-Hersees development of the law concerning secondary strike activity in Ontario can be divided into two periods. The first tentative steps towards a definition of secondary strike activity were taken by the judges between 1963 and 1969. The second stage in the evolution of the law was initiated by the amendment and subsequent replacement of section 17 of the Ontario Judicature Act by what is now section 20 of the same statute. The amendment of the statutory procedures for the obtaining of an injunction was designed to restrict the availability of the injunction in cases involving labour disputes. It had an important impact on the development of the law.

1. Judicial Interpretation of the Per Se Illegality Rule

Four cases prior to the amendment of the Judicature Act indicated a new approach to picketing. In these cases the courts demonstrated a willingness to delve into the substance of the relationship of the primary employer and the third party to determine whether the third party was not in reality part of the total economic strength of the primary employer or whether the third party had allied itself to the struck employer in such a way as to interfere with the outcome of the legal strike. The courts refused to grant injunctions unless the applicant could show that no struck work was being performed at the worksite and that the applicant was truly secondary.

In Tenen Investments Ltd. v. Wueller the application by the third party for an injunction to restrain picketing at the site of a construction project was rejected. The plaintiff company, the general contractor for the project, terminated its contract with the primary employer shortly after the latter's employees went on strike. There was a clause in the contract permitting termination if there was a delay of more than fifteen days owing to a labour dispute. The applicant engaged a new sub-contractor to complete the struck work. The replacement company was owned by the same corporate parent as the struck employer and shared corporate officers. The court said that, in these circumstances, it would not use the injunctive remedy to take away the final weapon available to employees in their effort to get fair treatment from their employer. The fact that the struck sub-contractor was no longer present on the construction site changed nothing. The performance of struck work and the

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35 This was precisely the strategy of legitimation suggested by some of the observers: See Beatty, supra note 14.
36 R.S.O. 1960, c. 197 as am.
37 R.S.O. 1980, c. 223.
corporate linkages transformed formally secondary strike activity into a necessary aspect of the primary strike.

The *Lescar Construction* case again involved a sub-contractor whose employees were engaged in a legal strike and peaceful picketing. The plaintiff contractor sought an injunction to restrain the picketing when the struck employer was replaced by a new sub-contractor. It argued that this was secondary picketing and, thus, *per se* enjoinable on the basis of the *Hersees* case. The injunction was refused. The court held that, in these circumstances, it was necessary to determine if the construction site was the place of business of the struck employer. If it was, picketing was not the kind prohibited in the *Hersees* case and subsequent decisions. In this instance the company doing the struck work belonged to the same person as the struck employer. To grant the injunction would permit the struck employer, by a legal subterfuge, to undermine the legal right to strike. This would be an abuse of a discretionary remedy.

The next two cases appear to have been decided after the amendments to the *Judicature Act* but make no mention of the amended section. In *Refrigeration Supplies Co. v. Ellis* the court refused to grant an injunction. The plaintiff company and the struck employer both belonged to the same corporate parent in the United States. The plaintiff normally provided warehousing services to the struck employer. After the employees began a legal strike, the employer moved some of its office employees to the premises of the plaintiff company where they carried on the business of the primary employer. The plaintiff company argued that this was prohibited secondary picketing, but the court rejected this argument. The struck employer was carrying on business on the premises, hence, the striking employees were engaged in permissible primary picketing.

Finally, the Supreme Court of Ontario refused an interlocutory injunction where the plaintiff company terminated the contract of a sub-contractor whose employees were on a legal strike and had its own employees do the struck work. The court agreed that secondary picketing was illegal but held that this was not such activity. The picketing, when it began, was primary and the plaintiff could not turn otherwise legal picketing into prohibited secondary strike activity simply by assigning its own employees to perform the work of the strikers.

The judicial analysis in these cases is hesitant and unclear. The judges do not explain whether it is the corporate interconnection, the performance of struck work or the fact that the *situs* of the picketing is the place of business of the struck employer which shifts the balance in favour of the union. No coherent analytical pattern emerges. However, each of the key factors in the analysis of secondary picketing is present, and it is clear the judges are

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42 R.S.O. 1980, c. 223.
searching for criteria which permit them to distinguish between secondary picketing and what is in substance primary picketing.

2. The Impact of Section 20 of the Ontario Judicature Act

The use of the injunction in labour disputes has been the source of much criticism and controversy. The injunction was developed by the Court of Equity to protect property rights in instances in which a suit in damages would provide no adequate remedy. It became very popular as a remedy in labour cases. The major criticism is that since very few cases ever come to trial to determine the issues of fact and law after the injunction is granted, the issuing of the injunction in effect decides the case. If an injunction is granted, the union is deprived of its only effective weapon against the employer and is forced to settle the dispute. The nature of the remedy makes it extremely easy for the employer to obtain an injunction. The rights of two disputants, especially in applications for ex parte injunctions, are decided on the basis of affidavit evidence, which is not open to cross-examination either because the union has no notice of the proceedings or because the deponent of the affidavit is not in court. This encourages exaggeration and distortion. The lack of an adversarial process in the hurried proceedings increases the likelihood of judicial error. Furthermore, the losses of the employer are or appear to be large, difficult to assess in money and likely irreparable. In the balancing of competing interests they will virtually always outweigh the damage which the union would suffer if the employer's cause of action should prove groundless.

Concerned that the legitimacy of the courts was being undermined in the eyes of unionists, who perceived the courts as strike-breakers, some legislatures moved to restrict the availability of the injunction. In Ontario, the result was section 20 of the Judicature Act. These amendments were not intended to alter the rule regarding secondary strike activity. All other remedies including actions in tort for inducing breach of contract, remain available. However, given the demonstrated preference of employers not to proceed to trial, the altering of the rules governing availability of the injunction has had an important impact.


48 R.S.O. 1980, c. 223.

49 Not everyone agrees with this assessment; see Brown, Picketing: Canadian Courts and the Labour Relations Board of British Columbia (1981), 31 U.T.L.J. 153. I think the dismissal of s. 20 is premised on the assumed incompetence of the courts. S. 20 does not eliminate all problems but it certainly provides additional legal levers which can be used to extend the scope of permissible picketing.
Section 20(1) redefined a labour dispute as:
A dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

Subject to limited exceptions in section 20(1), the section prohibits the issuing of ex parte injunctions to restrain any act in connection with a labour dispute. Both parties have to be present at the hearing.

The section then prescribes certain procedures which must be followed before an injunction will issue. Section 20(3) requires that the applicant for the injunction make reasonable efforts to obtain police assistance to prevent any damage to property, injury to persons, obstruction of lawful entry to, or exit from the premises or breaches of the peace. Such efforts must be unsuccessful before an injunction can issue. Even the illegality of the strike in question will not necessarily justify the issuing of the injunction. In addition, it must be demonstrated that police assistance has proved unable to protect the property and persons of the employer, non-union employees and third parties. Where illegal acts are causing irreparable harm which police are powerless to prevent, the injunction will issue. In such a case, the courts are required to do the same balancing of interests and of costs and benefits as they have traditionally done in labour injunction cases.

The crux of section 20, in the context of secondary strike activity, is the issue of the existence of a labour dispute and the connection of the acts sought to be enjoined to that labour dispute. The definition of labour dispute in section 20 clearly extends the ambit of the application of the section beyond the confines of the primary bargaining unit, but it is not clear how far it will extend to protect secondary strike activity.

Where there is no labour dispute, it has been held that secondary picketing remains per se illegal. In J.S. Ellis and Co. v. Willis an injunction was granted when the Seafarers International Union picketed foreign ships operat-
ing in Canadian waters in order to bring pressure on the Canadian government to amend the Canada Shipping Act. Longshoremen refused to cross the picket line to unload the ship of the plaintiff company. The court decided that there was clearly no labour dispute involving the plaintiff company and the union. This was a political dispute which the plaintiff had no power to resolve.

In Darrigo's Grape Juice Ltd. v. Masterson, the court granted an injunction to restrain supporters of the California grape boycott from picketing at an outlet for such grapes in Toronto. The court held that section 20 had no application to this picketing because the parties to the action were not disputants within the terms of that section. To hold otherwise, said the court, would be to permit the importing of social and economic battles of other people into Ontario. The plaintiff company did not actually employ the grape pickers and had no control over their working conditions.

In Ford Motor Co. of Canada v. McDermott Mr. Justice Pennel of the Ontario High Court considered the definition of a "labour dispute" in detail on an application to make an interim injunction interlocutory. The plaintiff, Ford Motor Co., had been picketed by legally striking employees of a small manufacturing firm. This firm manufactured electrical components for the automotive industry, some of which were bought by the plaintiff company. There was clearly a labour dispute of some kind but given the requirements of section 20, the issue was whether or not the plaintiff was involved. The court held that it was not. It was merely a customer. There were no corporate links, it was neutral as far as the controversy in question was concerned. It had no dispute with its own employees. Pennel J. felt that the section could not be interpreted to mean that "...the real disputants in a particular industrial episode can conscript neutrals having no relation to the dispute." The existence of a contract between Ford and the primary employer was not sufficient to deny Ford its status as a neutral. Thus, the court reaffirmed the conclusion of the Ontario Court of Appeal in the Hersees case that the integrity of contractual relations is more important than the right to picket.

The situations described above demonstrate the difficulties raised by section 20. In each of these cases there is clearly a dispute over terms and conditions of employment. The seamen must have felt that the use of foreign ships,
on which cheaper non-union labour may have been employed, threatened union members' jobs. The grape pickers in California were trying to obtain basic union rights from recalcitrant employers. The question of the existence of a labour dispute is an objective one. Section 20(1) sets out the criteria. These cases, involving labour disputes in the largest sense, would seem to come within these criteria.

But the answer to this preliminary question does not itself resolve the issue of whether or not the acts done are in connection with a labour dispute. In deciding whether the prerequisite connection exists the courts are faced with a choice between a subjective test and an objective test. Using a subjective test, if the actors believed that their acts were connected to the primary labour dispute, these acts would not be enjoinable without proof of police inability to control the situation. Such a test would give great power to the unions to extend the impact of the strike. This test was recently adopted by the House of Lords in interpreting similar, but not identical, statutory provisions in England.\textsuperscript{59} The objective test, advocated by Lord Denning, would require that the union be able to demonstrate that the secondary strike activity has some objective connection with the primary dispute in the sense that "... it must help one side or the other to the dispute in a practical way by giving support to the one or bringing pressure to the other."\textsuperscript{60}

The Ontario courts have adopted the objective test proposed by Lord Denning, when interpreting a statutory provision which does not include a subjective element such as "... in contemplation of..."\textsuperscript{61} Thus, in the above cases, the union activity was not immune from restraint by injunction either because the picketed party was too remote from the direct disputants or because the subject matter of the complaint was not a labour dispute. An injunction would not increase the likelihood of settlement of the dispute, it would increase costs without providing corresponding benefits.

Since the third party must be involved in the labour dispute, although the relationship of employer-employee does not exist, the court is obliged to examine the proximity of the relationship between the picketed third party and the struck employer. It must determine whether or not the third party is involved in some direct way in the primary labour dispute.\textsuperscript{62} Direct involvement appears to mean that the plaintiff employer has some power to affect the resolution of the dispute. Thus, the issue for the courts necessarily involves


\textsuperscript{60} Express Newspapers Ltd. v. McShane, [1979] 2 All E.R. 360 at 364\textsuperscript{61} per Lord Denning; see also Duport Steel Ltd. v. Sirs, supra note 59.

\textsuperscript{61} Trade Union Labour Relations Act 1974, c. 52, s. 13(1) (U.K.) as am. by Trade Union Labour Relations (Amendment) Act 1976, c. 7, s. 3(2) (U.K.).

a consideration of the notions of (a) the "ally" doctrine, and (b) the total economic strength of the struck employer.

a) "Ally" of the Struck Employer

A number of Ontario cases have analysed the criteria for determining whether an independent third party is implicated in the labour dispute. In Commonwealth Holiday Inns of Canada Ltd. v. Sundy\textsuperscript{63} the plaintiff company argued that the picketing of its hotel, to which the struck employer had transferred some of its operations, was prohibited secondary picketing. The court rejected this view, holding that the inn was providing space from which the employer could continue operating. The normal operations of the primary employer were being carried on at the secondary location. The plaintiff company had become involved in a labour dispute.

In Neumann and Young Ltd. v. O'Rourke\textsuperscript{64} an injunction was granted to the plaintiff company. The union was engaged in a legal strike against a company that stored products at the plaintiff company's warehouse. The issue was whether or not the warehouse had become a place of business of the struck employer. There were no corporate links and there were no employees of the primary employer on the warehouse premises. The judge held that the simple warehousing of goods was not sufficient to constitute the secondary location as a place of business of the primary employer. The applicant had not involved itself in the labour dispute.

In Sasso Disposal Ltd. v. Webster\textsuperscript{65} an injunction was refused because the plaintiff company, a subsidiary of the same parent corporation as the struck employer, was doing work normally performed by the striking employees. It was held that the plaintiff had taken actions which could affect the terms and conditions of employment of the striking workers. In another case,\textsuperscript{66} the Ontario High Court held that, where the plaintiff company was performing work similar to the work performed by the striking employees at the premises of the struck employer, the injunction should not issue. Finally, the courts have held that where there is a marginal increase in work performed by a transportation conduit of the struck employer which will not have any great effect economically, and where there is no other corporate link, such activity will not constitute the third party as one of the primary employer's places of business.\textsuperscript{67}

b) The Place of Business of the Struck Employer

The courts have continued to display willingness to analyse the corporate interconnection when evaluating the legitimate scope of union activity

\textsuperscript{64} Supra note 62.
\textsuperscript{65} Supra note 51.
\textsuperscript{66} Tatham Co. v. Blackburn, supra note 62.
\textsuperscript{67} Alex Henry & Sons Ltd. v. Gale, supra note 62.
that was first seen in the *Lescar Construction* case. An *ex parte* injunction was refused in *Domtar Chemicals Ltd. v. Leddy* when the legally striking employees of a salt mine picketed a salt evaporation plant owned by the same employer, organized by the same local union and one mile away from the site of the mine. It was held that the secondary employer was clearly involved in a labour dispute. At a subsequent hearing, a permanent injunction was granted because the two operations were not integrated. There were separate managements, different processes, a separate product and separate markets. There was no involvement of the salt plant in the performance of struck work. The court held that the picketing was inducing breaches of the collective agreement at the salt mine and that it was seriously damaging the business of the salt plant. Hence the picketing was enjoined. In the absence of any proven active involvement on the part of the secondary employer in the dispute, the fact of corporate linkages could not, by itself, justify the picketing of the plaintiff.

In *Nedco Ltd. v. Nichols*, Osler J. refused to enjoin the picketing of a wholly-owned subsidiary of the legally struck primary employer, Northern Electric. There was clearly common ownership, and the two companies shared facilities. The building in which the plaintiff company carried on its operations was owned by the struck employer, and it was used as headquarters for some of the operations of the struck employer. Furthermore, there was extensive integration of the operations. The employees of both companies used the same entrances. Shipping and receiving for both companies took place at the same dock. The employees used the same cafeteria. Goods bound for a plant run by the struck employer were rerouted to the warehouse in this common facility after the beginning of a strike. These factors, when combined with proof of nominal damage to the plaintiff company’s business, led the court to refuse to enjoin the picketing.

In *Inglis Ltd. v. Rao*, the Ontario High Court held that the word “premises” as used in section 20 of the *Judicature Act* cannot be restricted to the actual struck premises. The union, thus, has the right to picket at other places of business of the struck employer. Such picketing would not be prohibited secondary picketing. In this case, the employer operated a service branch employing fourteen people and a manufacturing branch employing 775. At the large plant, there was a collective agreement in effect. The employees of the smaller plant went out on a lawful strike. They picketed the manufacturing plant, and truck drivers refused to cross although the employees of the picketed company reported for work. It was held that the requirements of section 20 applied to this picketing, and they had not been met. Therefore, the injunction was refused.

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68 Supra note 41.
73 R.S.O. 1980, c. 223.
Finally, Cory J. in *Canadian Pacific Ltd. v. Weatherbee* refuted the plaintiff company's request for two injunctions. This was the second such application brought by the plaintiff. After the initial refusal of an injunction by Hartt J., the plaintiff attempted to extricate itself from the labour dispute between its subsidiary, C.P. Express, and its employees. The second application sought to restrain picketing at two locations. Firstly, the plaintiff transferred the business of one subsidiary, normally carried on at a location shared with the struck employer, to new premises. After the transfer, the strikers began picketing this new location. At the second site in question, where the trucks driven by the strikers would ordinarily have been unloaded and some administrative work would be performed, the plaintiff fenced off an entrance and portion of the driveway and designated this as the entrance for the trucks of the struck employer. It wanted to restrict picketing to that entrance so as to enable truck drivers employed by clients to continue distribution of goods from the site. Some of this work would normally have been performed by the striking drivers.

The court held that, despite the efforts of the plaintiff, section 20 of the *Judicature Act* still applied. The test to apply is "... how remote the party seeking the injunction is from the labour dispute." The plaintiff, in the eyes of the court, was simply trying to avoid the effect of the decision of Hartt J. That decision had been based on the corporate interconnection between the plaintiff and the struck employer, the close physical proximity of the operations of the various subsidiaries and the fact that work of the struck employer was normally performed at one site. Thus, there was already a finding that the plaintiff was part of the total economic strength of the struck employer. Nothing the plaintiff had done could change that. Concerning the second site, the court said that the corporate link was more tenuous but the struck employer normally performed work at that site. Thus, it was part of the primary employer's place of business. The construction of a fence could not change that fact. As a result, the application for an injunction failed.

3. Summary

Under the prodding of the legislature, the Ontario courts have developed criteria to govern the availability of the injunction which mitigate the harshness of the *per se* illegality rule. These criteria have not eliminated all discussion of the right to trade and the need to protect contractual relationships from interference by third parties. The courts are too steeped in the liberal tradition to simply alter their ideological framework for cases dealing with labour law.

However, the Ontario courts have, in a haphazard case-by-case fashion, developed a less simplistic approach to secondary union activity which gives unions at least a fighting chance at a legal defence. The courts have focused on the degree of involvement of the third party in the labour dispute and the substance of the economic links between the primary employer and the third

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75 R.S.O. 1980, c. 223.
76 Supra note 74, at 781 (O.R.), 745 (D.L.R.) per Cory J.
party (although the relative weight of each criterion is not clear). The prohibition of secondary strike activity remains. Neutral parties, which are not involved in the labour dispute in some way beyond purely contractual relations with the struck employer, are protected. If a third party becomes implicated in the dispute, it loses that protection.

The decisions are not without problems. For example, the decision in *Inglis Ltd. v. Rao*\(^{77}\) seems directly contradictory to that in *Domtar Chemicals Ltd. v. Leddy (No. 2).*\(^{78}\) Furthermore, the legislative intent behind section 20 is not completely clear; it still leaves a great deal to judicial discretion. However, the cases clearly indicate that the courts are willing to give serious consideration to arguments that the apparently secondary employer is involved in the labour dispute because it has directly intervened in aid of the struck employer or because it is part of the primary employer's total economic strength.

**B. Developments in Other Common Law Jurisdictions in Canada**

1. **Manitoba**

   In Manitoba, the legislature amended the *Queen's Bench Act*\(^{79}\) to prohibit the courts from issuing an injunction that would restrain a person in the exercise of the right to freedom of speech.\(^{80}\) According to the statute, freedom of speech includes communication of information by true statements on a public thoroughfare. This provision is unique in Canada.

   In *Channel 7 Television Ltd. v. N.A.B.E.T.*\(^{81}\) the Manitoba Court of Appeal refused to reverse a lower court decision denying the employer an interlocutory injunction to restrain potential picketing of its clients and a boycott campaign organized by striking employees. The court held that the purpose of section 60 of the *Queen's Bench Act* was to insulate picketing from the reach of the injunction. Freedom of speech is not absolute and must give way to competing interests in society. However, prior to the amendment, the courts did not enjoin primary picketing so the amendment must be designed to extend the protection to peaceful secondary picketing. Only activity which goes beyond the legitimate exercise of freedom of speech can be enjoined. Freedom of speech necessarily includes an element of persuasion, so the simple fact that people are persuaded by the picketing is not sufficient to make it enjoinable. There must be some additional element such as violence or otherwise criminal conduct. In this instance, the picketing was perfectly peaceful and, therefore, could not be restrained. This did not mean that the activity was not tortious. The applicant was free to seek any other remedy. If the union had induced breaches of contract, damages would be adequate to indemnify the applicant.

   The significance of this case is limited to Manitoba because it involved the interpretation of statutory provisions unique to that province. In effect,

\(^{77}\) *Supra* note 72.

\(^{78}\) *Supra* note 70.

\(^{79}\) R.S.M. 1970, c. C-280, s. 60.

\(^{80}\) S.M. 1970, c. 79.

the Court of Appeal held that the legislature had nullified the effect of the *Herses* decision for the purposes of injunction proceedings. The legislature altered the balance amongst the competing interests in society in favour of freedom of speech and the courts must give effect to its wishes. The case did involve an application by the primary employer, and the court may have been influenced by the view that it should not take sides in the labour dispute. An application by one of the advertisers might have resulted in a different weighing of the competing interests.

2. Saskatchewan

The Saskatchewan Court of Appeal was faced with the task of interpreting paragraph 20(1) of section 45 of the *Queen's Bench Act* 82 in the case of *Nedco Ltd. v. Clark.* 83 The case presented virtually the same facts as the Ontario case of *Nedco Ltd. v. Nichols* 84 and arose out of the same nationwide strike against Northern Electric.

In its first decision in this case, the Saskatchewan Court of Appeal held that the effect of paragraph 20(1) was to prohibit the issuing of *ex parte* injunctions. 85 Notice had to be given to the other side. Therefore, the judge had no jurisdiction to enter upon an inquiry into the legality of the strike on an application for an *ex parte* injunction. Subsequent to that decision an interim injunction was granted 86 on the basis that the picketing was causing irreparable harm to the plaintiff’s business and that the union had no interest in any dispute between the plaintiff company and its employees.

The Court of Appeal reversed this decision. 87 The court felt that these were appropriate circumstances in which to take notice of the corporate structure of the struck employer. Nedco was a wholly-owned subsidiary which constituted an integral part of the total economic strength of the struck employer. The operations were carried on in close proximity, and it would be difficult to draw a line between the places of business of the two employers. Therefore, there was no reason to enjoin otherwise legal picketing.

However, secondary picketing remains prohibited in Saskatchewan unless it can be shown that the picketed third party forms an integral component of the struck employer. In a recent case, 88 the Saskatchewan Queen’s Bench issued an injunction to restrain the picketing of a retail outlet in which the

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82 R.S.S. 1965, c. 73 as am.
84 Supra note 71. The facts in the Saskatchewan case were: the plaintiff company was a wholly-owned subsidiary of the struck company formed to take over the distribution sales division of its parent and housed in a building owned by Northern Electric shared with other operations of Northern Electric included in the bargaining unit. The employees of both companies used the same entrance to the building; both companies used the same loading docks; customers used the same parking lot.
85 Supra note 83, at 429 (W.W.R.), 717 (D.L.R.).
86 Id. at 429 (W.W.R.), 718 (D.L.R.).
87 Supra note 83.
owners of the struck employer held the largest block of shares and over which they exercised voting control.

The defendant union was involved in a legal strike against a building products manufacturer who sold its products generally throughout Saskatchewan, either through retailers or directly to contractors. It sold 26.9 per cent of its total production to the plaintiff company. The plaintiff company bought about 18.7 per cent of the supplies for its Regina outlet and 13.18 per cent of those for its Saskatoon outlet from the struck company. The union picketed the Regina outlet and distributed pamphlets explaining the corporate link and stating that patronizing the store would prolong their strike.

The court held that it is proper to, in its language, "...pierce the corporate veil..." but that proof of shared ownership does not automatically justify the picketing on the basis that it was no longer secondary picketing. To fall within the protection of the decision in Nedco Ltd. v. Clark it must be shown that the third party is an integral component of the struck employer. In this instance, the court found that there was a substantial difference between the struck company and the third party because there were two substantial shareholders of the secondary target who stood to be adversely affected, and who had no connection whatsoever to the primary employer. The judge concluded:

It surely cannot be successfully contended that any retailer who merely purchases goods from a manufacturer or wholesaler who has been struck should be subjected to the possibility of a legal picket line being established at his place of business by reason of that fact.

Thus, mere contractual relations with the struck employer, absent integration into the corporate structure, will not expose the third party to picketing.

This case clearly demonstrates the difficulty of drawing a well-defined line between primary and secondary companies. In the Massey case, the owners of the struck employer exercised voting control over the retailer who sold more than twenty-five per cent of their annual output. As such it formed part of the total economic strength of the primary employer although the geographic proximity and degree of integration, present in the Nedco case, were absent. On the facts, it is not at all clear to what extent the third party was helping the struck company to resist the demands of the employees. In addition, the family nature of the business may have been an important distinguishing factor. It seems unlikely that the courts would allow workers to picket a business solely on the basis that the owners of the struck employer personally held shares in it. In the Nedco case, it was the corporate entity that owned the third party, and not an individual who held shares in both corporate entities.

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80 Supra note 83.
90 Supra note 88, at 759 (W.W.R.), 150 (D.L.R.) per Johnson C.J.
91 One possible solution to this problem is to determine the legality of picketing according to the extent of the part-owner's interest. See Brown, supra note 49 at 177-79. He does not deal with the possibility of personal rather than corporate ownership but there is no reason why corporate form should determine the legal status of the picket line.
3. British Columbia

From 1959 to 1973 the British Columbia courts had to interpret and apply a statute that explicitly regulated the scope of picketing. Secondary picketing was prohibited by the requirement that the picketing be in connection with a legal strike and at the employer's place of business, operations or employment.92 This section was designed to protect freedom of trade.93 Indeed, the prohibition went far beyond banning secondary picketing to include the banning of boycotts of the products of a struck employer,94 and declarations that certain products were, in union jargon, "hot" and not to be handled.95 Thus, the legislature in its desire to protect business, enacted a very broad and all-encompassing prohibition of secondary strike activity.

However, in response to union efforts to ensure that the full effects of a legal strike were not undermined by employer abuse of this prohibition, the British Columbia courts proved willing to interpret the Trade-Unions Act96 so as to permit secondary situs picketing at the employer's places of business, operations or employment. The scope of primary picketing was not necessarily limited to the bargaining unit for which the union was certified. Picketing was permitted only against the primary employer, but the courts allowed that picket lines could be deployed at secondary locations.

The issue on which these decisions turned was the degree of integration of the operations at the secondary site with the primary employer's business.97 The transitory presence of delivery trucks was not sufficient to transform the secondary situs into the employer's place of business. Thus, where the primary employer's trucks simply made deliveries at the site, that location could not be picketed.98 Nor could a secondary site be picketed where the struck employer's trucks merely picked up supplies prepared by the secondary employer. The property in the goods that passed on loading onto the primary employer's trucks and the storage of the supplies prior to loading and hence prior to the transfer of legal title, did not transform the secondary employer's site into one of the employer's places of operation.99 However, where deliveries were made by an employee of the primary employer who had to perform work at the site in unloading the primary's product, this work activity constituted

92 B.C. Trade-Unions Act, R.S.B.C. 1960, c. 384, s. 3(1). The jurisprudence interpreting this section is still relevant because of similar provisions in other provinces. See Labour Relations Act, S.N. 1977, c. 64, s. 124 and Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 104.
93 See Koss v. Konn, supra note 28.
96 B.C. Trade-Unions Act, R.S.B.C. 1960, c. 384.
99 Supra note 97.
the secondary employer's site as the primary employer's place of operations during the period of the deliveries. Picketing other than during that period was enjoined.\textsuperscript{100}

Another criterion for determining the degree of integration was the control exercised by the employer over the operations at the secondary site. In \textit{Martin and Robinson Ltd. v. Retail, Wholesale and Department Store Union Local 580},\textsuperscript{101} the primary employer was denied an injunction when it sought to restrain picketing at a storage shed and loading dock in Vancouver harbour. The judge found that the plaintiff was arranging to ship goods to its customers from the shed. It would allocate portions of the shipment to various customers and direct the loading of shipments into various boxcars. Because the distribution of foods was the essence of the struck employer's business, this activity was part of its normal operations.

Where space hired in a warehouse was used by the struck employer to fulfill its contractual obligations to its customers and to produce and store its product, the warehouse, owned and operated by a third party without corporate links, was held to form part of the place of operations of the primary employer. The storage of the product was an integral part of its business.\textsuperscript{102} However, the legal relations between the struck employer and the warehouseman can vary. In the \textit{Hi-Way Transport Ltd. v. I.B.E.W. Local 246} case,\textsuperscript{103} the secondary company was storing goods manufactured by the struck employer but sold to customers prior to storage. The secondary company owed these customers a contractual obligation to deliver and was, in effect, storing the goods for their purchasers. Therefore, the warehouse was not a place of business of the struck employer and the picketing was prohibited. In a subsequent case\textsuperscript{104} the court held that a warehouse in which goods were stored while they were in transit to the primary employer's customers could not be picketed. The warehouseman was not an agent of the struck employer and the goods were not a stockpile from which the employer could draw to resist the effects of a legal strike.

The courts were also willing to analyse the degree of integration of the operations of the primary and secondary employers. Thus, a union representing both the striking employees of a wholly-owned subsidiary and the employees of its parent working at a secondary location, was allowed to picket the parent company's place of business. Management functions were performed there for the subsidiary and, hence, it was a place of operations of the

\begin{footnotesize}
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struck employer.\textsuperscript{105} Again, where the company seeking the injunction was a wholly-owned subsidiary occupying the same building as the primary employer and sharing some office space with it, an injunction was refused.\textsuperscript{106} The union was allowed to picket the locations of a parent company in British Columbia where it was performing struck work for a wholly-owned subsidiary during a legal strike of the subsidiary's employees in Alberta. The corporate linkage showed that it was interested in the dispute and its actions made it one of the places of operations of the struck company.\textsuperscript{107}

4. Alberta

An interesting contrast to the British Columbia jurisprudence is provided by the approach of the Alberta Court of Appeal\textsuperscript{108} to interpreting similar but not identical provisions in its own labour legislation. The court prohibited primary picketing because of its secondary effects. The plaintiff companies were the developer and general contractor on a construction site. The union was the certified bargaining agent of two subcontractors engaged in work on the project. The union went on a legal strike and picketed the project. The employees of other subcontractors respected the picket line. The struck employers were shut down.

The Alberta Court of Appeal upheld the validity of the interim injunction enjoining this primary picketing in connection with a legal strike. The union, it held, could not engage in primary picketing of the struck employer, at the employees' place of employment, as allowed by section 100(1) (now section 134(1)) of the Alberta Labour Act,\textsuperscript{109} if in so doing it came within the prohibition of efforts to persuade persons in section 100(2) (now section 134(2)) of the Act, which was held to be the overriding provision. The right to engage in primary picketing does not include the right to inflict harm on secondary employers and their employees.\textsuperscript{110}

However, this restrictive approach may have reflected circumstances peculiar to the construction industry, in which the primary location of employment is often shared by many companies. In \textit{A.-G Can v. I.U.E.C. Local 12},\textsuperscript{111} the Alberta Supreme Court held, following the British Columbia precedents, that the words "employees place of employment" covers more than the actual location of their employer.

\begin{itemize}
\item \textsuperscript{105} \textit{Allied Parts and Engine Rebuilders Ltd. v. Misc. Workers Union Local 251} (1972), 72 C.L.L.C. para. 14,132 (B.C.S.C.).
\item \textsuperscript{106} \textit{Seaboard Advertising Co. v. Sheet Metal Workers Local 280} (1971), 71 C.L.L.C. para. 14,091 (B.C.S.C.).
\item \textsuperscript{109} R.S.A. 1970, c. 196 now replaced by S.A. 1973, c. 33.
\item \textsuperscript{110} \textit{Edinburgh Developments Ltd. v. Vanderlaan}, supra note 32, at 381-82, per Clement J.A.
\item \textsuperscript{111} [1973] 1 W.W.R. 766 (Alta. S.C.).
\end{itemize}
A union engaged in a legal strike against an elevator manufacturer set up pickets at the business locations of the clients of the struck employer where the installers would normally work. The plaintiff, a client of the struck employer, sought to restrain the picketing because its employees respected the picket line.

The interim injunction order was vacated. Bowen J., held that the words “employee’s place of employment” in section 100(1) (now section 134(1)) meant the place where the employee actually carried out assigned tasks rather than the geographic location of the employer’s business. The judge went on to say:

... the intent of the legislature was clear in enacting this section that there could be a number of locations at which the striking employees could endeavour to persuade people not to enter. In stating that picketing of this nature could be done at the employer's places of operation and employment as well as at its place of business, I take it that this was done specifically to allow the secondary picketing and to make it lawful to do so.112

The learned judge seems to have lost sight of the important distinction between the British Columbia and Alberta provisions. In Alberta, the situs of picketing is defined not in relation to the employer’s places of business, operations and employment as in British Columbia, but, rather, with reference to the employee’s place of employment. Section 100(1) (a) (now section 134(1) (a)) does refer to the employer’s place of business, operations, or employment, but this phrase refers to the content of the persuasion, not the situs of picketing. Thus, it seems difficult to conclude that the Alberta legislature intended to authorize any form of secondary picketing.

However, the result in this case appears to be correct. The employees’ place of employment can be other than the offices of their employer, and the phrase would authorize secondary location picketing if the employee performed work at that site. This is a much more restricted right than that granted to workers by British Columbia courts and legislation and it is difficult to see how to mount arguments which would permit the evolution of a common law equivalent to either the ally doctrine or the “total economic strength” approach. The two Alberta decisions are contradictory and it is not clear how far the limited right to secondary location picketing extends, if it exists at all.

5. Summary

The commentators were quite right when they pointed out that the ideological framework within which the courts operate requires them to legitimate their decisions in reference to fundamental notions of liberal theory such as individualism, the primacy of voluntary market exchange and the right to trade. Unions, as fundamentally non-liberal institutions, create great difficulties for the courts. Because of the clashing of ideologies, the courts quickly lost their legitimacy in the eyes of the union movement.

However as this survey of the jurisprudence demonstrates, the courts have moved to restore the legitimacy of their decisions by attempting to make

112 Id. at 768, per Bowen J.
a more accurate assessment of the real economic relations rather than blindly relying on appearances. The evolution of the *per se* illegality rule has varied from province to province according to provincial labour legislation, statutes regulating the availability of the injunctive remedy and the frequency of resort to secondary strike activity by the unions. The concern for certainty and predictability of contractual relations remains paramount. It has been mitigated only to the extent that the union is able to prove that relations between the third party and the struck employer have transcended the purely contractual realm. The courts have proved willing to analyse the substance or content of the relations between the third party and the primary employer to ensure that the prohibition of secondary picketing not be interpreted so as to destroy the effectiveness of the strike weapon. The courts have refused to enjoin secondary *location* picketing where it is directed against the struck employer or a third party ally. Secondary picketing remains otherwise prohibited.

V. THE BRITISH COLUMBIA LABOUR BOARD AND SECONDARY PICKETING

In the *British Columbia Labour Code* the legislature has explicitly stated the rules according to which the scope of permissible picketing is to be determined. The jurisdiction to adjudicate disputes over the scope of picketing is given exclusively to the British Columbia Labour Relations Board, a tribunal which has supposedly accumulated expertise in the regulation of labour relations over many years and which can apply that knowledge to the interpretation of the revamped legislation. This approach reflects the view that the common law courts are institutionally incapable of dealing with labour relations problems because of class bias, perceived or real, and lack of expertise. The Labour Relations Board, in interpreting the provisions of the statute, has not altered the policy which underlies the regulation of the scope of picketing in Canada. The object of the statute is to restrict strike activity in time and place. Workers cannot withdraw their labour power whenever they feel like it. They must follow prescribed procedures for obtaining and exercising bargaining rights. A necessary concomitant of these restrictions is the restraint on the right to engage in picketing:

But if it is the law's objective to prohibit strikes as a means of settling certain types of disputes, the lesson of industrial relations experience is that picketing, even peaceful picketing must be controlled as well.

It is a well-established fact that:

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113 R.S.B.C. 1979, c. 212, Part V.


116 *Parklands Development Corp.*, *supra* note 115, at 347 per Weiler.
picketing at a work site is much more than the communication of information; it is a signal to members of a union to stop working. As far as the union member is concerned, this signal derives its influence not from coercion or fear, but rather from a tradition of solidarity in the trade-union movement.¹¹⁷

The Board has concluded, as did the common law courts previously, that picketing cannot be construed as the simple communication of information. Picketing is *prima facie* prohibited unless it is connected with a legal strike and directed against the struck employer.¹¹⁸

An essential component of this statutory scheme is the prohibition of secondary strike activity:

A fundamental premise of the Code is that third party employers who are uninvolved in the bargaining dispute between the picketing union and the struck employer should not be subject to secondary picketing.⁹

Accordingly, the legislature conferred a broad discretion on the Board to give precise directions concerning trade union picketing so as to confine its impact to the struck employer and to insulate third party employers from its damage.¹¹⁹

This policy is premised on the view that the collective bargaining system is, in its essence, an adversary system in which the parties negotiate on the basis of their respective bargaining strengths as determined in the market place. Therefore, picketing should be permitted only in those areas where the struck employer will be affected by the picketing and influenced in the exercise of its option to continue to resist the employees' demands.¹²⁰ In another case the scheme was described as follows:

The theory of the law is that picketing is an economic weapon in a bargaining dispute and should be directed only at the employer which is a party to the impasse and has the power to settle it. Secondary employers and their employees should be insulated from the deliberate expansion of a labour dispute in which they are not involved. The one exception to this principle is contained in s. 85(1) (c) which entitles the union to picket the place of business of someone who has become an ally of the struck employer. ... An ally is someone who has inserted himself into the primary dispute by assisting the employer in resisting the lawful strike (s. 85(2)) ... the secondary employer is no longer an uninvolved neutral.¹²¹

The economic costs of strike and lock-out activity which determine the "contract zone" in any dispute, are to be inflicted on the primary employer and its allies and their employees. The secondary employer and employees

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¹¹⁷ *Id.* Exactly the same attitude towards the effect line forms the basis of the common law approach. See *supra* note 30.


¹²¹ *Construction Labour Relations Ass'n of B.C. & C.U.P.E.*, [1975] 2 C.L.R.B.R. 103 per Weiler at 106. This approach is essentially the same as the objective test for the existence of a labour dispute advocated by Lord Denning and accepted by the Ontario courts. See *supra* note 60.
have no control over the settlement, and the imposition of the economic costs of strike activities on neutrals is socially wasteful in that it disrupts production without any corresponding increase in the efficacy of the process of dispute settlement.

As in the courts, the issue raised by this statutory scheme is that of the definition of the term "secondary" in the labour relations context. The innovation of the Code lies in the provisions governing the distinction between primary and secondary picketing, which seek to resolve the difficulties created by the intricacies of corporate structure and by employer solidarity. When the secondary employer is, in reality, the primary employer, or has come to its aid, a dogmatic prohibition of secondary picketing would have the effect of altering the bargaining power derived from market strength in favour of the struck employer. The bias would undermine the legitimacy of what are seen as neutral procedures for dispute resolution in a market context. Consequently, an analytical scheme is required to ensure that what is being prohibited is, in substance, secondary picketing.

A. The Statutory Scheme

The picketing provisions contained in Part V of the *British Columbia Labour Code* provide the tools necessary for determining what picketing is permitted, and delineating the legitimate scope of that picketing. The starting point of the analysis is section 88, which prohibits all picketing by a union or other person except that which is expressly authorized by the statute. Section 84 is a saving provision excluding from the section 88 prohibition all activity that communicates information concerning terms and conditions of employment in any manner that does not amount to picketing as defined by the Code. In order to determine what picketing is permissible one must turn to sections 85 and 86. In light of the criteria set out in these sections and certain penumbral sections, such as sections 27, 37 and 91 of the Code, which influence the interpretation of the core sections, the Board has a number of questions it must ask in order to define the permissible scope of picketing in any particular case:

(1) What is picketing?
(2) Who is the employer for the purposes of section 85(1) (b)? This involves the interpretation of section 37.
(3) Is the person picketed an ally for the purposes of section 85(1) (c) in light of section 85(2) & (3)?
(4) Is there any reason in light of section 27 to exercise its discretionary powers to limit picketing?
   (a) Is there a collective agreement in force at the secondary site which would justify the prohibition of picketing? or
   (b) Is there a common *situs* problem under section 86 which requires

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Secondary Picketing

restriction of the scope of picketing to protect any neutral secondary employers?

(5) Are there any equitable considerations which justify the refusal under section 91 of any order notwithstanding any result of the above analyses?

In establishing the criteria of analysis under the statutory scheme the Board has been conscious of the balancing of interests it must do to ensure the effectiveness of the strike and lock-out weapons and at the same time protect neutral employers from the effects of strike activity, beyond the natural ripple effect of any strike. In its decisions the Board has emphasized that it does not want to create any per se rules.123 Its hope is to evolve a flexible approach that will permit it to take into consideration the industrial relations reality in any particular situation. Decisions are, in the eyes of the Board, to be regarded as illustrations of the kinds of criteria that will be considered in deciding whether to issue a cease and desist order. The result in any particular case will depend on its own facts.

The retention of a large degree of flexibility and discretion is one of the more remarkable innovations of the British Columbia Labour Board. Formal logic no longer camouflages policy making; the Board avowedly takes into account the reasonableness of the union's demands as the Board sees it. It thereby makes explicit what many commentators said was implicit in the judicial decisions: the tribunal's view of the justice of the union's cause. However, while the vocabulary of decision-making has indeed been changed, the substantive rights of unions have not necessarily been strengthened.

B. The Interpretation of the Statute

1. What is Picketing?

The definition of picketing was fully considered very early in the development of the case law interpreting the new provisions. In Parklands Development Co.124 the complainant companies were involved in the construction of two apartment developments. They contracted work with both union and non-union sub-contractors. Representatives of the union approached the employer with the demand that only union members be hired. The companies refused and, consequently, persons carrying placards appeared at the work site. There were some confrontations on the picket line. However, subsequent to the proclamation of the picketing provisions of the new Code, the union supporters carried signs designed to inform non-union workers about how to get in touch with the union for information on the advantages of membership. This activity interfered with deliveries as unionized workers honoured what they believed to be a picket line.

The companies sought a cease and desist order. The union argued that this was an exercise of its right to communicate information under section 84 of the Code rather than picketing as defined in section 1(1) and regulated by

123 Liquor Distribution Branch, supra note 119, at 349-50.
124 Supra note 115.
sections 88 and 85 of the Code. The Board ruled that this was prohibited picketing:

    The right to disseminate information, protected in s. 84, does not outweigh in importance the right of an employer in a non-strike situation to carry on his business without continual interruptions from persons to whom he is not legally obligated.\textsuperscript{125}

The union appealed to the full Board.

The full Board held that there was no doubt that the union was attending at or near the company’s place of business. The union argued that this was not sufficient to constitute prohibited picketing. The definition in section 1(1) requires that this activity be for the purpose of persuading or attempting to persuade anyone not to enter the premises or deal with the person at whose place of business the union is attending. The error of the vice-chairman, according to the argument of the union, was to define picketing in terms of its effects rather than its purposes. In addition the union argued that this activity was communication of information protected by section 84 of the Code.

The Board agreed that the union was communicating information but it held that section 84 contained an important proviso. This communication had to take a form other than that of picketing. The union argued that this proviso only restricted communication in the form of mass picketing involving violence, coercion or the commission of any nominate tort. On the basis of the Aristocratic case, it was argued that the communication was \textit{prima facie} legal.\textsuperscript{126}

The Board rejected the union arguments. Peaceful persuasion was not excluded from the picketing provisions of the Code. Section 84 does not constitute a \textit{carte blanche} permission to communicate information. Rather, it limits the broad prohibition in section 3 of the old Act, so as to permit the seeking of popular support and the organization of a consumer boycott, activities which previously had been held to be illegal.\textsuperscript{127} Picketing was singled out for special treatment because, given the tradition of union solidarity, it constitutes something more than the mere communication of information. The additional element is, presumably, the power to interfere with existing trade relations and, especially, contracts.

The Board then went on to consider whether the vice-chairman was in error in holding that the union must have intended the reasonable consequences of its actions. Not all activity at the employer's place of business is prohibited. Members of a union do have an ordinary right to communicate

\textsuperscript{125}Parklands Development Corp., [1975] 1 C.L.R.B.R. 91 at 97 \textit{per} Peck. This is similar to the conclusion of the B.C. Court of Appeal in \textit{Koss v. Konn}, supra note 28.

\textsuperscript{126}Supra note 27.

\textsuperscript{127}Sunoco Ltd. v. I.B.P.S.P.W.W. Local 433, supra note 94. The B.C. courts had gone much farther than the Ontario courts in prohibiting consumer boycotts regardless of how they were organized. In the \textit{Hersees} case, the Ontario court of appeal specifically mentioned that if the union wanted to organize such a boycott then it could do so through a newspaper ad campaign. As such, the new code represents a codification of \textit{Hersees} rather than a startling break with the past.
information. They cannot communicate it in a manner that constitutes picketing. Picketing consists of activities at the place of business for a specific purpose: persuading others not to enter the premises or do business with that employer. In order to determine the communicator's actual intention, the Board must look at all the relevant circumstances of the case, including the history of relations with the employer, the nature of union conduct, the duration of the activity and its effects. It is perfectly legitimate and, indeed necessary, given the nature of the issue, to infer that "the true objective of an actor is the effect which he is regularly, predictably and knowingly producing." True intention, which is all too easily masked by careful wording of statements, can never be determined solely by reference to the declared purpose. Thus, the Board refused to cancel the original decision.

This decision is the most systematic analysis made by the Board of the definition of picketing. It is clear from the above analysis, and the fact that the definition has so seldom been questioned, that individuals parading up and down in an organized fashion in front of a place of business will be considered to be picketing, and therefore, subject to sections 88 and 85 of the Code. Just as the common law courts concluded, this form of activity has a great symbolic significance in the labour relations context and the "electric fence" effect will occur regardless of the subjective intent of the persons participating in the activity. The public, whether out of feelings of solidarity or concern for personal safety, will respect the picket line. This objective reality determines the nature of the activity.

The common law courts concluded that such activity by its very nature would amount to inducing breach of contract and hence is illegal activity. The statutory scheme in British Columbia as interpreted by the provincial Labour Board, embodies exactly the same assessment of the nature of picketing. As a result, picketing must be strictly confined in time and place. It can only be engaged in connection with a legal strike and at the place of operations of the struck employer.

2. Who is the Employer?

The identification of the employer begins with the certificate issued by the Labour Relations Board. According to section 85(1) (a) the union can picket the location of the bargaining unit that is on strike. Section 85(1) (b) permits the extension of the primary picketing to all other sites or places of business, operations or employment of the employer. The Board has interpreted this section to mean that the union can picket, subject to the exercise of Board discretion relating to collective agreements and common situs problems, at any place where the primary employer engages in some positive activity related to its economic survival.

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128 Parklands Development Corp., supra note 115 at 353 per Weiler, followed in London Drugs Ltd., supra note 119, at 17-18 per Weiler.


In *Squamish Terminals Ltd.*, the Board prohibited the picketing of a terminal where pulp produced by the struck employer was stored for shipping to customers. There was no evidence of unusual stockpiling at the terminal prior to the strike. There were no corporate links between the primary employer and the terminal enterprise and the struck employer exercised no control over operations at the terminal. The storage of the pulp was incidental to transportation functions and its temporary presence at the terminal could not transform the terminal into the site of primary activities just because the primary employer retained legal title in the pulp. In addition there was no evidence of an ally relationship. Therefore the picketing was purely secondary. A decision permitting picketing would risk involving third parties whose only relations with the employer were purely contractual. In reaching this conclusion the Board analysed the common law jurisprudence and cited with approval *Johnston Terminals v. Misc. Workers Local 351.*

In order to widen the permissible scope of picketing beyond the boundaries set by the activities of the primary employer, there must be associated or related activities carried on by more than one firm or corporation such as would justify the exercise of the Board’s discretion under section 37. This section permits an examination of the corporate structure. To support a finding that separate corporate entities are, in effect, the same employer for purposes of the Code, the evidence must establish some corporate linkage. There must be financial interests in common between the primary employer and the third party before they will be treated as one employer. The existence of a parent-subsidiary relationship, or the fact that the two corporate entities are filial subsidiaries of the same parent company, will provide the necessary corporate interconnection. Having found the interconnection, the Board will then analyse the degree of interdependence to determine if the companies function as one.

The finding that there is a high degree of functional integration of management in the corporate structure, the interchange of management personnel from one company to the other, the provision of management services such as accounting from head office and, especially, the shared control of labour relations policy and decision-making will convince the Board that the reality for collective bargaining purposes is that there is one operation against which the union should be allowed to deploy its forces. If such a finding is made, picketing will be permitted at the place of operations or business of the related

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132 Supra note 104.
134 Canex Placer Ltd., supra note 116; see also Teamsters Credit Union, [1979] 2 C.L.R.B.R. 441.
136 This analysis resembles that used by the court in *Domtar Chemicals Ltd. v. Leddy* discussed supra note 70.
companies as at the place of operations of the primary employer, subject, of course, to the discretion granted by sections 85(1) (b) and section 86.

3. Is the Third Party an Ally of the Struck Employer?

Where the third party is not a part of the employer's total economic strength, the only justification for an expansion of the picketing is a finding that the third party is an ally of the primary employer. The ally doctrine is, in the eyes of the British Columbia Labour Relations Board, the *quid pro quo* of the prohibition of secondary strike activity. If the union cannot extend the economic impact of the strike neither can the employer diminish it. The parties must bargain according to their "natural" market power and must not seek to alter that power through combination with sympathetic unions or employers. Section 85(3) creates a rebuttable presumption that a third party employer who performs work, supplies goods or furnishes services that would otherwise be performed, supplied or furnished by the struck employer, is an ally. Once the union has proven that the third party is involved in the performance of struck work, the onus is on the applicant to disprove the allegation that it is an ally of the struck employer.

The distinction between the third party employer who seeks to find alternate supplies in the market when the strike disrupts its own economic activity or who respects an existing contract, and a third party who helps increase employer resistance to settlement of the primary dispute is fundamental. It is a perfectly natural inclination on the part of a third party adversely affected by the strike to take self-help measures to offset that impact. Neutral third parties will go out into the market to seek alternate supplies of goods and services to replace those otherwise provided by the struck employer. They may also seek alternate clients. This increases the pressure on the struck employer to settle because it is faced with the long-term loss of suppliers and customers. A competitor which furnishes its product in place of that of the struck employer is, in a sense, doing struck work. This will not expose the competitor to the risk of picketing because this is purely market behaviour.

In addition, the involvement of the third party employer must go beyond the performance of existing contractual relations. The struck employer is not obliged by law to shut down its operations. If it can continue to operate, it is free to do so. In such case, third parties having contractual relations with the primary employer can and are most likely obliged to respect their contractual obligations. Where the contractual relationship pre-dates the strike

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and the nature of the obligation has not been altered or expanded because of the strike with the objective of increasing the capacity of the employer to resist the strike, the third party is not an ally of the struck employer.  

A third party becomes an ally when, without some neutral justification, it performs some voluntary act, that will provide alternate sources of revenue which, by diminishing the economic impact of the strike on the primary employer, will better enable the employer to resist settlement of the strike. The Board will apply an objective test to determine intention. The third party may be motivated by the most pristine self-interest and yet be having an enormous impact on the labour dispute. It will be taken to have intended the forseeable results of its acts.

In one case the third party, who had leased a computer from the struck employer which would normally be serviced by the striking employees, used a back-up computer at the primary employer's offices for one day because of a breakdown of its own computer. It had no option because the back-up computer was the only one available which was programmed for such work. The Board held that the third party was not an ally for the purposes of section 85 because the act was not voluntary and the use of the back-up computer was provided for in the original contract.

Stockpiling does not automatically result in the designation of the third party as an ally. It depends on the extent of the stockpiling and the impact on the strike effort. Thus, where the liquor distribution branch of the Provincial Government stockpiled liquor with the co-operation of the employer, in anticipation of a strike, it became a legitimate target of picketing. The stockpiling was not a standard practice of the branch and it knew that the continued sales would seriously blunt the effectiveness of the strike.

Where a sub-contractor comes onto the site of the strike and performs work which is not being done because of the strike, it will take the risk of having its operations picketed because it is intervening in the dispute. Where the

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143 London Drugs Ltd., supra note 119; Andreas Krebs Construction (1977) Ltd., supra note 140; Chevron Canada Ltd., supra note 142; Construction Labour Relations Ass'n of B.C. and U.C.J.A., supra note 140.
144 Johnston Terminals and Storage Ltd., supra note 120.
147 Johnston Terminals and Storage Ltd., supra note 120. This case also involved common situs problems which led to a refusal of an order because the struck employer was carrying on its business on the premises of the applicant.
148 Totem Welding Supplies Ltd., supra note 138.
third party is brought in at substantial cost to the primary employer precisely to reduce the impact of the strike and is, therefore, profiting directly from the prolonging of the strike, it will be considered to be an ally. A third party who performs struck work will not cease to be an ally once it has completed its contract and left the place of operations of the struck employer. If this were permitted there would be no incentive to remain neutral in the primary dispute. In order to cease to be an ally, the third party must disengage itself from any involvement in struck work immediately on learning that it is involving itself in a legal strike. Otherwise, it runs the risk of having its operations picketed for the duration of the dispute. Thus, where the sub-contractor engaged to perform struck work left the site without completing the work, it was held to have successfully freed itself of any involvement in the strike.

The objective of the ally provision is to ensure that the parties bargain from their position of economic strength or weakness as established by the particular labour market. The effect of this approach is to restrain the union from widening the scope of the strike in order to create disproportionate bargaining power. The employer, in turn, is denied the use of the economic resources of third parties in its effort to resist the strike. Employer combination runs the risk of the widened scope of picketing. The disruption of the production of third parties who chose to place their resources at the service of the struck employer is the disincentive to employer widening of the scope of the strike.

4. The Discretionary Powers to Limit Picketing

Having established a *prima facie* right to picket on one of the bases set out above, the union still does not have an untrammeled right to picket the primary employer, its related operations, and its allies. The Board has the discretion to restrict picketing so as to protect the integrity of a collective agreement in another bargaining unit and to insulate neutral third party employees engaged in operations at the same site as the primary employer from the disruptive effects of the primary picketing. Because the Board takes a very flexible approach premised on broad standards, the exercise of its discretion is the critical core of its decision-making power.

a) The Existence of a Collective Agreement

Primary strike activity within the confines of the bargaining unit is immune from the exercise of the discretion set out in section 85(1) (b). This

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151 Haul-Away Disposals Ltd., *supra* note 139.


153 When the Board speaks of "natural" bargaining power it never acknowledges the fact that the labour market is, itself, created artificially by labour legislation based on a conscious policy choice in favour of delineating the bargaining unit according to the individual employment relationship. "Natural" bargaining power is as much a fiction as the "right to trade".

154 Doman Transport Ltd., *supra* note 133.
discretion is to be exercised to protect the integrity of collective bargaining relations at secondary sites of the employer's operations. The policy objective is to prevent a disproportionate escalation of the dispute which could result from the exercise of the right to picket set out in section 85(1) (b). In the exercise of its discretion the Board tries to be careful not to tip the balance of bargaining power determined by the market relationship of the two parties.  

The Board has set out a number of criteria to govern the exercise of its discretion. It will examine the behaviour of the employer to determine whether or not the latter has accepted the effects of picketing at the primary site. Where the employer has shut down its struck operations and is relying on its market-established bargaining power to attain the best possible settlement there is a strong argument for the restriction of picketing. This argument is reinforced where the expansion of picketing may throw more people out of work without significantly increasing the pressure to settle.

However, where there is a high degree of integration between the two bargaining units in question, the Board will be more reluctant to restrict the picketing. Functional integration of the two operations through which activity at the secondary site contributes substantially to the economic viability of the primary operation will weigh in favour of the union. In Empress Foods Ltd. the Board distinguished among the four subsidiaries of the parent of the struck employer. Three of them contributed nothing to the operations of the primary employer, and they had collective agreements with their own unions. The fourth company prepared fruit used by the primary employer in making its products. Therefore, it was having an impact on the strike and was a legitimate target.

An historical relationship between the two units, such as similar wages and working conditions over a long period, or a history of simultaneous bargaining, will help justify the expanded scope of the picketing. This factor is reinforced where two locals of the same union represent the employees at both sites. The possibility of loss of elected posts will encourage the union leaders to act reasonably in the circumstances. The employees at the secondary site have some input into the decision-making processes and can decide for themselves to what extent they are willing to bear the costs of the strike to assist their fellow employees. Therefore, the fact that both sites are represented by the same union may justify the extension of picketing activity.

157 Dillingham Corp. (Canada), supra note 119; Domtar Construction Materials Ltd., supra note 155.
159 Cannex Placer Ltd., supra note 120.
160 Id.
Finally, the Board will also consider the ratio of striking employees to non-strikers thrown out of work by the additional picket lines although this factor is not, in isolation, decisive.161 Where a small group of strikers through the use of pickets at secondary sites causes large numbers of other workers to be put out of work, the Board may restrict the picketing. Conversely, if the numbers of people not working is not significantly increased by the additional pickets, the Board will be inclined to permit the picketing.102

None of these criteria is decisive by itself. The Board must balance the benefit to the striking employees of the expansion of picketing activity against the detriment to the neutral employer and the non-striking employees affected by the picketing. The striking employees have a right to try to achieve a better contract through the withdrawal of their labour but they must achieve that goal through the use of the bargaining power created by the withdrawal of their own labour.163

The Board has stated clearly that it disapproves of a small unit using picket lines and the union doctrine of solidarity to shut down much larger operations and thereby achieve disproportionate bargaining power. It especially dislikes the attempt to shut down a unit which just settled a strike on terms which the strikers have refused to accept. The attempt to use the disruption of work at the secondary site to obtain a better deal than that obtained by those employees is considered an abuse of the right to picket. The parties have to rely on their own bargaining power.164 However, where the company is discriminating against the striking workers or is trying to alter a long established historical relationship, this factor may outweigh the temporary harm caused to the employees at the secondary site.

b) Common situs Employers

Section 86 gives the Board the power to restrict all picketing, whether at a primary or secondary site, if such restriction is necessary to prevent the inflicting of undue harm on neutral third parties carrying on operations at the same site as a place of business of the struck employer. This discretion is a necessary corollary to the prohibition of secondary strike activity and to the

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161 Id.
162 Standard Oil Co. of B.C., supra note 135; (Ratio 1:17) see also Canada Cement Lafarge Ltd., supra note 137; Domtar Construction Materials Ltd., supra note 155. As employees obtain work elsewhere, the ratio may change and so may the legal status of the picketing. See Construction Labour Relations Ass'n of B.C. and C.A.I.M.A.W., supra note 156, at 158-59 (C.L.R.B.R.), 407-409 (C.L.L.C.).
163 Standard Oil Co. of B.C., supra note 135.
164 Canada Cement Lafarge Ltd., supra note 137; Canex Placer Ltd., supra note 120. The preoccupation with the welfare of the non-striking employees is peculiar. Surely, these employees can decide for themselves whether or not they want to cross the picket line. If they are willing to forgo salary and risk disciplinary measures, they should be allowed to make that choice. Perhaps the real concern is the prevention of sympathetic actions in which case the policy is another example of "...the same old thing in brand-new drag..." In any case, it is clear that the Board is actively engaged in a modified form of interest arbitration. The union has to prove that its demands are reasonable.
legislative policy of insulating third parties from the effects of the strike. In these cases, primary picketing is having secondary effects.

To justify an order under section 86, there must be no involvement in the primary strike\textsuperscript{165} and the third party must not be a related company which would be treated as the primary employer by virtue of section 37 of the Code.\textsuperscript{166} If the applicant is truly neutral, the Board must weigh the advantage gained by the striking employees from the picketing against the harm caused to the employees of the neutral company. Where the advantage of a show of solidarity with the striking employees is minimal because the neutral has little or no influence over the settlement of the strike, the Board will be disposed to issue a cease and desist order.\textsuperscript{167} This tendency will be reinforced if the impact on the primary employer is negligible and the potential losses of the neutral are large. However, the fact that the benefit to the union is minimal is not necessarily decisive.\textsuperscript{168} The Board will try to tailor the order to the circumstances in order to ensure that no struck work will be performed by the neutral employer\textsuperscript{169} or that the employer will not indirectly benefit from the protection afforded neutral third parties.\textsuperscript{170} The Board does not want to tip the scales in favour of the struck employer by increasing its capacity to resist the union's demands.

In the case where the third party is performing work under contract with the struck employer,\textsuperscript{171} the balancing of interests is more delicate because the struck employer stands to profit from the restrictions on picketing. This situation usually arises where the third party is a construction company engaged in renovation or new construction at a primary employer's place of business. The onus on the third party is more onerous because this is not a case involving a "purely accidental" presence at the common site but one which is brought about by a contract with the struck employer. The Board must weigh the potential benefits to the struck employer against the losses of the third party. These losses can be very large where the contract is for a fixed price, the third party has large starting-up costs, and the inflation rate is high.

In these cases, the Board distinguishes between the modernization of existing facilities and new construction. The former is more likely to be of short-term assistance in resisting the strike. The latter, especially in its early stages, is unlikely to be of much assistance whereas the losses of the contractor may be enormous. Thus, where the employer will not, in the short

\textsuperscript{165} Wescraft Manufacturing Ltd., [1975] 2 C.L.R.B.R. 324.
\textsuperscript{166} Supra note 133.
\textsuperscript{167} Construction Labour Relations Ass'n of B.C. and C.A.I.M.A.W., supra note 156; Dillingham Corp. (Canada), supra note 119; Camosun College, [1975] 2 C.L.R.B.R. 94.
\textsuperscript{168} Construction Labour Relations Ass'n of B.C. and C.A.I.M.A.W., supra note 156.
\textsuperscript{169} Wescraft Manufacturing Ltd., supra note 165.
term, be handed an income-producing asset with which to resist the union’s demands, the Board will come to the aid of the third party. The order can take effect for a fixed period so as to permit the union to expand the scope of picketing in the event of a lengthy strike. As construction nears completion the rationale for protecting the third party will disappear and the potential impact on the strike may increase.

5. Equitable Considerations

The final element in evaluating the legality of picketing and the exercise of Board discretion, is the equitable “clean hands” doctrine codified in section 91 of the Code. This section permits the Board to refuse an order where the behaviour of the applicant during the dispute would so justify. Thus, the illegality of the picketing activity or the disproportionate escalation of the strike will not automatically result in the issuing of a cease and desist order. There may be countervailing considerations. If the employees are unable to exercise their right of free expression because of unfair labour practices committed by the employer, the use of pickets to inform them of their rights may be justified even though this amounts to prohibited organizational picketing. The nature of the work force may be such that there is no other effective way of organizing the industry. This could be the case in the construction industry. In such circumstances equity may weigh in favour of the union despite the illegality of the picketing.

In the case of an escalation of the strike the order may issue, but it can be coupled with conditions designed to protect the effective prosecution of the primary strike. In the Standard Oil Co. of B.C. case, the Board restricted the picketing because of its impact on a larger bargaining unit in spite of a finding that there was a common employer under section 37. It coupled this order with a condition that the parent corporation cease all struck work carried on at the secondary site, which was increasing employer capacity to resist the strike. Without this provision it was felt that the order would be an inequitable interference in the bargaining relationship between the parties.

C. Conclusion: A Brief Comparison of the Decisions of the Courts and the British Columbia Labour Board

Because of the discretionary nature of the remedies available from both the courts and the British Columbia Labour Relations Board, it is impossible to say that in every case the result would have been exactly the same regardless of jurisdiction. However, if one makes the necessary, but absolutely unverifiable, assumption that the conclusions of fact by the different tribunals would be

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172 Sandman Inn (Vancouver) Ltd., supra note 130.
174 Sandman Inn (Vancouver) Ltd., supra note 130.
175 Supra note 135; see also B.C. Railway Co., supra note 156 in which the Board, as a condition of issuing the cease and desist order, required the applicant to grant the strikers a licence to enter onto its property for the purpose of picketing the premises of the struck employer.
identical, the decisions would vary especially as between Ontario and British Columbia.

Some of the Ontario decisions might be changed. In *Inglis Ltd. v. Rao*, a cease and desist order might have issued because the expanded picketing was putting a disproportionate number of people out of work. In *Falconbridge Nickel Mines Ltd. v. Tyer* a cease and desist order might have issued again because of the enormity of the losses being suffered by the applicant due to the delay in opening its refinery. But the order would likely be coupled with a condition that no struck work be performed. In *Tatham Co. Ltd. v. Blackburn* an order might have issued because the picketing was imposing losses on neutral parties without a corresponding increase in pressure on the primary employer.

It is possible to speculate that the approach of the British Columbia Labour Relations Board would have resulted in the issuing of more conditional orders in Ontario especially in cases involving common situs problems. Thus, in *Robertson Yates Corp. v. Fitzgerald* instead of a blanket injunction which effectively removed the right to engage in primary picketing, the order could have been coupled with conditions to ensure that the protection of the secondary contractor did not undermine the impact of the legal strike. Presumably, the courts could develop a more sophisticated approach to the formulating of injunctions if counsel raised such a possibility. There is nothing inherent in the nature of the injunction that requires the courts to be heavy handed.

Conversely, if the British Columbia situations had occurred in Ontario after the amendments to the *Judicature Act*, the decisions would again have been largely the same because the extensions of the right to picket in British Columbia were premised on some involvement in the primary labour dispute either through corporate interconnection or active intervention.

As was suggested above, the factor that would, perhaps, make the biggest difference would be the exercise of the discretion that conditions the right to picket in British Columbia. In Ontario, once it is proven that the picketing is connected to a labour dispute, section 20 prevents the issuing of any injunction unless the police are unable to control the situation. This restraint on the courts exists regardless of the existence of a collective agreement or the numerical ratio of the strikers and the non-striking employees who are respecting the picket line. The discretionary power may not be as necessary in Ontario be-

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176 *Supra* note 72. Compare with *Domtar Construction Materials Ltd.*, *supra* note 155.

177 *Supra* note 44. Compare with *C.L.R.A.* and *C.A.M.A.W.*, *supra* note 156.

178 *Supra* note 62.

179 *Supra* note 32. Compare with *Standard Oil of B.C.*, *supra* note 135. *Detroit & Windsor Subway Co. v. Blyth*, *supra* note 62 is another case where the fact that the injunction was obviously going to prevent primary picketing was not even mentioned. The common law courts have tremendous difficulty with common situs cases.

180 R.S.O. 1980, c. 223.

181 Difficulties of proof of the requisite link might arise in Ontario because of the nature of the injunction proceedings but these are impossible to predict.
cause the refusal to cross a picket line has been held to amount to an illegal strike exposing the workers and their union to penalties under the collective agreement and the labour legislation. In addition, actions for inducing breach of contract are available in Ontario even when the picketing is permissible. Therefore the legal context limits the potential effectiveness of the expanded scope for picketing.

In British Columbia, however, actions for inducing breach of contract have been abolished and refusals to cross picket lines are not illegal strikes, although they may amount to violations of the collective agreement or the individual contract of employment. Therefore it may be necessary to use the discretionary powers of the Board to mitigate what is, formally, a much more effective right to picket.

At first glance, the facts of the Wescraft case illustrate a situation in which the result would vary between British Columbia and Ontario. The applicant company was a customer of the struck employer, a gas company. During the strike of the gas company's drivers, the applicant continued to purchase its gas from the struck company despite the strike. The gas was stored in tanks belonging to the struck employer and leased to the customer. When the gas company continued its deliveries by using supervisory personnel, the union set up a picket line at the place of business of the customer. The picket line was present around the clock. The Board did not discuss the nature of the contractual relations between the companies, but it was assumed that the third party company had the option of purchasing its gas elsewhere. The Board refused to issue a cease and desist order.

The published decision is brief and its reasoning is not perfectly clear. It is possible to argue that the decision is based on the fact that the struck employer owned the tanks and that the striking employees normally would work at the site for one and one half hours during deliveries. If this is true, the struck employer was actually performing work at that site, in which case the secondary location was a place of operation for the primary employer. There would be involvement in the labour dispute and the result would likely be the same in Ontario if the facts indicate no conflicts in the picket line.

If the correct interpretation of the decision is that by continuing its purely contractual relations with the employer, the customer exposes itself to the risk of being picketed, the decision indicates a significant expansion of the right to picket, one which would not be followed elsewhere. Such an interpreta-

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183 Labour Code, R.S.B.C. 1979, c. 212, s. 87(b) (c).


186 Supra note 165.

187 See, e.g., Ford Motor Co. of Canada v. McDermott, supra note 57.
tion, however, is contradictory both to the declared policy of protecting neutral third parties and to later decisions of the Board in which picketing was restrained where the only involvement was continued normal contractual relations with the struck employer. The continuation of normal contractual relations without any additional effort to aid the employer has been held in both jurisdictions to be insufficient to justify an expansion of picketing.

It is difficult to predict the reaction of the Ontario Courts to cases similar to Empress Foods Ltd. and Canex Placer Ltd. because there seems to have been no case in which a union has picketed a company purely because of its corporate relationship absent any additional element such as the performance of struck work or a common situs for the subsidiaries. Corporate interconnection has been an important factor in the Ontario cases and it seems plausible to argue that, once it is shown that the corporate structure simply masks the employer's total economic strength, there is the requisite involvement in a labour dispute which would trigger the operation of section 20. If this is true, then the issuing of a cease and desist order in the Empress Foods case would not occur in Ontario because section 20 is not discretionary. Therefore, it would not be possible to distinguish between one subsidiary and another on the basis of either functional relationship with the struck bargaining unit or the existence of a collective agreement between the subsidiary and its employees.

On the other hand, the courts may require some greater involvement in the dispute than simply a corporate relationship. If this argument is accepted, there would have to be some increased activity on the part of the subsidiary, whether functionally related or not, which is designed to offset the impact of the strike before section 20 would have any effect. Therefore, picketing of a subsidiary such as that allowed in the Canex Placer case, in which the striking employees of one mine were allowed to continue intermittent picketing of another owned by the same corporate parent, may be prohibited in Ontario.

This question remains to be decided in Ontario because the cases are contradictory. It may be that in the future the most important distinction between the Ontario and British Columbia approach to the regulation of picketing will be the significance attached to corporate interconnection. However, it is entirely possible that the courts, in analysing the existence of a labour dispute, will be influenced by factors such as the historical relationship between bargaining units and the presence of the same union in both plants.

The common situs cases may provide another example of situations in

188 London Drugs Ltd., supra note 119; Andreas Krebs Construction (1977) Ltd., supra note 140; Canada Cement Lafarge Ltd., supra note 137.
189 Supra note 158.
190 Supra note 120.
191 Supra note 158.
192 Supra note 120. Compare with Domtar Chemicals Ltd. v. Leddy, supra note 70.
193 See supra, section IV A2(b).
which the British Columbia approach would be less restrictive. The courts have a tendency to issue injunctions to restrain even primary picketing when it has a secondary effect. The British Columbia Board has tried to ensure that its solutions to common situs problems do not unduly benefit the employer.

Thus, in the Standard Oil case, the Board was willing to restrict picketing that was disrupting operations of the applicant's refinery to the loading area out of which the primary employer worked, only on the condition that all struck work performed at the refinery be stopped. The refinery was the parent company of the primary employer and could not complain of the picketing as long as it was involved in the strike.

Section 20 of the Ontario Judicature Act does not make any exceptions for picketing connected to a labour dispute, so the fact that the primary picketing is having secondary effects does not appear to be relevant. However, the issuing of conditional orders permits a more flexible approach than that adopted in the cases which have come before the courts.

The British Columbia legislation did make some significant changes in the legislative description of the legitimate situs for picketing. These changes create the possibility of differing results in provinces whose legislation is similar to the old Trade-Unions Act. For example, in Williams v. Amalgamated Meat Cutters, the court had enjoined picketing on the grounds that the delivering of merchandise was not sufficient to transform the place of business of the client into a place of operations of the struck employer. In a subsequent decision, the British Columbia Supreme Court modified the Williams result, holding that where the struck employer was performing work at the site of the secondary company, the union could picket during the period in which the struck work was being performed. Since then, the British Columbia Labour Relations Board has held that section 85 overrules these limitations to the extent that it allows the union to picket "any place that the employer operates, or where the employer does anything forming part of the operation of his business. . . ." There is no limit on the time of this picketing.

It is clear, however, that pure secondary picketing remains prohibited throughout Canada. The British Columbia Labour Board dealt with the per-

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104 See, e.g., Heat Frost Insulation Workers Local 126 v. Edinburgh Development Ltd., supra note 108 and the numerous cases which applied Hersees, supra note 11.
105 Supra note 135.
106 R.S.O. 1980, c. 223.
108 Supra note 98.
109 Wescraft Manufacturing Ltd., supra note 165. See also Parklands Development Corp., supra note 115, Squamish Terminals Ltd., [1975] 2 C.L.R.B.R. 289, and Johnston Terminals and Storage Ltd., supra note 120, for a discussion of the changes from the previous legislation.
missibility of such picketing in *London Drugs Ltd.* In this case the applicant operated a retail outlet for pharmaceutical products. The employees of a laboratory manufacturing such products were certified and went on strike to obtain a first collective agreement. The union was unable to shut down the primary employer so it decided to expand its picketing to include retail outlets for the employer’s product. It began picketing the store and warehouse of London Drugs in Richmond, British Columbia. The retailer accounted for about fifty per cent of the total sales of the primary employer. It had a contractual arrangement whereby the employer manufactured, packaged and labelled a large range of products for retail under London Drug’s own label. None of the applicant’s employees refused to cross the picket line but some deliveries were not made.

The Board issued a cease and desist order requiring the union to remove the picket line. Clearly the retailer’s continued patronage of the laboratory gave financial support to its efforts to resist the strikers’ demands. However, the retailer had no corporate connection to the struck employer and simply continued previously established contractual relations with the primary employer. Such activity did not amount to active involvement in the strike which would transform the retailer into an ally of the struck employer. Dependence on one client for economic survival could not alter that result. Furthermore, it would not be reasonable to require the retailer to find an alternate supplier who would have to make major adjustments to its equipment for what could prove to be a short period. Thus, this was a case of pure secondary picketing which was prohibited under the British Columbia legislation.

An examination of the cases in British Columbia and Ontario does not lead to the conclusion that the courts consistently restrict the scope of picketing activity whereas the British Columbia Labour Relations Board consistently expands it. Indeed, a comparison of the jurisprudence seems to indicate that the British Columbia Board has been more restrictive in its approach because the discretionary nature of its powers has led it to limit activity that would have been permitted in Ontario because it was connected to a labour dispute. Of course, it must be remembered that this apparent restrictiveness is offset somewhat by the power of the Board to impose conditions on the applicant to ensure that the order does not undermine the primary strike.

In comparison with other provinces which have adopted similar wording to the former British Columbia legislation, the British Columbia Board has noted some definite changes. Therefore, the approach of provinces whose legislation is similar to the old British Columbia legislation may prove to be significantly more restrictive. Manitoba may have taken the most liberal approach in its desire to defend the right of free speech. Nonetheless, very similar concerns underlie the decisions of both the British Columbia Board and the courts elsewhere in Canada.

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201 Supra note 119. The obvious comparison is with Hersees, supra note 11, where the contractual link was even more tenuous.
VI CONCLUSION

Labour relations tribunals were created in the hope that they would legitimize decision-making in this area by avoiding the bias of the courts and the incoherence of the common law jurisprudence in administering and regulating industrial relations. Industrial peace was to be attained by giving due recognition to the just aspirations of the union movement. Once this was done, unions would respect even unfavourable decisions. Yet an examination of the common law and statutory rules governing secondary strike activity reveals that the legislatures, the courts and the labour relations boards have taken virtually identical approaches in defining the lawful scope of union activity.

The substantive rule remains the same: secondary strike activity is prohibited. The right to trade must be protected and mere contractual relations with the struck employer will not involve the risk of becoming embroiled in other people's labour disputes. The policy justification for the rule is the same: a strike is an isolated dispute between two parties and the impact of this event on secondaries must be kept to an absolute minimum. In the interests of "society as a whole", production must continue. Only that disruption of economic activity that increases the direct pressure on the primary employer will further the goal of industrial peace. The evolution of the rule is the same: the absolute prohibition must be sufficiently subtle to ensure that the primary employer does not in another corporate guise or through the enlisting of allies, use the rule to resist the demands of a union on a legal strike. The quid pro quo of the prohibition of secondary strikes is the right to widen the scope of the picketing to include the total economic strength of the struck employer. Otherwise, the obvious injustice of the result will undermine the legitimacy of the rule.

This similarity of rule and policy is necessarily the result of the numerous pressures brought to bear on these institutions. The courts would never have reached their current position if it had not been for the flurry of criticism provoked by the common law regulation of picketing, the statutory amendments, the political pressures brought to bear by unions, employers and political parties, the enactment of the British Columbia Labour Code202 and the patient presentation of argument by lawyers trying to clarify the rule. The similarities between the judicial and administrative response may indicate how it is possible to elaborate a consistent industrial relations policy in spite of what often appears to be institutional chaos among the eleven Canadian jurisdictions and the cacaphony of the industrial relations actors jockeying self-interestedly for political and economic advantage. It is even possible to argue that the courts mended their ways precisely because they recognized the validity of the critique of their decisions and the necessity to assume the responsibility for their judicial legislating.

Whatever the causes, it is clear that the interaction of all these forces has brought us to a point where there is a substantial consensus amongst courts,

202 R.S.B.C. 1979, c. 212.
legislatures and labour boards on industrial relations policy. This was possible because the policy objectives of the three institutions were always very similar. The goal was to maximize production through the minimization of the impact of any particular strike on the economy as a whole. Given the common objective it was possible over a period of time to build through judicial and statutory legislation a remarkably coherent industrial relations policy.

This is not to suggest that there are no differences in institutional style. Judges do demonstrate greater affinity for the rhetoric of laissez-faire and the right to trade than do labour boards and legislators. The courts use a formalist approach to decision-making. The British Columbia Labour Board speaks a different language: that of balancing interests and industrial relations realities. It tries to formulate standards in light of industrial relations goals and then tailor the results in particular cases so as to maximize the possibilities of attaining those goals, but these differences in institutional style do not necessarily reflect a different assessment of the costs and benefits of unions.

This brings us to the heart of the critique being made. If bias had resulted in an arbitrary and incoherent rule imposing unjustifiable restrictions on unions, one would naturally assume that the legislatures or the new administrative tribunals would have adopted a new substantive rule. Yet none of the critics have seriously argued that secondary boycotts should be permitted regardless of the consequences and no legislature has adopted that approach.

The real issue at stake in this debate is the legitimation of the regulation of labour conflict. This conflict must be confined in order to preserve the existing social order. Unions have the power to wreak havoc. If one follows labour monopoly to its logical conclusion one finds general strikes and class conflict. This potentially destructive conflict has to be contained and domesticated.203

The courts were unable to perform this role because past overzealousness in the defence of employer interests resulted in union perceptions of courts as instruments of "class" repression. The objective of the critics is, therefore, not necessarily to change the substantive rule, although they were proposing important refinements, but rather to create an instructional framework which would make the constraints imposed on strike activity more palatable to both the union movement and the rank and file, thereby minimizing "the sense of grievance among those who will have to bear the adverse consequences of this decision and who might otherwise feel no compunction about creating some havoc in response."204 The labour relations boards provided the mechanism to legitimize the restrictions imposed on unions in the interest of social stability.

The fact that workers were permitted and then encouraged, by the law to band together to negotiate terms of employment which society would decently accept, helped transform the system in order to preserve it. Enlightened employers now realize that a vital institution of collective bargaining is an indispensible bastion

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203 At least from the viewpoint of the employers who would stand to lose the most.
204 Weiler, Reconcilable Differences, supra note 10, at 306 in commenting on the theory of industrial co-determination.
of their own market freedom, however sharp may be their differences with trade unions about specific issues.205

The unfortunate aspect of this critique of the common law regulation of strike activity is that the use of the language of bias to advance the case for administrative tribunals serves to mask a debate between advocates of the traditional formalist approach, with its emphasis on certainty and predictability as legitimating values, and those advocating a realist or neorealist approach, with its emphasis on broad standards and flexible decision-making.206 As a result, the critique obscures the very real question of class bias in decision-making, judicial or administrative. Close examination reveals that the criticism is not really about bias at all. This leaves us without any theory with which to examine the ways in which the class structure of society permeates and influences the functioning of its judicial system. Indeed, the use of the criticism of bias to legitimate the regulation of industrial conflict by administrative boards obscures the extent to which labour legislation itself is a mechanism of social control. The generally accepted view that unions have had little impact on the distribution of wealth and income between labour and capital may be eloquent testimony to the effectiveness of that control.207

205 Id. at 288 fn.

206 This categorization is crude because legal scholars seldom articulate their underlying premises and because the argument outlined in the introduction is necessarily a composite culled from the writings of many individuals, some of whom may actually have differing philosophies. Some may, for example, accept the arguments of the Legal Process School. See, e.g., Weiler, The Slippery Slope of Judicial Intervention, supra note 21. For a concise discussion of these philosophic tendencies see Ackerman, Law and the Modern Mind, supra note 21. For a defence of the use of standards see Brown, supra note 49.