DUSESSOY'S SUPERMARKETS ST. JAMES LTD. v. RETAIL CLERKS UNION, LOCAL 832, et al., [1961] M.J. No. 46

Manitoba Judgments

Manitoba Queen's Bench
Monnin, J.
Judgment: May 1, 1961

[1961] M.J. No. 46 | 30 D.L.R. (2d) 51

(72 paras.)

Counsel

C. V. McArthur, Q.C., for plaintiff.

A. M. Israels, Q.C., for defendants.

MONNIN, J.

1 Plaintiff's action is against the union, its business agent, the international representative of the union in this district, and eight of its members who actually picketed plaintiff's premises. Plaintiff alleges that defendants conspired together to injure it in its business, beset and watched its premises, accosted its customers, interfered with them and urged them to shop elsewhere; that the stickers, placards and leaflets were false and misleading; that the activities of the pickets constituted a nuisance; that they conspired unlawfully to induce it to commit a breach of its contract with the Codville Company Limited (hereinafter called Codville); and that the defendant Ewonchuk assaulted its president.

2 Plaintiff claims damages and continuation in permanence of the interlocutory injunction which was originally granted *ex parte* and latterly continued up to the date of trial. All defendants deny the allegations: Ewonchuk denies the assault; the union pleads it is not an entity in law against which this action can be brought; and all allege that Codville is known and advertises itself as the Supply Depot for I.G.A. stores, which stores, by joint advertising, by their uniform appearance and service and by stocking similar brands of merchandise -- many with the I.G.A. labels -- represent to the public that they are an integrated enterprise or, as one witness said, "an integrated whole".

3 Plaintiff, incorporated under the laws of Manitoba, carries on business as a retail grocer, in rented premises, in the City of St. James. At the top of these premises, at the front, there is a substantial sign in the following words: "DUSESSOY'S IGA FOODLINER", and above the entrance, on the side, there is another "IGA" sign. The property was formerly owned by Caledonian Leaseholds Ltd., which, on April 9, 1957 leased the lands and premises to Codville.

The latter sub-let them on July 31, 1957 to Andrew (Amadee) Dusessoy, who was carrying on business under a trade name. Dusessoy eventually transferred all his assets and liabilities to plaintiff corporation. Plaintiff's establishment is a "tied" house; see Articles 21 and 22 of the lease.

4 Codville, incorporated under the laws of Manitoba, carries on business, also in the City of St. James, as wholesale merchants. Independent Grocers Alliance Distributing Co. is incorporated under the laws of the State of Illinois. Its purpose is to help individual retail merchants to merchandise, advertise and sell in order to compete with chain stores and others. This American corporation owns and controls a subsidiary known as Independent Grocers Alliance Distributing Company, Canada, Limited, incorporated under the laws of Ontario, which has registered in Canada the three letters "IGA". For our purpose it is sufficient to say that Codville is the wholesale distributor of IGA products for all IGA stores in Manitoba.

5 In order to compete effectively with other stores the plaintiff, through its predecessor, in September, 1957 obtained a franchise from this voluntary chain association and thus undertook to become known as an IGA store. By s. 21 of the lease it is bound to purchase from Codville all the merchandise sold or offered for sale by Codville, provided that if Codville is unable or unwilling to supply such merchandise then plaintiff may purchase elsewhere.

6 Codville has in the City of St. James a large warehouse on which is displayed its corporate name as well as the words "Supply Depot" with, in large-sized letters, the IGA sign. Codville sells to retail stores other than those in the IGA chain and 45% of the merchandise handled and shipped by its employees -- members of the union -- would be consigned to stores not belonging to the IGA voluntary chain.

7 Codville has no direct control or direct interest in the plaintiff corporation. Plaintiff's relationship with Codville is simply that of franchise holder and sub-lessee. There is no entity known as IGA Supply Depot, although Codville advertises itself as such, and rightly so. Codville has no direct interest either as a subsidiary or by control of the majority of the stock issued in other IGA stores of the Metropolitan area and it does not own stock in any subsidiary which owns an IGA store. Among other things the Supply Depot provides store engineering service, store supervision, a complete advertising program, and management counsel; but all of this is in a purely supervisory capacity which does not change the nature of plaintiff's separate entity.

8 There is a strong similarity of operation on the part of all franchise holders and the Supply Depot attempts to standardize the methods of display, the layout, and the store fixtures.

9 The union is not, and never has been, the bargaining agent for plaintiff's employees, and no trade dispute exists between plaintiff and defendants.

10 On December 20, 1960, at approximately 10:15 a.m., fifteen of the twenty-three employees of Codville, all members of the union -- among whom were eight of the named defendants--- declared a strike and started to picket Codville's premises. Originally Codville owned its trucks but for some time prior to December 20, 1960, Security Storage Ltd. had owned all trucks used to deliver Codville merchandise. These trucks carried the markings of Codville and, in a more prominent fashion, the IGA sign. Defendant Ewonchuk had been employed as a truck driver by Codville for approximately 9 years but ceased driving at the commencement of the strike. He had driven a truck for Codville during the time the latter had owned its vehicles and, later, during

the period of ownership by Security Storage Ltd. After the strike commenced Codville hired no substitute for Ewonchuk but Security Storage provided a truck driver who performed the services previously rendered by Ewonchuk. I am satisfied that this substitution was not a sham but truly a change of service occasioned by the departure of Ewonchuk.

11 On the evening of the day the strike commenced (December 20, 1960) one Rees, the International Representative for the central Division of the Association and a member of the union, attended a meeting of the Winnipeg and District Labour Council, during which he addressed the meeting for approximately 20 minutes and gave a report on the Codville strike. In Court he was able to repeat very little of what he said at that time and because of this lack of memory or evasiveness I am prepared to accept the testimony of Magnus that Rees told the meeting not to shop at the I.G.A. stores but to shop "across the road". This is the *fons et origo* of the matter.

12 On the evening of December 20th or 21st, 1960, Desautels, the union's business agent, telephoned Dusessoy, whom he well knew, for the avowed purpose of asking him to contact Mr. Codville and to impress upon him the necessity of settling the strike and to apply pressure upon the Codville company. A long conversation followed, at first of a friendly nature but rapidly degenerating into a rough and tough exchange of words to such an extent that Desautels hung up the receiver allegedly because of the harshness of Dusessoy's language. Though the union was not the bargaining agent for plaintiff's employees and had no dispute with plaintiff, Desautels proceeded to quote from schedules of wages for similar work at other chain stores in the metropolitan area. Upon being informed that there was no direct connection between plaintiff and Codville, that plaintiff could not and would not make representations to Codville, the discussion worsened and Desautels was called a "shyster lawyer". He retaliated by informing Dusessoy that pickets would be placed in front of his business premises; that they would put him out of business and ruin him. Dusessoy denies the use of any vulgar language and Desautels denies the threat. I am unable to accept these denials and, from the obvious context of the discussion, I am satisfied that just about what each party recalls of the occurrence actually took place.

13 On December 23rd, one or two days after this heated discussion, pickets appeared simultaneously in front of plaintiff's store and in the vicinity of other IGA retail outlets in the metropolitan area.

14 Plaintiff's store frontage is on Portage Ave. and to the east and west are two parking lots capable of holding 50 to 60 cars each, with entrance driveways from Portage Ave. and exits into a lane at the rear. From two to five men paraded in front of the premises at various times during the afternoon and from 1 p.m. to 9 p.m. on those days when the store was open for business during the evening. The men carried placards--at first rough ones made by themselves with crayons and, later, printed ones. I am satisfied that placards similar to those shown on ex. 17 were used. One of these carried the following message:

SUPPORT

Codville

I G A

Supply Depot

STRIKERS

Retail Clerks Union Local 832

15 The words "Codville", "Supply Depot" and "Retail Clerks Union Local" were in much smaller letters than "Support", "IGA", and "Strikers". Another placard (ex. 17) read:

SCAB LABOUR SUPPLIES IGA RCU LOCAL 832

16 The printed placard: "Support Codville" etc., was printed on a black background and measured 213/4 ins. by 133/4 ins. The words "Support", "IGA" and "Strike" were in red letters measuring in height, respectively, 31/4 ins., 51/2 ins., and 41/4 ins. The words "Codville", "Supply Depot" and "Retail Clerks Union Local 832" were in white letters of approximately 3/4 inch in height.

17 At the same time stickers appeared on cars. These measured 17 3/4 ins. by 37/8 ins., were of wording in bright yellow on a black background, and bore the following words:

I SUPPORT THE IGA STRIKE

Codville

18 The words "I support" measured 2 ins. in height; "IGA" and "Strike" measured 23/4 ins. in height; and "Codville", written at the bottom of the stickers below the word "IGA" measured only 5/16 of an inch.

19 Meetings were held by the strikers at their union office, at which were present Desautels and Rees. Placards and stickers were all paid for by the union. Rees drafted two leaflets, at which 10,000 copies were mimeographed in the union office and distributed through the Winnipeg metropolitan area. Times and places of picketing were discussed at these meetings and eventually a schedule was prepared by the men and used by them in their activities. This was a concerted group effort.

20 The weather at the end of December, 1960 and during the forepart of January was bitterly cold. A large majority of the plaintiff's customers drive to its store. Plaintiff's witnesses testified that the picketers marched mostly in the store area and over the driveways. Defendants assert that they did not concentrate on the driveways but marched to and fro on the entire width of the lot. As a car approached, the pickets would attempt to stop it and cause the driver to open his window. An informative conversation would then be entered into, lasting between 1 and 2 minutes, and on some occasions the driver would be handed a leaflet. Plaintiff's witnesses further testified that on two or three occasions they saw several cars stopped on Portage Ave. (Provincial Trunk Highway No. 1, a part of the Trans-Canada Highway) while the leading car was engaged in conversation with a placard-carrying striker. On a few occasions cars, after having stopped, would allegedly proceed on their way and fail to enter the plaintiff's parking lot.

21 On January 10th a Mrs. Tasker was driven to the store and when about to enter it a placard-

carrying striker told her: "You should not shop here." She entered the store but stated that the experience had been disagreeable to her. Mrs. Ostwald, a former customer, 'phoned Dusessoy, expressing her sympathy with the Codville strikers, and informed him that she would not make purchases at the store until the strike was settled. Since then she has not entered the store.

22 Leaflets issued by the Retail Clerks Union, Local No. 832, contain, *inter alia*, the following statements:

> *Exhibit 5--*
>
> All I.G.A. Stores in Manitoba, Saskatchewan & North Western Ontario are under the direct supervision of Codville Management Personnel and are directly connected to The Codville I.G.A. Supply Depot presently being operated by strike-breakers & scabs.
>
> All I.G.A. Stores in Manitoba, Saskatchewan & North Western Ontario are displaying scab goods for sale to the public. Strike breakers are delivering these goods.
>
> Several of the larger I.G.A. Stores are owned and operated directly by Codville's.
>
> *Exhibit 6--*
>
> The I.G.A. Stores are DIRECTLY CONNECTED with the Codville I.G.A. Supply Depot. Several Stores are under the DIRECT SUPERVISION of Codville Management Personnel. Codville has a DIRECT INTEREST IN SEVERAL I.G.A. STORES. STRIKE BREAKERS are delivering SCAB GOODS from the Codville I.G.A. Warehouse to the I.G.A. STORES.

23 Plaintiff purchases 30% of his merchandise directly from Codville's warehouse. About 35%, consisting of other produce such as meats, fruits, vegetables, milk, bread and pastry is ordered either directly from the suppliers or through the Codville order board, then delivered to plaintiff's store by the suppliers themselves. Some of the billing is direct but most of it goes through the Codville Supply Depot and, in turn is billed to the plaintiff with a small service charge added. The remaining approximately 35% of plaintiff's merchandise is ordered direct from other suppliers.

24 Mr. Rees, who drafted the leaflets referred to, had this to say on his examination for discovery:

> Q. 145 Do you know how much merchandise, in relation to the total purchases, the plaintiff purchases from Codville's? A. He purchases 100 per cent through Codville's. Q. 146 And did you believe that when you wrote these pamphlets? A. I still believe it today. Q. 147 And that is the impression you intended to convey? A. I had no desire to convey any other impression. It was certainly the facts as we knew them, and do know them today.

25 At the trial he reduced his percentage to a little less than 90%. Codville has no control over plaintiff's store and the only relationship emerges from the lease and the franchise. Defendants failed to prove that Codville has control over any of the stores and in this respect the leaflet contains untruthful statements which could only deceive the public. I find that all deliveries were made to plaintiff's store either by employees of suppliers or drivers hired by Security Storage Ltd. It is therefore equally untrue for the leaflet to say that "Strike breakers are delivering scab

goods from the Codville IGA warehouse to the IGA Stores". The only purpose of these untrue statements was to tie in the IGA movement with Codville in order to apply economic pressure to Codville through plaintiff's retail outlet.

26 Codville takes advantage of its distributorship of IGA supplies in some of its advertising, but that does not make it and the various retail outlets an integrated whole as suggested by Desautels. Moreover, there was a deliberate and marked attempt in the leaflets, the stickers, and two of the placards to give predominance to the IGA factor and to minimize the Codville aspect of the strike; so much so that on examination for discovery, when being questioned about the last sentence in the leaflets, Desautels had this to say:

> Q. 101 And you say, "We appreciate your support, and apologize for any inconvenience caused by the strike." What do you mean by that? A. Well, this is nothing but politeness. It is etiquette when you know something is out of the normal order of things, that you will automatically apologize. Q. 102 But what were you apologizing for? A. Well, I do not think that the I.G.A. had a strike every day of the week, and it is not our intention to hurt the customer. We want to get their support to get a quick settlement.

27 And in examination on his affidavit he said:

> Q. 112 Was there any reason why the adhesive banner should have advertised it was an I.G.A. strike? A. It was a simple declaration of a fact, "I support the I.G.A. strike"--and anybody that wants to carry one on their automobile may do so.

28 Those are the statements of the business agent of the union, who is also a member of the bar. He was aware that a search at the Land Titles Office would have shown the condition of the title; that a search at the office of the Provincial Secretary would have disclosed the identity of the plaintiff and of Codville; and that a search at the office of the Prothonotary could have disclosed any registered partnerships. Stubel, who did not have Desautels' legal training and so had more reason to be mistaken, said on his examination for discovery:

> Q. 39 You say the sign you carried around your neck was the information? A. Well, it said the I.G.A. people were on strike, and Mr. Dusessoy had an I.G.A. store, and he has some connection with the I.G.A. supply depot. That is why we were there. Q. 40 Was it because he was directly connected--. A. I did not know that actually .... Q. 51 Did you say this is an I.G.A. strike? A. No, I said it was an I.G.A. supply depot strike.

29 The car stickers, giving great predominance to the initials "IGA" next to the word "Strike" and minimizing the size of the word "Codville" to the extent that it could be totally obliterated at times depending on the exact position of the sticker on a car, were intended to deceive the public into believing the IGA employees were on strike. The placard, ex. 14, although it referred to Codville Supply Depot, was similarly deceiving because of the large letters, in relation to the others on the placard, which were used for the words "Support" "IGA" "Strike". The placard that Ewonchuk is shown carrying in photograph ex. 17, and which I am satisfied was at one time or another displayed in the vicinity of plaintiff's premises, makes no reference whatsoever to Codville. The leaflets carried information which was untruthful, absolutely wrong, on matters which could have been readily checked by defendants or their servants.

30 The picketing was orderly and peaceful but the continued blocking of entrances to the driveways, where the pickets no doubt concentrated their attention; the consequent stopping of vehicles on the driveways for 1 or 2 minutes at a time; also on the highway to the extent that some drivers did not enter the parking area but proceeded past, amounts to a nuisance for which no condonation exists.

31 Martin, a private investigator hired by Codville to give it protection and to report on activities at Codville's and at all IGA stores where picketing was taking place, testified that pursuant to receipt of anonymous telephone calls he decided to interview Rees. Not knowing Rees he discussed with Watson, the business agent of another union, the possibility of an interview and arrangements were made for it to be held in Watson's office. Rees did not attend but he sent Desautels and the three--Martin, Watson and Desautels--engaged in discussion. Martin alleges that Desautels made a threat in language approximately thus:

> We are going to continue striking if it takes us a year. We have the International Union behind us and all the money it takes. I phoned Amadee Dusessoy. We will keep on picketing his store until we ruin him.

32 Desautels denies this conversation and Watson was not called. Plaintiff's counsel asks me to infer from this failure to call Watson that he would not corroborate Desautels. At the hearing of the motion to continue the interlocutory injunction, Watson's affidavit was tendered as well as his examination upon it. In these two documents he denied that such a conversation took place. Both documents are in the Court pocket but were not tendered in evidence by defence counsel, who nevertheless has requested me to take cognizance of them.

33 To form part of the evidence these two documents should have been tendered as exhibits: Q.B. Rule 232. Therefore the denial which they contain is not before me. Plaintiff undertook the onus of proving through Martin that this threat had been made. In the face of Desautels' positive denial plaintiff has failed to satisfy me that it was ever made.

34 An attempt to improve their lot is perfectly lawful and justifiable on the part of members of a union providing their methods are also lawful, but untrue statements calculated to inflict injury on an employer in his trade relationships is actionable: see *Collard v. Marshall*, [1892] 1 Ch. 571 at p. 577; *Allied Amusements Ltd. v. Reaney, Kershaw Theaters Ltd. v. Reaney*, [1937] 4 D.L.R. 162, 69 Can. C.C. 31, 45 Man. R. 371; *Pacific Western Planing Mills Ltd. v. Internat'l Woodworkers of America* (1953), 14 D.L.R. (2d) 684. Is it not more so when it also causes serious injury to a third party not at all involved in the labour dispute?

35 What I must find here is whether there was a conspiracy on the part of the defendants to injure the plaintiff in his trade. Willes, J., in *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306 at p. 317 defined conspiracy as follows: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." The law on the subject of civil conspiracy to injure one's trade was laid down in the famous trilogy of cases by the House of Lords, namely, *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; *Allen v. Flood*, [1898] A.C. 1, and *Quinn v. Leathern*, [1901] A.C. 495, later clarified by *Sorrell v. Smith*, [1925] A.C. 700 and *Crofter Hand Woven Harris Tweed Co. et al. v. Veitch*, [1942] 1 All E.R. 142.

36 In *Sorrell v. Smith* the Lord Chancellor, Viscount Cave, expressed two propositions of law as follows (p. 712):

> Such an examination is of no value, unless it yields some general principle or test which may be of service in deciding other cases; and from these authorities, which I have carefully read and considered, I deduce as material for the decision of the present case two propositions of law, which may be stated as follows:--
>
> (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.
>
> (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.
>
> The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken.

37 I must look into the motives of the various participants in this action, as men are to be taken as intending the direct consequences of their acts. Can I infer from the intentional nature of defendants' acts that their real motive was to injure and not the promotion of their lawful interests in obtaining higher wages and better benefits? I have no doubt that their alleged motives were simply a cloak behind which to hide their avowed intention of bringing Codville to its knees through injury to plaintiff's trade.

38 Attending near an employer's place of business to obtain and communicate information is a step in the advancement of labour interests; but here I find defendants had an entirely different purpose, notwithstanding the repeated statements of their witnesses to the contrary that the pickets were merely informational. The real purpose was to hurt Codville through loss of business which they hoped to cause the plaintiff. This in effect is the indirect application of economic pressure applied to the employer through the medium of his customers. In common language, it is a "secondary boycott" undisputedly directed at their employer.

39 McRuer, C.J.H.C, in *General Dry Batteries of Can. Ltd. v. Brioenshaw*, [1951], 4 D.L.R. 414 at pp. 419-20, O.R. 522 at p. 528, 101 Can. C.C. 323 at p. 330, said:

> I am not at all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so that he may capitulate in the dispute. It is one thing to exercise all the lawful rights to strike and the lawful rights to picket; that is a freedom that should be preserved and its preservation has advanced the interests of the labouring man and the community as a whole to an untold degree over the last half-century. But it is another thing to recognize a conspiracy to injure so that benefits to any particular person or class may be realized. Further, if what any person or group of persons does amounts to a common law nuisance to another what is being done may be restrained by injunction.

40 The purpose was clearly to injure plaintiff and, through it, to punish Codville for not settling the strike in a manner satisfactory to defendants; the fact that in the dispute there was no direct

relationship between plaintiff or its employees and the defendants; the threats made by Desautels to Dusessoy; the deceiving stickers and placards; the untruthful statements contained in the leaflets; the rapid course of action taken by the union organization; the picketing, amounting to nuisance: all these taken together build up a case of wrongful purpose, namely, a conspiracy to injure plaintiff in its trade, for which defendants are accountable.

41 Counsel for plaintiff admitted that no breach of contract was induced and that defendants could only be held liable if damage ensued. Since no breach occurred, no damage ensued and this portion of plaintiff's action fails.

42 On January 14th, while Ewonchuk was picketing, Dusessoy came out of the store, camera in hand, and tried to take a picture of him. Dusessoy claimed that as he was attempting to do this Ewonchuk purposely backed into him, turned around, struck his arm, and that a scuffle ensued in the course of which the camera fell to the ground and was broken. In evidence-in-chief Ewonchuk stated:

> BY THE COURT: Q. You can't tell me what you were told. You went back to the store? A. Mr. Dusessoy came out again with the same manner, calling me names and calling me fucking chicken, son-of-a-bitch, bastard and everything. He come and put the camera into my face and tried to get a picture of me; from every side he come. I tried to turn away, I tried to keep walking away until he crowded me out into the street and then I was right off, when he crowded me off the sidewalk into the driveway, into the street, I was partly into the street, when he still had this camera trying to bother me. I turned around and knocked the camera out of his hands. Then he raised his hands again, he said, "Come on you son-of-a-bitch coward, you are no good for nothing at all, make something out of it". I told him, "Mr. Dusessoy, I don't want no trouble with you". He did that to me when I knocked the camera out of his hands. He tried to get the camera. I kicked the camera over to my partner. My partner held the camera. There was another man jumped in and they tried to get the camera away from us. They jumped the other fellow, my partner, and I told the other fellow to throw the camera to me. I smashed the camera on the street and then after Mr. Dusessoy -- I went in the car and I sat down. He came up to the car; he was hollering names and waving his fists at me.

43 On Ewonchuk's evidence alone I am satisfied that he assaulted Dusessoy.

44 Having disposed of the *Us* by my finding on conspiracy to injure plaintiff in his trade, I must nevertheless deal with the question of the secondary boycott which formed a substantial part of plaintiff's argument at the trial.

45 Webster's New International Dictionary, 2nd ed., p. 2261, gives the following definition of "secondary boycott": "The boycott of (A) by an organized group (B) to compel a third party (C) to do, or abstain from doing, a thing for which (A) has no direct responsibility." It is an attempt to apply economic and social (in the widest meaning of the word) pressures to Codville through plaintiff, and is a course of conduct of recent vintage in our complex and ever expanding social order which warrants close scrutiny. It may be described further as the organized abstention of business relationship with an employer through a third party in order to compel the employer to modify or change his attitude by partial or total paralysis of his business venture.

46 By law plaintiff enjoys freedom of trade, an undeniable right just as strong as freedom of

speech. That right of trade can only be curtailed in very peculiar circumstances for the good of the community as a whole and not only in the interests of a specific and clearly limited group. Plaintiff has a proprietary right to trade and to do business with persons or corporations of its choice--the more so when it has no dispute with anyone--and this right belongs to it unless the Legislature, by clear and unequivocal language, has interfered with it. That is not the case here.

47 Citrine, in *Trade Union Law*, 1st ed., says at p. 55:

> It follows from the proposition that trade interference is not in itself a species of tort, that the legality of boycotts, black lists, stop lists and similar devices depends entirely upon whether or not they involve illegal acts or the use of illegal means. *Where there is no element of combination*, the sole question is whether tortious acts have been committed.

48 Application of secondary boycott or economic pressure is a creature of the last decade or two and has only been discussed in three Canadian decisions that have been brought to my attention, and further research on my part has failed to discover any others. The three are as follows: *Producers Sand & Gravel Co. (1929) Ltd. v. Vancouver Island Drivers Division et al.*, an unreported decision of Macfarlane, J., dated April 18, 1950, to be found in *The Labour Injunction in British Columbia* by Professor A. W. R. Carrothers, at Appendix "E", p. 242; *Verdun Printing & Publishing Inc. v. L'Union Internationale des Clicheurs et Electrotypeurs de Montreal*, [1957] Que. S.C. 204; and *Sauvé Frères Ltée. v. Amalgamated Clothing Workers of America*, [1959] Que. S.C. 341. Also see Canadian Labour Law Reporter, No. 15,243. I have ascertained from the Editor of La Revue du Barreau that the last two mentioned cases were not appealed. All three were motions to grant or to continue an interlocutory injunction until trial.

49 In the *Producers Sand & Gravel* case, *supra*, the picketers were employees of Evans, Coleman & Johnson Bros. Ltd. The defendant union was their bargaining agent in a labour dispute between the employees of that company and the company itself. The men described the gravel in the pits of plaintiff *Producers Sand & Gravel Co.*, as "hot", subject to a strike called by the union against *Evans, Coleman & Johnson Bros. Ltd.*, which was a subsidiary of plaintiff corporation. In concert they worked to injure the plaintiff by interfering with its customers. Macfarlane, J., said, at p. 245 (Carrothers, *supra*):

> Some similar language of the nature of Mr. Justice Irving's I think was used in the *Schuberg* case and this is from the judgment of Mr. Justice McPhillips -- "It is set down in 27 *Halsbury*, tit. 'Trade and Trade Unions', Sec. 1025, p. 525: 'It is the general principle of the common law that a man is entitled to exercise any lawful trade as and where he wills; and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract, as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State.'"
>
> Now what he is dealing with there is the question of fundamental rights and while the Courts, as all other bodies must recognize that there is a trend in the affairs of men today which may limit freedom of individual action, yet the Courts should be zealous to see that individual rights are not by irresponsible power, crushed.
>
> I think it would be absurd construction to say that without clear and unequivocal language the Legislature intended to authorize anybody, whether trades unions or not, to invade the proprietary rights of persons with whom they have no concern. In the event of there not being any labour dispute I see no reason why that particular trade union should be

> interested in the business of another person. I don't think the Legislature intended that they should be given that immunity.
>
> There is of course the fact here that this company--the plaintiff company is a subsidiary of the company with whom there is a labour dispute but it is a subsidiary conducting its business with other people both through and independently of the company with which there is a strike and these other people, these municipalities and the public of these municipalities, have a right to deal with them without intereference from a trade union who has a dispute with some other person and not with them.

50 In the *Verdun Printing & Publishing* case, *supra*, the company and the union were attempting to negotiate a collective agreement and, upon failure to negotiate, the union called a strike. Picketing proceeded for a few weeks without apparent results, and then it ceased. To intensify the effect of the strike the union contacted orally or by letter various persons doing business with plaintiff corporation requesting them to cease delivering necessary printing supplies to it or to quit giving it work. As a result some ceased to supply plaintiff and its customers suffered. Deslauriers, J., found that this was a secondary boycott, and at p. 206 says:

> The Court is prepared to admit that a certain type of boycotting to promote the interests of a group can be legal such as the undertaking between certain members of a union to stop doing business with a person against whom a united action is directed. That is called primary boycott. Respondent's actions do not enter into that category. Rather, they identify themselves with acts of secondary boycott namely schemings for the purpose of injuring one person by forcing others to injure him also. It appears to the Court that that is exactly what the respondents have done in the present case. (My translation.)

51 In *Sauvè Freres, supra*, petitioner carried on a retail haberdasher's business for men and sold all accessories of men's clothing, including suits, 10% of which came from Hyde Park Clothes Ltd. These suits were retailed by petitioner under its own commercial labels without any indication allowing the customer to discover the manufacturer. Employees of respondent union called a strike against Hyde Park Clothes Ltd. and commenced to picket petitioner's retail establishment. There existed no financial interest or administrative control of any kind between the retailer and the manufacturer and both were legal entities, distinct and independent of one another, as in the present case. Côté, J., said (see translation in Canadian Law Reporter by CCH Canadian Ltd., at p. 11,706):

> The manipulations which the respondents have applied to the petitioner in order to bring about a favourable settlement of their conflict with Hyde Park Clothes Limited is of a kind that our courts in Canada have not had the opportunity of considering in a hearing on the merit. In an interlocutory judgment which the Honourable Judge Ignace Deslauriers rendered in the case of *Verdun Printing & Publishing Inc. v. Union Internationale des Clicheurs et al.*, 1957 S.C., 204, he had come to the conclusion from the facts which had been submitted to him and which strangely enough remind those of the present case that a scheme had been employed for the purpose of causing prejudice to one person by forcing other persons to do likewise, that such acts fell under the definition of "secondary boycott" and, as abusive acts, could not be sanctioned by the courts. This decision was favourably commented in an article by Mr. M. L. Beaulieu reported in Volume 18, Revue du Barreau, p. 161.

52 The Court held that the retailer had established a *prima facie* right to the free exercise of its business which the picketing had impaired and granted an interlocutory injunction. These decisions, although far from specifically stating that the injunctions were granted because of the conspiracy to injure plaintiff or petitioner in their respective businesses, are closely akin to that principle. In the present state of the law and in the absence of specific legislation on the subject, I feel that I am amply justified in disposing of the secondary boycott aspect of this case by my finding that it was part of the conspiracy to injure plaintiff in his trade.

53 Now I must consider whether the union is a suable entity in this Province. Herewith are the recent cases dealing with union status in Manitoba:

1. *Re Internat'l Union of Operating Engineers, Local Union No. 827 & Man. Labour Bd.* (1952), 60 Man. R. at p. 202, a decision of Campbell, J., wherein he found that a trade union was a *quasi persona juridica* and was reversed on other grounds by our Court of Appeal [[1952] 4 D.L.R. 397, 60 Man. R. 201].
2. *Peerless Laundry & Dry Cleaners Ltd. v. Laundry & Dry Cleaning Workers Union*, [1952] 4 D.L.R. 475, 105 Can. C.C. 89, a decision of Freedman, J., wherein he held that under the Manitoba *Labour Relations Act* a trade union was a statutory entity possessing legal existence apart from its members and a suable entity for the implementation of the Act and for causes of action founded directly upon breaches of its provisions.
3. *Walterson et al. v. New Method Launderers Ltd.*, [1955] 2 D.L.R. 776, 111 Can. C.C. 341, 63 Man. R. 95, where our Court of Appeal came to the conclusion that a trade union is not a legal entity and may not sue or be sued in civil proceedings and may not prosecute or be prosecuted in criminal proceedings.
4. *Orchard et al. v. Tunney*, 8 D.L.R. (2d) 273, [1957] S.C.R. 436, varying [1955] 3 D.L.R. 15, where, although there was plenty of discussion about the entity of a trade union, the matter was not in issue since a representation order had been granted by the Court of Appeal.
5. *Nabess & Lynn Lake Base Metal Workers' Federal Union, No. 292 v. Sherritt Gordon Mines Ltd.* (1959), 67 Man. R. 22, where, at p. 28, I said:

   > I am inclined to favour the expressions of opinion of my brothers Campbell and Freedman but feel I am bound by the clear and precise words of Adamson, C.J.M. in the *Walterson case, supra*. I have, therefore, reluctantly come to the conclusion that the union has no status.

6. *Re Warner & Man. Labour Bd. et al.* (1960), 25 D.L.R. (2d) 217 wherein Williams, C.J.Q.B., held that a trade union is not a society and has not been given a status by the *Labour Relations Act*.

54 The question is again open for decision in view of the positive language of Locke, J., in *Internat'l Brotherhood of Teamsters, etc. v. Therien*, 22 D.L.R. (2d) 1, [1960] S.C.R. 265, where, after reviewing the facts in *Orchard et al. v. Tunney, supra*, he said, at p. 6 D.L.R., pp. 271-2 S.C.R.:

> The proceedings in the matter do not indicate whether the collective agreement signed by the union with Tunney's employers had been made after the union had been certified as the bargaining agent under the provisions of the *Labour Relations Act*, 1948 (Man.), c. 27, and, as the action was not brought against the union, the question as to whether it was in law an entity which might be made liable in tort was not considered, either at the trial by Williams C.J.Q.B. or in the Court of Appeal or argued in this Court. There was, accordingly, no issue in this Court as to the legal status of the labour union. Accordingly, what was said by Rand J., in delivering the judgment of the majority of the Court and by me in delivering the judgment of our late brother Nolan and myself, which really merely consisted in restating what had been said earlier in this Court by Duff J. (as he then was), Anglin J. (as he then was) and Brodeur J. in *Local Union No. 1562, United Mine Workers of America* (1919), 49 D.L.R. 578, 59 S.C.R. 240, cannot be taken as deciding that in Manitoba a trade union certified as bargaining agent under the Manitoba Act (which closely resembles that of British Columbia) is not an entity which may be held liable in tort. A case is only authority for what it actually decides.

55 After discussing *Taff Vale R. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, the *Trade Union Acts*, 1871 and 1876, the *Trade Disputes Act* of 1906, the *Trade Union Act* of British Columbia, 1902, c. 66, and the *Labour Relations Act*, 1954 (B.C.), c. 17, and relying on those last two British Columbia statutes, he said, at pp. 9-10, p. 11 D.L.R., pp. 275-6, pp. 277-8 S.C.R., as follows:

> By the *Labour Relations Act*, s. 2, a trade union as defined includes a local branch of an international organization such as the appellant in the present matter. Extensive rights are given to such trade unions and certain prohibitions declared which affect them. The Act treats a trade union as an entity and as such it is prohibited, *inter alia*, from attempting at the employer's place of employment during working hours to persuade an employee to join or not to join a trade union, from encouraging or engaging in any activity designed to restrict or limit production or services, from using coercion or intimidation of any kind that could reasonably have the effect of compelling any person to become or refrain to become a member of a trade union and from declaring or authorizing a strike until certain defined steps have been taken. By s. 7 if there is a complaint to the Labour Relations Board that a union is doing or has done any act prohibited by ss. 4, 5 or 6, the Board may order that the default be remedied and, if it continues, the union may be prosecuted for a breach of the Act. By s. 9 all employers are required to honour a written assignment of wages by their employees to a trade union. A union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining is entitled to apply to the Labour Relations Board for certification as the bargaining agent of such employees and, when certified, to require the employer to bargain with it and, if agreement is reached, to enter into a written agreement with it which is signed by the union in its own name as such bargaining agent. Throughout the Act such organizations are referred to as trade unions and thus treated as legal entities ...
> .
>
> I agree with the opinions expressed by the learned Judges of the Court of Appeal in the cases to which I have above referred. The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. What was said by Farwell J. in the

> passage from the judgment in the *Taff Vale* case which is above quoted appears to me to be directly applicable. It is necessary for the exercise of the powers given that such unions should have officers or other agents to act in their names and on their behalf. The Legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort since a corporation can only act by its agents.
>
> The passage from the judgment of Blackburn J. delivering the opinion of the Judges which was adopted by the *House of Lords* in *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93 at p. 110, referred to by Farwell J. states the rule of construction that is to be applied. In the absence of anything to show a contrary intention -- and there is nothing here -- the Legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. *Qui sentit commodum sentire debet et onus*.
>
> In my opinion, the appellant is a legal entity which may be made liable in name for damages either for breach of a provision of the *Labour Relations Act* or under the common law.

56 All the other members of the Court agreed with him on this point.

57 In Manitoba we have a *Labour Relations Act*, R.S.M. 1954, c. 132, which has been in force since 1948, but we have no *Trade Union Act* similar to the British Columbia statute, R.S.B.C. 1948 c. 342, which, in language practically identical to the original Act of 1902, provides as follows:

58 The first section states that a trade union shall not be liable for a tort in connection with a strike or labour dispute unless its members or officers acting within the scope of their authority have authorized or concurred in the wrongful act; s. 2 is to the effect that trade unions shall not be liable for communicating certain information in employing fair arguments to induce workmen not to renew contracts, and s. 3 that trade unions shall not be liable for publishing certain information respecting strikes.

59 The first section of this legislation presupposes that trade unions were liable for torts since it exempts them from certain ones.

60 Our *Labour Relations Act* is similar in effect, if not in wording, to the British Columbia Act. By it a trade union means any organization of employees formed for purposes including the regulation of relations between employees and employers; rights of employers and employees are reserved; employers or employers' organizations are not to interfere with trade unions and employers cannot discriminate against trade union members nor shall they seek to intimidate members of trade unions; employees, except with the consent of the employer, shall not solicit membership in the union during working hours; clauses pertaining to union shop or closed shop may be inserted in collective agreements; trade unions can apply for certification as bargaining agents as a group and upon certification as such have exclusive authority to bargain collectively on behalf of the employees of the unit; collective agreements are binding on the employer, the employee and the union; provisions are inserted for notice to negotiate and the parties must proceed within a specific time; provisions are made for strikes and lockouts, conciliation boards and reports thereof; penalties are provided for breach of various sections. Throughout the Act

they are referred to as trade unions and treated as legal entities with certain rights and privileges.

61 From this brief summary of the provisions of our *Labour Relations Act* can one say that the attributes and responsibilities of a *persona juridica* have been given to a trade union in order to make it an entity having a separate legal existence as distinct from its membership? True, the unions have not been formally incorporated under the Act or by any Act of our Legislature which relates to incorporation of associations or groups of people. A trade union is not a partnership nor-a person as we understand it in the legal sense, but does that mean that the Legislature is restricted to three legal entities only -- a person, a partnership and a corporation? Cannot the Legislature, which is supreme, create a new kind of legal entity different and maybe even foreign to all former types of legal entity?

62 The learned Chief Justice of this Court, in *Re Warner & Man. Labour Bd. et al*, said [25 D.L.R. (2d)] at p. 220: *"Apart from statute* a trade union such as Local 330 is a voluntary unincorporated association, an entity unknown to the law." (The italics are mine.) I agree with that statement but note that the learned Chief Justice predicated his words with "apart from statute".

63 If a trade union can on behalf of members enter into a contract and be found guilty of offences of commission or omission (see s. 45) is it not an entity with rights and responsibilities? I realize that s. 46 says that for the purpose of such a prosecution it shall be deemed a person.

64 I have before me no evidence of the assess and the business transactions of the defendant union, an affiliate of a large international union, and apart from references to those two aspects I am in absolute agreement with what Tritschler, J., *ad hoc*, now, J.A., said in *Tunney v. Orchard et al.*, [1955] 3 D.L.R. 15 at pp. 49-50.

65 In *Re Polymer Corp. & Oil, Chemical & Atomic Workers' Internat'l Union*, 26 D.L.R. (2d) 609, [1961] O.R. 176, McRuer, C.J.H.C, also faced the question of whether a union was a legal entity in a matter of an arbitration dealing with a collective agreement, and, after comparing the relevant British Columbia and Ontario legislation, and quite apart from what was said in the *Therien* case, *supra*, about the provisions of the *Trade-unions Act* of British Columbia, he saw no reason why the principles of law applied in *Therien* should not be applied in the case before him and held that for the purposes of a breach of a collective bargaining agreement a trade union was an entity in Ontario. At p. 617 D.L.R., p. 184 O.R., he said:

> Quite apart from any question as to whether an action may be maintained in a Court against the Union, I think it quite clear that the Union has the capacity to incur liability for damages and hence the Board of Arbitrators are within their powers in proceeding to assess and award damages.

66 Is our law so unsatisfactory and so unwieldly that a body may be a legal entity for one purpose and not for another? By s. 46 of the Manitoba *Labour Relations Act*, for the purpose of a prosecution it is declared that a trade union is a person. Is it restricted to that?

67 The sole effect of the *Trade-unions Act* of British Columbia, of which we have no counterpart, is to grant to trade unions three types of immunities: the first of these immunities presupposes that, prior to that, trade unions were liable in tort. Since then, as far back as 1948,

our Legislature has seen fit to enact the *Labour Relations Act*. My consideration of that Act, and after comparing it with its British Columbia counterpart, coupled with my consideration of the *ratio decidendi* of Locke, J., in the *Therien* case, approved by the other four members of the Supreme Court of Canada, leads me to the conclusion that in order to find legal entity in trade unions it is not necessary that both statutes should co-exist. Notwithstanding able judgments to the contrary by Adamson, C. J.M., and by my brother the Chief Justice of this Court, with the greatest respect I am of the opinion that our Legislature, by granting these rights, powers and responsibilities to these unincorporated associations, intended to, and did, attribute legal personality to trade unions both for breach of a provision of that Act or under the common law. On a more thorough review of the law, and guided by the *Therien* case, I find that I came to the wrong conclusion in the *Nabess & Lynn Lake* case, *supra*.

68 The evidence discloses that the business agent of the union and the international representative, who also was a member of the union, as well as the individual defendants, conspired to injure the plaintiff in its trade. I am satisfied, although I have no positive evidence to that effect, that the union, *qua* union, knew full well what was being done, and participated in and encouraged the activities of the individual defendants. Plaintiff is entitled therefore to succeed in his action against the union which was sued in its name.

69 In a case of this type plaintiff is always faced with the hardship of proving damages. It lost Mrs. Ostwald's trade and obviously others and I am satisfied that it suffered substantial damage between December 23, 1960, and January 18, 1961. The evidence of the accountant is not specific as to the quantum of the loss because of the number of unknown factors amongst which is the nature of the supermarket trade where the names of one's customers are seldom known to the retailer since business is carried on in a very impersonal manner. During the period in question there was a reduction in sales and this shrinkage was the natural and intended result of the pickets, stickers and placards.

70 On the other hand Rees' evidence is of little value; likewise I place little value on the monthly reports of the Dominion Bureau of Statistics pertaining to chain store sales and stocks during the period January 1, 1959, and January 1, 1960, and January 1, 1960, and January 1, 1961, because they are on a Canada-wide basis whilst those for the Winnipeg region might well have shown, had they been filed, different percentages of increases or decreases during the same periods.

71 I fix plaintiff's damages against all defendants at $3,000. Plaintiff is entitled to a permanent injunction in the terms of the interlocutory judgment granted by my brother Campbell on February 9, 1961.

72 Costs of the two motions were made costs in the cause. Examinations for discovery of the various defendants took the better part of a working day and the trial lasted 3 1/ 2 days. I allow plaintiff one set of costs against all defendants for the trial and the two motions which I fix at $700. Plaintiff is entitled to all its disbursements as well as those of the examinations on the affidavits and the examinations for discovery.

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