AN EXAMINATION OF THE USE OF THE INJUNCTION IN LABOUR MANAGEMENT DISPUTES

by

EDWARD WILLIAM ROMNEY

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Department of Commerce and Business Administration

The University of British Columbia
Vancouver 8, Canada

Date  July, 1971
ABSTRACT

The purpose of the study was to determine if the labour injunction was a necessary recourse for Canadian labour management disputes. It was hypothesized that the use of injunctions is a function of attitudes rather than legislation; that there tends to be an increase in the incidence of injunctions during periods of industrial conflict; and that the injunction must be available to protect the right to private property and the right to private contract. These postulates were substantiated through a review of the injunctive processes of Great Britain, Australia, the United States and Canada (Ontario and British Columbia). It was further hypothesized, that if the injunctive legislation was necessary, then the present process required change, as it is not as efficacious as originally postulated. The alternatives presented are based on data obtained from the analysis of the three previously named countries and Canada. The proposed changes are presented in relation to British Columbia, but are applicable to the other provinces of Canada.
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CHAPTER I

INTRODUCTION

Purpose of Study

Some degree of conflict is present in most union-management relationships. Of the many weapons employed in industrial warfare none has aroused more controversy than the labour injunction. Some countries have found acceptable solutions for their difficulties, but Canada is still beset by the problem of labour injunctions. Labour, management and government are expressing concern and interest over the situation. One need only view the history of strikes and lockouts during the late fifties to readily understand their interest. The freer use of court injunctions than in the past has occupied attention and tried the patience of labour and at times of management.

The Ontario Federation of Labour blames the current "crisis" in industrial relations directly on out-of-date labour legislation. They state that the indiscriminate use of injunctions amounts to eighteenth century law applied to twentieth century conditions. Particularly galling to labour is the fact that nearly two-thirds of injunctions were issued ex parte, that is on one-sided evidence that the unions were given no opportunity to challenge. Thus much criticism has been against this ex parte injunction. However, management spokesmen insist that injunctions are proper tools of preventive justice. Numerous solutions to the problem of the injunction have been expressed. They range from total acceptance to absolute abolishment.

The purpose of this study is to determine if the labour injunction is a necessary recourse for Canadian labour-management disputes. It is
hypothesized that the use of injunctions is a function of attitudes rather than legislation; that there tends to be an increase in the incidence of injunctions during a period of intense industrial conflict; and that the injunction must be available to protect the right to private property and the right to private contract. These postulates will be substantiated by examining the injunctive processes of three other countries, namely Great Britain, Australia and the United States. The writer proposes to contrast the existing labour legislations of the previously cited countries in an attempt to isolate the legislation, procedures and other factors present in industrial relations. In Canada the labour history of Ontario and British Columbia will be studied. It is postulated that the results of these reviews will support the previously stated hypotheses; the main contention being that Canada still requires the injunctive remedy be available in labour management disputes.

It is further hypothesized that though the injunction should be retained, the injunctive process requires change. The changes will be based on data derived from the analysis and review of the labour legislation of Canada, Britain, Australia and the United States. The efficacy of alternative processes will be presented in the final chapter. The conclusions will be correlated in an attempt to postulate a more effective system for the issuance of the injunction in labour management disputes in Canada, and primarily British Columbia.

Research Methodology

The writer will study the experiences three common law countries have had with the labour injunction. The labour legislations and collective bargaining structures will be examined to determine if the
The incidence of the injunctive remedy is a function of the collective bargaining structures and in turn, if there is relevant application of findings to a proposed streamlining of the labour injunction in Canada, and in particular British Columbia.

Labour in Canada tends to make the broad statement that the United Kingdom, Australia and the United States have solved their difficulties with the labour injunction. From labour's point of view the difficulty the injunction creates is that it is being used as an economic weapon by management to break strikes in early stages. This statement will be examined in the body of the thesis after the labour legislations and the evolution of the injunctive remedy in the three countries has been studied. The writer will determine if, in fact, the injunction is being used by management as an added economic weapon in collective bargaining, and in particular at the strike stages, or if the remedy is being used to protect private property. There have been current cases where the injunction has been used in British Columbia. The writer will examine the necessity of the intervention into the dispute via the courts, and if the right to private property was in jeopardy, and what other remedies were available.

The study is based on research through journals, books, studies, speeches and other publications pertaining to the labour legislations of Canada and the countries stated, and in particular to the labour injunction.

**Scope and Limitations of Study**

The use of labour injunctions is too wide a topic to be thoroughly investigated in every aspect. The writer will present the industrial relations law in three countries: the United Kingdom, Australia and the United States. In the part of the law of industrial relations that
relates to the use of the injunction, and in the general context of the legal framework of collective bargaining, there are notable differences among the three countries and Canada, even though there is much in common in the structure, composition and operation of industrial society. The writer, therefore, considers it relevant to include an account of the labour laws of these countries to provide background information for an inquiry into the use of the labour injunction in Canada. In Canada, the provinces most actively involved in labour management problems are British Columbia and Ontario. Thus, in examining the use of injunctions in Canada, the review will focus on these two provinces. Following this analysis the writer will conclude by presenting the findings in relation to the hypotheses. The results will also be utilized in the formulation of alternate proposals for the injunctive process in British Columbia and Canada.

Chapter Organization

Chapter II deals with the British experience in strike law and the labour injunction. The objective is to present employee-employer relations and assess briefly the past and current situation in the United Kingdom, and its relevance to Canada. An outline of the historical developments is a necessary preliminary for any understanding of the radical change which has occurred since 1954 and it is by this background alone that British labour law is capable of explanation. The latter part of the chapter is a review of the industrial activities in Australia. If one overlooks very minor differences one can say that English and Australian trade union law were the same before the introduction of compulsory arbitration. Thus, examination of Australian labour legislation will be
confined to the period following the 1890's, when differences and deviations from the English pattern began to occur. Developments will be presented only to the extent necessary to provide background for understanding of the injunctive remedy in labour disputes in Australia.

Chapter III is a study of the use of labour injunctions in the United States. Development has been traced from the pre Norris-La Guardia Act to the present. The injunction will be viewed under federal law and according to state law. The writer will include remarks regarding the relevance of the American experience to the Canadian experience.

This is followed by a study of the labour injunction in Canada. The two major areas examined will be the provinces of Ontario and British Columbia. A brief historical account will be presented prior to the examination of the present situation.

The final chapter will be devoted to a summary of the study and to the development of conclusions regarding the use of the labour injunction in Canada.

Definition of Terms

Injunction. The injunction is a form of judicial relief whereby the Court orders a party to proceedings to refrain from doing specified acts (a restrictive injunction) or to do certain acts (a mandatory injunction). It differs from the ordinary legal remedy of damages, as it usually orders, not the usual money payment, but the positive redress of prescribed behavior. It is granted at the discretion of the court and may take one of several forms, a final settlement of a dispute (a permanent injunction), a temporary measure to prevent the occurrence of further alleged injury until the case is tried; or it may in extreme
cases, be given speedily and without notice to the opposing party for a short period of time (ex parte).

Thus it is a court order generally forbidding the doing of an illegal or wrongful act. "The courts are empowered to grant an injunction in all cases in which it appears to be just or convenient to do so, to protect or exert an existing legal right." It can be granted temporarily before the right has been ascertained by the court (interim or interlocutory or temporary injunction), or permanently after the right has been ascertained (permanent or perpetual or final injunction). The injunction orders the person against whom it is directed to refrain from doing a particular act, the performance of which amounts to breach of trust of property or breach of some other equitable obligation.

To obtain an injunction of plaintiff must show that there has been violation or a threatened violation of the law and that redress is not possible through the normal legal process. The injunction is extended as an extraordinary recourse to protect real property from irreparable damage prior to trial.
CHAPTER II

THE LABOUR INJUNCTION: THE BRITISH AND AUSTRALIAN EXPERIENCE

I. THE BRITISH EXPERIENCE

The labour injunction in Britain is not and has not been a controversial issue such as it has been in the United States, and more recently in Canada. The writer proposes to show how the British have apparently solved their difficulties and also determine if their experience is relevant to the Canadian system of industrial relations. When British industrial relations are compared with other democracies they stand out because they are so little regulated by law.¹

In 1954 Professor O. Kahn-Freund said that section 4 of the Trade Disputes Act of 1906 is the British solution of the problem of the labour injunction.² However, today it is not possible to write in such a categorical fashion. The nineteen fifties may turn out to be the last decade of the "abstention" of the law for which the British system of industrial relations had been long, and unjustly, praised.

In order to gain any understanding of the British experience with the labour injunction the development of British labour law must be examined. In Canada, labour states that the injunction is not used in Great Britain and therefore the courts do not interfere in labour disputes. It is hypothesized that the incidence or use of the labour injunction is a result of the attitudes of labour, management and the judges during economic and social environmental phases, and that such attitudes determined its use in Great Britain - the law responded directly
to shifts in the social environment. To illustrate how attitudes ranging from total abstention to a renewed common law intervention, the period from 1850 to 1966 will be studied. Professor K. W. Wedderburn provides a very good review of the development of the labour law in the United Kingdom. The period is divided into four phases of British labour law, each of which has its distinct attitudes pertaining towards the use of the common law and injunctions in labour disputes. These four periods are:

(i) Illegality: to 1871
(ii) The Exclusion of the Common Law: 1871 to 1920
(iii) Gradual Judicial "Abstention": 1920 to 1959

The system in Great Britain can be described as a voluntary system in which the law did not seek to control or mold the structure of collective bargaining. There was, and is, no legal duty to bargain; no general legal right to trade union recognition; few legal rules concerning the parties or agents for bargaining. The collective agreement is not according to majority opinion a legally enforceable contract between collective parties. Thus, the law abstains in the sense that it aims not to control the economic strength and pressures brought to bear in the free process of collective negotiation. In analysing the system it must be remembered that it grew out of the special character of the early British industrial revolution and of the struggle of its labour movement against illegality.

(i) **Period of Illegality**

Prior to 1871 convictions for conspiracy were common and picketing
was a crime, if it exposed non-unionists to "black look". In the eyes of
the law trade unions were bound to be illegal conspiracies. Even in 1825
the Act permitted only collective negotiation on hours and wages at one
place of work; and it established severe penalties for crimes under the
headings: violence; threats; intimidation; molestation and obstruction.

Against this particular background the labour injunction was issued.
In one case in 1868, the judge issued an injunction to stop intimidation
and he observed that it was the court's jurisdiction to protect property.
The injunction was, in this period, an exclusive preserve of the
Chancery courts; and the number of times it was used did not appear to be
large as the employers appeared to prefer the clean cut of the prosecution.

(ii) The Exclusion of the Common Law: 1871-1920

In 1867 the trade unions were entirely an industrial movement; the
Labour Party was still over three decades away. Thus its demands were not
political, but in industrial and pragmatic terms. The labour movement
demanded, and gradually won, the removal of law which rendered its
activities illegal. The judges responded by developing new forms of
common law liability. The unions pressed the legislature for new
statutes to exclude them and were successful in 1875 and 1906. The
statutes had the look of "privileges" for trade unions.

The Trade Union Act, 1871, declared that trade union agreements
and purposes should not be any longer unlawful or criminal on the grounds
of restraint of trade. To the former problem of conspiracy the Act of
1875 applied an invention which was to become the golden formula of
British labour law. No combination was to be indictable as a conspiracy
if it was a combination to do or procure any act: "in contemplation or
furtherance of a trade dispute..... if such act committed by one person.
would not be punishable as a crime" (sec. 3).  

This banished criminal conspiracy from the area of trade disputes.
Section 3 of the 1875 Act (The Conspiracy and Protection of Property Act)
was considered to be the rock upon which industrial action could be
founded. For approximately ten years few legal actions were brought
against unions. During this period there was no reported use of the
injunction. However, by the end of the 1880's the social and legal
picture changed.
The Years 1885-1901: A Hostile Judiciary

During this period the new unions which appeared on the scene
posed as tough and aggressive defenders of their members. This contrasted
with the "soft tactics" of the older craft unions. Employers responded
to this attitude with resistive and counter-attacks by importation of non-
union labour. Legally, in the decade preceding 1900, the judges also
responded and found against trade unionists a variety of new grounds.
One development which occurred was that the civil liability for conspir-
acy was renewed and combinations again ran the risk of being judged
malicious or illegitimate. This was a civil liability which was not
protected by the 1875 Act.

By 1901 the entire union edifice seemed threatened by the new form
of simple civil conspiracy, for the judges appeared ready to condemn the
most common place union objectives. During this new legal attack upon
the unions, the use of the injunction became an available remedy and, in
fact, the Judicature Act of 1873 expressly declared that an interlocutory
order could be made whenever it seemed "just or convenient". So it was
under these conditions that the injunctions were issued in the 1890's and allowed the judges to strike down any boycott or strike which they termed malicious.

Other courses of action were also developed alongside conspiracy. Picketing was held to be a common law "nuisance". The attack on picketing was developed in a series of cases in which the attendance of the pickets was held "to compel masters to conduct business in accord with the men's demands". This was the basis of the injunction.

This period is judged as one where the court was concerned to protect the proprietary and business interests of the employer. Such dicta showed little, if any, understanding of the damage to the interests of a union and its members by the prohibition for a period of a strike or embargo which may have been called at tactically the precise opportune moment. Professor Wedderburn states that "one almost expected the judges to clinch the argument by pointing out that they will save the union's property too by avoiding payment of strike pay".\(^5\)

With this brief review of the social and legal setting in which the injunction was used, the situation leading to the 1906 Trade Disputes Act must be explored since it is apparently the solution to the labour injunction in Great Britain. In 1901 labour unions suffered a defeat. Taff Vale employees went on an unlawful strike and engaged in picketing in an unlawful manner and seriously damaged railroad property. An injunction was issued against the strikers and action for damages was instituted against the union. The Taff Vale case decided that a Trade Union could be sued in tort by its registered name, and even if unregistered could similarly be sued in a representative action, so as to reach its funds.\(^6\) This decision shocked the unions and it was not
surprising to see in 1906 on the election posters—a judge handing to an employer a scourge with which to beat the workers. The Taff Vale case became part of the working class view—that will be the way they will treat unions. They refer to the Law Lords.

A less kindly Professor Jenks declared in 1912, after the 1906 legislation:

"The House of Lords had first invented a new civil offence (civil conspiracy) and had then created a new kind of defendant against whom it could be alleged."^

The fierce reaction conducted by trade unions led to the enactment of the 1906 legislation. A Royal Commission was appointed in 1903 and its report led to the enactment of the Trade Dispute Act. The Act repealed the doctrine of civil conspiracy, legalized peaceful picketing, and relieved unions from liability in torts for actions, whether of a primary or a secondary nature done in relation to trade disputes. Thus at one stroke, as Professor Carrothers phrased it, "the process of collective bargaining in England was set free of the law".

In relation to injunctions this particular Act is the basic statute that has been successful in excluding the labour injunction completely from British industrial affairs. It is section 4 of the Act which effectively removes the injunction from labour disputes. The section reads that:

"An action against a trade union...or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court".8

This prohibition on tort liability was, and is, absolute. It was not restricted to trade disputes. This section of the act brought a
sharp halt to the writs issued against trade unions themselves. So, by the start of the war in 1914 the system in Britain became based on the firm exclusion of common law liability which related to economic pressure from all trade disputes.

(iii) Gradual Judicial Abstention: 1920-1959

This period is one in which the exclusion of the law from economic sanction and from trade disputes was even being accepted by the judiciary. A detailed analysis of this period will not be undertaken but it must be pointed out that the majority of judges were unwilling to intervene with the labour injunction. What led to this change in judicial attitude? The following factors undoubtedly contributed.9

First the new attitude was exemplified by the new judges who had seen the impact of their seniors' hostility on the trade union movement. Some had taken to heart the obvious class antagonism which had moved people to speak about it. As Lord Scrutton stated in 1921:

"The habits you are trained in, the people with whom you mix lead to your having a certain class of ideas of such a nature that when you have to deal with other ideas you do not give as sound and accurate judgments as you would wish... It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class."10

Secondly, before 1925 leading cases went no higher than the Court of Appeal, a court where the more liberal judges were numerous than in the House of Lords which in the early twenties was peopled with Law Lords whose attitudes more readily reflected pre war bias.

Thirdly, the judges were dealing with a situation in which the trade unions were fighting with their backs to the wall. Between 1921
and 1938 unemployment only fell below ten per cent in one year. The judges were very careful to uphold the rigour of Section 4 of the Trade Disputes Act of 1906 and also circumscribe the area of civil conspiracy.

Judicial Attitude: 1940-1960: This later decade was also one in which labour law cases were few and the attitude of "abstention" had gone deep into the judges' minds. The English battles over labour injunctions were fought, not over procedural or remedial issues, but over questions concerned with the fundamental causes of action.

(iv) Renewed Judicial Intervention: 1960-1966

The social conditions of Britain changed after the war and in the mid fifties trade union membership became stronger. Full employment levels were an accepted criteria of industrial peace. A growing anxiety over the problem of inflation, an increasing middle class criticism of and the employers resistance to unions were the environmental factors which again revived the common law intervention. In summary, the conditions again seemed to have a flavour of the period of illegality, which the trade unions were struggling with in the early 1870's. This new social background then began to be translated into new judicial attitudes.

A recent case of 1964, Rookes v. Barnard, where a threatened strike by the union if an employee, Rookes, were not removed from the payroll because he refused to remain a union member, exemplifies the new attitude expressed by judges. Rookes was subsequently dismissed and he sued the union official. The judge ruled that the threat by the union to strike was in fact intimidation. He allowed the action on the grounds that the threat amounted to civil intimidation unprotected by the 1906 Act.
The threat to commit breach of employment contract was therefore equivalent of a coercive threat of violence. This apparent altered attitude of the judge, in fact, was an attack of the right to strike. It again appeared to those who felt unions had been revived and that intimidation would be made the basis of attacks upon union officials and members, and again include the use of the injunctive remedy to thwart the economic tool of the union—the strike. With this particular case and others, the injunction again began to appear on the British scene and Section 4 of the 1906 Act which gave unions tort immunity was challenged. Again one must remember that the social climate during this period had much influence on the judge's decision in the Rookes V. Barnard case, which opened the door to this new judicial intervention.

As a consequence of this decision, the Trade Disputes Act of 1965 was passed. It is entitled "An Act to prevent actions founded on tort, or of reparation, being brought in respect of certain acts done in contemplation of furtherance of trade disputes."

The pertinent section of the Act reads as follows:

"An act done after the passing of the Act by a person in contemplation or furtherance of a trade dispute (within the meaning of the Trade Disputes Act of 1906) shall not be actionable in tort on the ground only that it consists in his threatening:

a) that a contract of employment (whether one to which he is party or not) will be broken, or

b) that he will induce another to break a contract of employment to which that other is a party."

The Act is limited to employment contracts. However by using the blanketing term "trade disputes", the new Act may well have fallen into the same type of situation which occurred in 1932 in the United States. The term in the United States tended to embrace organization and
recognition picketing, mass picketing, and strikes in breach of contract.

To further exemplify the changed view of the judiciary, subsequent cases did reveal the intervention into the trade disputes area. Unions were beginning to feel the new attitude with a growth of new causes of action such as:

a) interference with contracts without breach
b) interference with future contracts by unlawful means
c) malicious interference with business or employers
d) conspiracies to use unlawful means
e) picketing—where conduct of picketing was enjoined
f) inducement of unions for breaking commercial contracts.

This new view hinges upon the wording of Section 4, where the union is granted immunity to tortious acts alleged to have been committed by or on behalf of the trade union. The courts have extended the causes of action and added the trade unions to the list of possible defendants. There is still, however, the traditional view of Section 4 and thus abstention. It is expressed in Camden Exhibition and Display Ltd. v. Lynott, 1965.

However, there is also a middle view which proposes to issue declarations in place of injunctions. This view proposes that when a declaration is granted and once the law is so declared, unions or their officials would not seek to do anything contrary to it. It is felt that public pressures would be so strong that unions would observe a declaration in order to preserve their status. This declaratory judgment would not carry a contempt penalty and thus no imprisonment. Only public pressure to obey the statement, and the union's desire not to destroy its image in the public's eye is all that is required. Thus
this middle view attempts to eliminate the writ and contempt from labour disputes but it still requires the use of a judge's opinion to make a declaratory judgment.

The disagreement of recent cases against the injunction hinges on the fact that it recognizes the employer's contractual and property rights but that it is blind to the interests of collective labour.\textsuperscript{14}

Recent ex parte injunctions have also been issued "to preserve the status quo", but again, from labour's point of view, this can ban union action for a short and probably vital period until action is heard further. Without going into the details of two recent cases in which the ex parte was used, the situation in Britain reveals that a High Court judge will now grant an injunction --even a mandatory one--against union defendants and even against the union itself.\textsuperscript{15} These recent cases show how far the law has moved since 1954, when the popular belief was that the injunction had been removed from British disputes.

Conclusions

In concluding the chapter on Great Britain's experience with the labour injunction, the most significant point which can be learned is that the frequency and use of the labour injunction is directly attributable to the attitudes of labour, management and the judges. The law, especially judge-made law, often adapts itself to meet the changes in the social environment of the time; however it frequently develops in a manner hostile to the trade union movement. During the periods traced the use of the court injunction has been directly attributed to the economic picture of the country, the phase of the union movement and the attitude of the judges toward intervention.
How can the study of the British system be of any value to the Canadian labour scene? The following points must be considered relevant:

1. the frequency and use of the injunction is directly related to the state of the labour movement and the attitudes of the judges and the public at the time.

2. the apparent abstention of the law from labour relations and thus the infrequent use of the labour injunction again is directly relatable to the shifts in the social environment; the apparent solution to the labour injunction is, in fact, the attitude expressed by both management and labour during the 1871 to 1920 period, and is further exemplified by the judicial abstention from 1920 to 1959.

3. in Canada the attitude of labour, management and government leads us to believe that a more regulated system of labour relations is a proper solution for our country and thus more intervention into the arena of labour relations. The British system literally has no enforceable collective agreement, as Canada does, and thus in the writer's view, is a more unstable system of labour-management relations. The Canadian system defines when a strike can be taken, however the British process leaves this tool open for the union to virtually use at will. Thus the strike in Britain becomes a more powerful weapon than its counterpart in Canada.

4. in 1960 in Great Britain, again because of the economic conditions—mainly the struggle with inflation and the maintenance of full employment, the new union strength, the increasing middle class criticism of unions and employers' resistance to the unions, the common law began to intervene into labour-management disputes. The nebulous area of when a strike is legal or illegal became an issue. The common law began to
intervene into disputes and injunctions began to reappear. Keeping in mind the growing unrest with the wage drift, the common law judges began to intervene in disputes and determine the economic strengths of the parties to collective bargaining. The decision in the Rookes v. Barnard case held that a coercive threat of breach of employment contract was equivalent to a coercive threat of violence. Thus a frontal attack on the right to strike.

5. prior to the 1960's the courts held the ring by preventing violence and other intolerable conduct, and thus the availability of the labour injunction to prevent irreparable harm to property. However in the 1960's, as previously discussed, the courts began intervening to determine the legality of the strike and thus were impinging upon the economic sanctions which the parties aimed to use. The injunction has therefore been used to break a strike. This is purported not to be the case in Canada today; the strike takes place at a specified time after negotiation and conciliation procedures have been followed, according to the various statutes. The use of the injunction in Canada, as will be shown later, is not being used to give one party an advantage in bargaining; it is being used basically to control intolerable conduct during strikes and thereby protect the private property.

The study of the British system has revealed the lack of legal intervention as compared to Canadian labour law. The systems of collective bargaining are strikingly different, or possibly in different stages of development. The basic attitude in Great Britain is that collective negotiations must be a free process and that the law abstains from controlling this process. This is a basic difference between the two systems. The labour injunction has not been utilized in Britain
to the same extent as in Canada, primarily because of the attitude of abstention.

Some of the specific differences between the two countries which must be kept in mind when comparing the two collective bargaining structures and the use of injunctions are:

1. Most plants are organized on a multi-union basis along occupational lines rather than in an industrial union basis. No governmental agency assists the employees' selection of exclusive bargaining agents nor confers any bargaining rights on such agent. No government machinery carves out appropriate bargaining units.

2. Bargaining takes place at different levels and between employees' bargaining agents and employers' associations remote from the plant and shop. Bargaining in any one industry, for example, may follow all or some of these forms:
   a) between employer federations and union federations
   b) regional bargaining between employer associations and unions to apply the multi-industry bargaining on a local basis
   c) between employer and trade union at plant site
   d) between "Stewards' Council" and management. The Stewards Council is composed of stewards from different unions in a multi-union plant. The role of the steward in continuous negotiations differs sharply from "watchdog" function he performs in North America. In the British shop the steward is much more independent of union control. Commentators claim this contributes to a lack of official union control, contributing to the larger number of unofficial or wildcat strikes in the United Kingdom. In Britain the number of days lost through strikes is low, but
the number of short strikes comparatively high.

e) consultation through Joint Consultation Councils to which representatives of employees (no official union role) are elected to discuss with management matters which are not the subject of negotiation with trade union.

3. The government may impose terms and conditions on employers by various means. Section 8 of the Terms and Conditions of Employment Act permits the Minister of Labour to submit to the Industrial Court for determination a dispute with an individual employer who can not obtain an agreement with a union in an industry which has established terms and conditions pursuant to negotiations involving a substantial portion of the industry or trade. The Minister under the Wage Councils Act may also impose terms and conditions of employment on industries where there is no effective collective bargaining machinery. Similarly, under Section 2 of the Industrial Courts Act the Minister may submit an economic dispute to the Industrial Court for arbitration.

4. On the other hand, the government has not enacted legislation protecting employees' right to organize or preventing employers from discriminating against union activities. Briefly, there are no union or employer unfair labour practices as in Canada and the United States. This abstention of the law from British labour relations is reflected in the lack of contractual rights and obligations flowing from labour agreements. It is rare for such agreements to have a fixed duration. As a result, contractual settlements do not insure industrial stability. The unofficial strikes arise more as challenges to management than as economic or
negotiated strikes.

This brief, generalized outline of basic differences indicates the main reasons why an exhaustive comparison with the United Kingdom practice must not be considered as completely relevant to the Canadian system. In summation, a recent view in Great Britain is that the common law is unduly technical and as Viscount Radcliffe said in Stratford v. Lindley:

..."the law should treat a resolution of this sort according to its substance, without the comparatively accidental issue whether breaches of contract are looked for and involved; and by its substance it should be either licensed, controlled or forbidden."19

He feels this would be getting down to reality if the law were really re-defined so as to control, license and forbid trade union activities according to their existence. The opposite view to this is that this would be a detriment to the trade union movement as the forms of economic sanction would be decided in advance of a dispute. The industrial parties could not bargain in whatever way was suitable at the time. As far as the labour injunction is concerned, its reappearance could signal that a new system of legal regulation could be introduced. This, in fact, is due to the social climate in Great Britain.
II. THE AUSTRALIAN EXPERIENCE

Since the Australian trade union law has its foundations from the English, a detailed historical analysis of legal developments up to the time compulsory arbitration was introduced is basically unnecessary. As we have already witnessed, the English trade union law is a combination of some of the most obscure and difficult doctrines of law: the law of unincorporated associations, the law of conspiracy and the law of restraint of trade. The same remark is applicable to Australian trade union law, as it is built on English foundations, except it is even more complex. The complexity is partly the result of the division of the industrial power between the states and the Commonwealth. 20

One must be conscious of the fact when comparing the development of the law in England and Australia that the basic attitudes and conditions in each country were different. The conditions peculiar to Australia were favourable to this new province for law and order. The basic attitudes of the trade union movement to legal regulation was different in each country. Essentially, compulsory arbitration grew out of the bitterness of the union strikes of the 1890's. The unions in the maritime, pastoral and mining industries suffered severe defeats, because of either relatively weak bargaining positions or because of the intervention of the "colonial gouts." In order to remedy this situation, unions turned to political action, and unlike their English counterparts who sought to liberalise existing law, their efforts were directed to obtaining equal footing with employers immediately, rather than waiting for some parity in bargaining power. The strike issue involved was the
the existence of trade unionism itself. It was also deemed necessary to find an impartial body to judge industrial matters as it was feared that governmental bias would always favour employers. The result was compulsory arbitration, and thus the rejection of the use of industrial power as a means of finding equilibrium. With this attitude, it was a natural consequence to outlaw combined activity in the nature of strikes by unions. The anti-strike laws impinge on both criminal and civil law. Thus trade unions were brought more closely within the protection and control of the courts.

In order to evaluate the Australian background and make any comparison with Canada's it must be remembered that the states of Australia, unlike the provinces of Canada, have the full powers of sovereign nations except in so far as they have given such powers to the federal legislature. The Commonwealth is allowed to step in when the industrial dispute extends beyond the limits of any one state. The states are free to implement their compulsory arbitration schemes by using direct legislation or by delegating power to tribunals.

As mentioned before, it is this complexity of the co-existence of the state system and the Commonwealth one, operating within set limits, coupled with the two sets of arbitration machinery which give Australia a very unique system of industrial relations.

The civil law restrictions on trade union activity that are used in Canada as bases for restraint exist in Australia. However, the tort of civil conspiracy is given a greater scope by the use of the "illegal means" argument in combination with anti-strike legislation and the tort of intimidation; inducement to procure breach of contract is also available with a wider ambit than elsewhere because of the no-strike
The Enforcement of Statutory, Criminal and Civil Law Restraints

In general the forbidden activity under the anti-strike legislation, even though the meaning of strike varies from state to state, has two elements:

i) a combined refusal to work

ii) a combined purpose of coercing an employer.

With these two elements of prohibition why does Australia still have strikes? It apparently arises from the fact that the right to refuse to accept employment is a protected activity and therefore not a strike. Point two basically outlaws secondary and sympathy strikes.

With this fairly wide armoury of sanctions at their disposal why do employers not use them to restrain union pressure rather than rely on the haphazard tenets of the civil and criminal law? One reason advanced by Sykes for this apparent dislike of using penalties under no-strike law is that even though trade unions were the ones to insist on a compulsory arbitration system from which these provisions resulted, they have always regarded the right to strike as sacred. He goes on to state that there is still room for collective bargaining in the system as it exists in Australia. This does not mean no-strike laws are ineffective; it merely points out that they are not enforced frequently.

The Injunction and its Use

This remedy is available in Australia as a means of enforcing both criminal and civil law. The rules governing the issuance of the injunction are very similar to those in England and Canada. An injunction
can be issued on notice or ex parte and they may be directed at trade
unions (as for many purposes under State Laws, Trade Union Acts have
given corporate standing to unions), or to certain people, their agents
and servants. The order, as in Canada, must be certain and without defect.
The remedy for disobeying a court injunction is against the property of
the defendant or contempt. There seems to be some confusion between
civil contempt and criminal contempt, but very often a mere breach of
an injunction, and thus only a civil contempt, may well become criminal
because the disobedience offends the dignity of the court.

An injunction is indeed a very useful weapon with which to restrict
organizations in their endeavours to combine or threaten to combine. Thus,
an injunction based on the violation of criminal or civil law with respect
to conspiracy, or because of the commission of a tort, or in the case of
intimidation, it should be readily available.  

In Australia civil conspiracy is augmented by the anti-strike laws
and thus make this tort very easy to establish. Again, even with this
ease of obtaining an injunction, it is not used frequently to enjoin trade
union pressure tactics. The output of cases involving the equity
injunction have been modest indeed. Sykes explains this sentiment in
this way:

"The explanation seems to be that it has become a
tendency with employees to think exclusively in terms
of the penal provisions of the arbitration statute and
awards made there under. Perhaps there is also the
reflection that this type of action involves less per­
manent ill-feeling than mulcting the union in damages
in the ordinary court. After all, management has to
live with the union."  

There is also another possible reason why the injunctive use is so modest,
because there is, and has been, an apparent lack of violence over the past
twenty-five years, even in the most strenuously contested issues. With this apparent non-employment of sanctions against trade union activity, one may feel that Australia is free of industrial disputes. This is not so. For example, in 1963 Australia, with a population of eleven and one-half million, lost 1,755,000 man hours due to strikes; in Canada with a population of eighteen million, only 917,000 hours were lost. So it indeed seems that the pacivity of instances of enforcement under anti-strike legislation and by the way of the injunction, can best be explained by the pre-occupation of participants in labour relations with the compulsory arbitration system.

Is compulsory arbitration then the solution to the injunctive problem we appear to have in Canada? From its apparent lack of use in Australian affairs, it does suggest that compulsory arbitration is an answer. However, compulsory arbitration is not a free collective bargaining process as it is in Canada and thus would appear, in the writer's views, unacceptable. Not being overly critical of forced bargaining, this is the way in which the trade union movement wished to progress in Australia, and thus appears to accept this type of intervention.

Mechanics of Compulsory Arbitration and Its Effects

The theory of compulsory arbitration is quite straightforward. The parties negotiate; if this fails there must be conciliation; if this fails to culminate in an agreement, then the public authority will make an award that the parties must accept. As the writer has already mentioned, the States and the Commonwealth have arbitration machinery living side-by-side. Coupled with this, two of the states have Wage Boards which are essentially legislative bodies which determine working conditions that are to prevail
in an industry. The remaining states have arbitral tribunals which make awards in a manner resembling the technique of the Commonwealth body.27

The award has been described as being so comprehensive and elaborate in scope that in the main there remains relatively little occasion or opportunity for the common law to apply in employment to which they relate. The award is made under the jurisdiction of the tribunal and thus does not depend on agreement between the parties. Thus it is more similar to legislation than to a contract. Under the State system the tribunals have the power to make a common rule for all those concerned with the particular industry.

Going one step further, the State awards will often contain anti-strike clauses. The statutory injunction is available as a sanction for breach of such an award.

What then is the effect of such a system? It has been submitted that both sides rely on the system to regulate their relationships with one another. The basic reason for this is that institutions originally designed merely to prevent oppression of workers and their organization, have become essential tools of economic planning in Australia. There is indeed one problem which exists in arbitration and that is the balancing of the desirability of conciliation and the consideration of the public interest. The view has been expressed that in Australia the economy is not as competitive as in some other countries. Consequently, there is greater danger of agreement between employer and union being contrary to public interest.28

Conclusions

The writer has referred to labour relations in Australia as state
and then as federal regulated. However, the State awards do tend to follow Commonwealth awards and thus give a picture of one compulsory arbitral system. There is also a belief that centralized unionism, one union for one industry, is a proper way to settle disagreements. The Australian Council of Trade Unions is the body which is striving for this concept and since twenty-six per cent of all trade unions comprise fifty to sixty-five per cent of all union members it is indeed a very influential body in getting labour to think along national lines.

The examination of the labour relations system and structure of Australia reveals, as it did in the study of the British system, that the frequency or incidence of the use of the labour injunction is directly related to the attitudes of the parties to collective bargaining. In Australia the system of labour relations extends to the opposite extreme from Great Britain's. In other words, the latter is highly regulated as compared to the former one of mutual consent. With the Australian system there is concern with the concept of the existence of the awards and the effect of breach of such awards on industry as a whole. There is a resultant lack of thinking in terms of civil or criminal law. As pointed out in the discussion, even the resort to the use of the injunction to stop illegal strike. Management would rather solve the dispute outside the courts. Both parties to collective bargaining prefer to have the arbitration system set aside from both governmental as well as legal intervention.

The study of British and Australian labour law experience with the injunction does again reinforce the theory that the incidence and the use of the injunction is a direct function of the attitudes prevailing in the country; in Australia there is not the preoccupation with civil and
criminal law as there is in Canada. However, there is still a statutory injunction available if needed, and trade unions claim, as in Canada, that it is used over-frequently by petty employers trying to break unionism.  

Needless to say, just the appearance of compulsory arbitration, the thinking along national lines and the very unique climate of industrial organization makes any direct comparison with Canada almost impossible. It is not a matter of saying compulsory arbitration has limited the use of the injunction, it merely appears that the awards are sacred and not disobeyed.
CHAPTER III

THE LABOUR INJUNCTION IN THE UNITED STATES

In studying the United States experience with the labour injunction it should be understood that their experience was under a different socio-economic climate. Many commentators, especially labour leaders, state emphatically that the United States has solved their difficulties with the injunction and that we should follow their solution. The writer does not feel that such a simple statement can be made. For example, they say the matter was finally resolved by the Norris-La Guardia Act of 1932. The conditions before the 1932 Act must be brought to light and other points of difference must be considered before any practical comparison can be made with the American experience. With these brief comments, the writer will explore the American experience with the injunction and then draw some conclusions as to the relevance to the Canadian situation.

Federal Constitutional Power

The very first point of departure between the Canadian and U.S. system of labour relations is that in the U.S. federal legislation dominates. Labour relations are regulated on a national level. The constitutional doctrine of supremacy of federal power prohibits not only state regulations which directly conflict with federal regulation, but also any controls within areas occupied by the exercise of federal power and intended by Congress to be free from state interference.

The states do have jurisdiction to enjoin and legislate with respect to conduct constituting or threatening physical violence or other breaches of peace. This has given states power to regulate picket line conduct,
even if the underlying labour dispute is in the federal sphere. The dominance of federal legislative power over inter-state commerce and the consequential dominance over American economic life is indeed a contrast to our system.

This doctrine of federal pre-emption recognizes that the N. L. R. A. is not a complete labour code and that nontreatment of a subject matter leaves the state power unaffected. Canadian constitutional theory differs quite sharply as both the federal and provincial governments enact labour legislation. Essentially one legislative power fills gaps of the other. Thus if any comparison is made between the two countries one must look at the U.S. federal law and compare it to our provincial laws.

Pre Norris-La Guardia Act

In order to understand the legislative theory behind the Norris-La Guardia Act it is necessary to look at the state of labour law at that time. Commencing about 1886 and continuing through the 1920's the injunction had an important and frequently decisive effect on the outcome of disputes between employers and unions. The frequency and the scope of these injunctions, as well as the circumstances under which they were issued and enforced, provoked an outpouring of criticism by men and women from all walks of life.

The era again depicts the efforts of labour unions to become recognized as a legitimate cause. The American law toward collective action by labour was dominated by the English doctrines of conspiracy and restraint of trade. With this type of background in mind the injunctive remedy was used to thwart collective action of the labour movement. The common law, while leaving employers unrestrained in their
use of economic force, placed severe limitations on unions.\textsuperscript{5} Keeping this in mind, until 1932 little had been done to protect the working man or to permit him to join in concert with fellow workers. Well documented studies showed the labour injunction as being used to prohibit peaceful picketing activities and showed that they were being issued by courts on the basis of very flimsy evidence.\textsuperscript{6} Thus prior to 1932 all picketing was generally considered unlawful. The number of injunctions issued between 1880 and 1930 were 1,845 and the peak decade was the 1920's when 921 were issued.\textsuperscript{7} There were many criticisms levied against the abuse of the labour injunction at that time. It was the customary court procedure which was criticized.

Professor Edwin E. Witte listed the complaints against the customary court procedure as follows:

1. Defendants did not have a fair opportunity to present their side of the case. Ex parte orders were issued.

2. Injunctions were often issued without sufficient proof. Notoriously exaggerated or inaccurate affidavits were the basis of many ex parte orders.

3. They were traditionally cast in such vague and general terms that they not only constituted an unwarranted extension of judicial powers, but also could not be understood by those to whom they were directed. They were virtually judge-made statutes governing the conduct of entire industrial communities.

4. There were no adequate provisions for prompt appeals.

5. Injunctions denied a fair trial to persons accused of a crime. Here Witte refers to contempt cases, without a jury, before the same judge who issued the injunction.

6. Posting of identification bonds by parties seeking injunctions provided in practice little or no protection to unions. Bonds were either at ridiculously low amounts, or were not required at all. It was practically impossible to identify defendants in labour cases for losses they sustained, principally because the effect of an injunction upon a strike, for example, could not be measured in dollars and cents. Further, the ineligibility of defendants to
recover on a bond until after the denial of a permanent injunction—a stage seldom reached in industrial disputes—virtually precluded any recovery.8

All of the foregoing criticisms, Witte concluded, rested

"not upon the claim that a procedure is followed in labour cases different from that in other injunction suits, but rather upon the argument that a different procedure ought to be applied because the situation presented in industrial disputes differs radically from that of ordinary legal controversies. Rules and practices which are objectionable in other suits work badly and unjustly in labour cases. It is not that labour is discriminated against, but that industrial disputes present special problems requiring special treatment.9

Benjamin Aaron also summarizes the criticisms of the injunction at that time. The principle counts were as follows:

1. the courts had refused to recognize that breaches of the peace could be redressed through criminal and civil actions for damages;

2. they had expanded a simple judicial device into an enveloping code of prohibited conduct, absorbing en mass executive and police functions;

3. issuance of restraining orders and preliminary injunctions could not preserve the status quo—irreparable damage to a union could result from an injunction designed to protect an employer from similar loss;

4. courts could not find facts quickly and fairly by relying upon the complaint and the affidavits of interested or professional witnesses;

5. the legal doctrines in labour injunctions were illusory and ambiguous, and tended to reflect the economic and social prejudices of the judges themselves.10

To further exemplify the philosophical thinking at that time Roscoe Pound observed that American legal thinking had been dominated from the onset by "an uncompromising insistence upon individual interest and individual property as a focal point of jurisprudence."11 This stubborn adherence by the judiciary with the liberty to contract led to the nullification of federal and state legislation which was designed to
outlaw the infamous "yellow-dog" contract. The United States supreme court declared such statutes unconstitutional under the fifth and fourteenth amendments.

Thus it was not surprising to see that a judiciary imbued with this philosophy should regard even peaceful picketing as a form of lawless intimidation, and the injunction the proper equitable remedy for threatened interference with the free enjoyment of "property" broadly defined. And it must be noted that the U.S. courts chose to go further than the English courts and to assume business interest also are property, to be protected by the injunction. The courts did not really care whether or not such interests were property at all but were only concerned with declaring them to be things of value which they believed should be safe-guarded in the only practical way—by the injunction.

Equally predictable was the tendency of the courts to regard a wide variety of economic pressures resorted to by unions as restraints of trade prohibited by the Sherman Act.

This then was the climate preceding the passage of the 1932 Act as the laissez-faire doctrines of the 1920's began to be challenged. The mood of the country was changing and criticism of the courts began to mount. Not only were they accused of applying one law to employers and another to unions; the courts were condemned for defeating, by the issuance of injunctions enforcing "yellow-dog" contracts, the attempts of working men to enjoin in effective forms of self help, while leaving unsolved the underlying causes of their discontent. Also with the onset of the depression there developed the bootstrap theory that if workers were permitted to organize and bargain collectively, they could improve their own deplorable wages and working conditions by concerted action. Yet the
labour injunction remained an effective device to prevent such self-organization and concerted activity.

Thus with this climate in mind, we can not compare the American experience with the labour injunction prior to the enactment of the Norris-La Guardia Act with the situation in Canada at the present time. All the principles of free collective bargaining have long been basic rights in Ontario, British Columbia and, in fact, in Canadian labour legislation. It is the writer's view that we are not in a period of government by injunction as in the United States prior to 1932. The injunctive remedy in Canada today is basically used to restore order and peace along picket lines. The relief this procedure permits is available and utilized in connection with picketing in labour disputes in every province in Canada. Moreover it is not correct, as the Ontario Labour Federation Brief (1966) asserts, that the use of court granted injunction has been removed from labour disputes in the United States. The type of relief granted in our courts would be granted in "cases cited" in every major industrial state of the United States.

Passage of the Norris-La Guardia Act

The extent of the change in public attitude toward the labour injunction was reflected in the sizeable majority by which the Norris-La Guardia Act was adopted by both Houses of Congress in March 1932. The Act was one of labour's greatest and most enduring legislative victories. E. Witte describes the purpose of the Act:

"The...act does not attempt to destroy injunctions. What it aims to do is to prevent employers from gaining through injunctions an unfair advantage in labour disputes. It seeks to keep the courts from interfering when ordinary law-enforcing methods are adequate, and to compel them to
give consideration to the probable effects of the orders they are asked to issue. It aims to give the defendants a fair opportunity to present their side of the case and requires the courts to weigh carefully the testimony. It makes the right of appeal really effective and accords trial to jury to persons accused of violations."

A careful reading of the fifteen sections of the Act discloses in specific detail the design to prohibit the issuance of injunctions in most labour disputes and to prevent the procedural abuses in those situations where it might be used. Perhaps more important is the Act's firm endorsement of a policy favourable to collective organization and bargaining and the requirement of non-intervention by the courts.

Very briefly a review of the most important sections will exemplify what the Act's purposes were. 22

Section 2 - The statement of public policy "that the Government shall occupy a neutral position, lending its extraordinary power neither to those who would have labour unorganized nor to those who would organize it." Thus the responsibility for formulating a national labour policy was reserved for the Congress, not the courts.

"The central proposition was that law served no useful purpose in labor disputes, save possibly to protect tangible property and preserve public order. Its philosophical underpinning was the belief that government should not resolve disputes or substitute its wage or price determination for private contracts in a free market." 23

Section 3 - Declared the hated yellow-dog contract to be contrary to public policy and unenforceable in federal courts.

Section 4 - Listed nine separate activities including strikes, which federal courts were forbidden to enjoin. These activities included paying strike benefits, peaceful picketing, peaceful assembly—in general the normal strike activities, as long as neither fraud nor violence was present.
Section 7 - Enumerated an elaborate series of findings that had to be made, and procedural safeguards that had to be observed before any injunction could be issued.

In summary, the Act made it almost impossible to obtain an injunction against the peacefully conducted labour action whether in the form of strikes, picketing or boycotts. It must be remembered that the Act did not completely eliminate the labour injunction from the federal courts, however the reduced number issued after the Act did suffice to nullify its use as a weapon to thwart the economic pressures of unions.

Labour Injunction Subsequent to the Norris-La Guardia Act

Professor Witte in 1951 examined the practice of the Federal Courts since the Act and came to the conclusion that the anti-injunction Act had effectively accomplished its purposes and that if there was still a problem of "government by injunction", as the unions were again complaining, it lay in the injunctions issued under the Taft-Hartley Act since 1947 and the injunctions issued by the United States Government in railroad and coal strikes in the last few years.

By the end of 1931, as set forth in Witte's, "The Government in Labor Disputes", at least 508 injunctions had been issued by Federal courts; the majority in the 1920's. From 1933 to 1951 only sixty-six federal injunctions were issued.24

The Act obviously solved the problem which was prevalent in the Federal courts but the legislation was not quite as effective in the State courts. Ex parte orders are now far less common (1951)in most State courts but still represent the usual procedure in the Los Angeles and Southeastern States.
Benjamin Aaron studied the question of State labour injunctions in detail. At the outset he points out the fact that some thirty-three of the fifty states have no statutes which comprehensively regulate the use of the labour injunction. As in 1951, this group includes all of the southern states, except Louisiana and also, quite surprisingly, the large industrial states of California, Michigan and Ohio.

Before examining the State court injunctions, the writer wishes to show where the injunctive remedy is still available under the Federal law and why its use has been preserved. More specifically, under the Railway Labor Act, the National Labor Relations Act and the Labor Management Relations Act.

**Injunctive Relief Under the Railway Labor Act.** (R.L.A.) Under the R.L.A. there became a difficulty of accommodating the anti-injunction rules of the Norris-La Guardia Act. Without going into great lengths, the basic point which needs to be brought forth is that the R.L.A. compels the carriers and the employees to bargain collectively. Injunctive relief is still available, although narrower than before the Norris-La Guardia, but the remedy is available to curtail unnecessary strikes in order to protect the "public interest" in such vital industries.

**Injunctive Relief Under the National Labor Relations Act.** (NLRA) With the passage of the 1932 Act the employees had the right to organize and to bargain collectively, but employers were still free to resist and with impunity punish employees who joined unions. So in 1935 the Government intervened with the Wagner Act and compelled the employer to bargain; thus labour's hand was enhanced. By 1947 the unions began to abuse the power which they had obtained. In 1947 the Taft Hartley amendments were
adopted to the NLRA in order to equalize the existing balance of power. Given this mood the injunctive remedy was revived to a limited extent. It is indeed interesting to note that by 1947 there was a sharp change in popular attitudes toward organized labour. The strike wave of 1947, the acute inflation and the enhanced power and prestige of organized labour led to the 1947 amendments. The emphasis was now on regulation, not enhancement of unionism. Employees were now assured of their right to refrain from union activities and be represented by a bargaining agent of their choice, a union could now be de-certified; secondary boycotts harming innocent parties were now prohibited and the labour injunction returned to the Federal courts to restrain such activities. National emergency strikes received special treatment and again were being supported, if necessary, by the Federal injunction.

More specifically, the NLRA gives to a single administrative agency, the National Labor Relations Board, exclusive jurisdiction over unfair labour practices. The Taft Hartley amendments gave to the Board both the power and the duty to obtain injunctive relief from Federal courts. Section 10 (j) authorizes the Board in its discretion to seek "appropriate temporary relief or restraining order" after the filing of a complaint, and empowers the district court to grant such relief "as it deems just and proper." This section refers to recognition practices and as such classified as unfair labour practice. Section (l) directs the Board to give specified unfair labour practices involving prohibited strikes, boycotts, picketing and hot cargo agreements full priority over all other cases and to seek injunctive relief when the Board believes such charges are true. Section 10 (j) and (l) were designed to give speedy relief to employers caught in situations described.
Unions again began to complain that the injunctive remedy given the NLRB was a regressive step and thus an undermining of the Norris-La Guardia Act. But here again, the writer feels the slogans and the solutions of the 1930's do not represent the problems which the Taft Hartley amendments sought to relieve. There was one safeguard and that was that the remedy could not be used by private parties. They had to go through the Board in order to obtain the injunction. Thus it was, and is, up to the Board to determine whether the remedy should be used. This has been criticised by some commentators as they feel the individual's right of relief in the courts could be vetoed by a government official. It is indeed quite likely that improper picketing could continue for a period of three to four weeks before the Board decides if the relief should be granted.

The Board was criticised by the Pucinski Subcommittee for failing to develop new techniques to provide expeditious treatment of cases. They also recommended that the Board make greater utilization of Section 10 (j) when the unfair labour practice is continuing and will continue unless restrained and will cause irreparable property or personal injury or injury to the rights guaranteed by Section 7.28

More recently Senator Ball criticised this screening process of the NLRB.

"I do not think it has ever been a sound liberal policy to place an appointed administrative official between a citizen and his right to go into court and protect his rights."29

Also fears that the Board might use this discretionary power under 10 (j) in an excessive or one-sided manner have proved to be exaggerated. Both management and unions have criticised the Board for not petitioning for injunctions more often. According to figures from July 1948 through
June 30, 1965 it has made only 107 applications of which fifty-eight were granted, thirteen denied and the remainder unsettled or withdrawn. While under Section 10 (1) the number of applications have grown from a low of 18 in 1951-1952 to a high of 282 in 1961-1962. It was here that the Board was criticised for not expediting the greater number of cases falling in this priority class.

**Injunctive Relief Under Section 301 of the Labor Management Relations Act.** (LMRA) The last phase of the revived or renewed controversy with the labour injunction appears under the accommodation of the Norris-La Guardia Act and Section 301 of the LMRA. Section 301 (a) allows an action for damages for violation of contract between employer and a union. Section 301 (b) provides that unions may be sued as entities and in behalf of the employees they represent.

The problem appears in the United States Supreme Court's decision in the Sinclair Refining Co. v. Atkinson case. The Court ruled that a union's strike in violation of a no-strike clause over an arbitrable grievance could not be enjoined, holding the Norris-La Guardia applicable to a 301 suit. The right to bring action under Section 301 was upheld.

This indeed becomes an interesting question because the employees are allowed to continue to strike over issues which they previously agreed to submit to arbitration. The employer is left with no adequate relief according to the Sinclair decision. Aaron refers to other recent cases where such relief has been granted by State courts. The State courts may, while following their own procedural requirements, and thus ignoring the Norris-La Guardia, apply the federal substantive law of Section 301 to give both injunctive relief and damages for breach.

In bringing this question of breach of collective agreement and the
injunctive relief into the Canadian context we see that this relief is available in British Columbia under Section 22 of the Labour Relations Act. Every collective agreement has written into it a procedure for finally and conclusively resolving disputes. In other words breach of collective agreement is unlawful under Section 22 and thus can be enjoinable by the court.

In concluding the treatment of injunctive relief under Federal law since the Norris-La Guardia Act the first point which readily becomes evident is that the remedy has not been removed entirely from the Federal courts. It is indeed, as Aaron states, the most remarkably durable judicial remedy which will probably be used so long as private parties are permitted to resort to economic warfare as a means of settling a labour dispute.

Labour Injunctions in the State Courts

As we have already witnessed the Norris-La Guardia Act practically immunized union concerted activities by curbing the power of the Federal court to issue injunctions. The State courts have retained their injunctive powers and are exercising them today. Some states have enacted "little Norris-La Guardia's" and thus follow the procedural safeguards as set down in the Federal Act. Those states with no anti-injunction laws, such as California and Texas, appear to proceed on the basis of affidavit evidence similar to that used in Ontario and British Columbia.

Aaron's study, referred to earlier, surveyed six states which have anti-injunctive laws and he found that they still issue labour injunctions in instances in which picketing is accompanied by threats and violence. California, which has no anti-injunction law, basically deals with picketing
on the basis of common law development. Mass picketing is consistently enjoined and the number of pickets may be limited. Picketing which obstructs, annoys and intimidates others by insults and menacing attitudes is enjoinable, as is the use of false and misleading statements; but peaceful picketing is restrained only when it is irrevocably blended with acts of violence and intimidation. 36

The question may arise at this point, why are the states permitted to issue injunctive relief in relation to the picketing which the writer has described? State legislative power over picket line conduct may encroach upon or exist co-extensively with the federal power, but the state court system still allows an employer to obtain injunctive relief free of the Norris-La Guardia, because the Act restricted the federal power over procedures in the Federal court and not the federal power over interstate commerce.

Thus an employer who has a cause for relief over picket line conduct is prevented from obtaining such relief at the federal level, but the State courts are available. Each state has different procedural requirements which must be followed before obtaining relief and others will still issue the ex parte order. The use of the injunction in both the anti and non anti states which Aaron studied showed a general decline in the use of the remedy. He offers some suggestions why this is so. 37 Firstly, the adoption of state labour relations boards with jurisdiction over much of the conduct previously regulated by the State courts. Secondly, the more important development was the doctrine of federal preemption. The exclusion of the state control of conduct which constitutes an unfair labour practice under the NLRA, together with the expanded jurisdiction of the NLRB have affected the scope of state injunctions. The important
area of development is in the interstate commerce area. States are allowed entry into this field in three general types of cases:

1. those which do not meet NLRB jurisdictional standards of impact on interstate commerce

2. those involving violence or breaches of the peace (picket line conduct would fall in this category)

3. those involving strikes in breach of collective agreements (this was discussed more fully in connection with Section 301 of the LMRA).

A third reason he offers for the decline is that labour and management have grown more mature and sophisticated. The writer merely wanted to include these views to help show that it is not merely the Norris-La Guardia which caused the decline; it was a combination of these and possibly more factors. Aaron criticises the procedural abuses which exist in the State court proceedings on the issuance of injunctions. This may be so but the only glaring abuse that he comments upon is "that the labour injunction, by its very nature, is a form of judicial power peculiarly subject to abuse." He does not want the weapon to be used as it was in the 1930's as a means of deciding which side wins an economic battle. He does feel it has a decidedly important use in cases which have a marked pattern of continuing violence. With respect to the Norris-La Guardia Act, the Act served its purpose at the time it was enacted but in the present it remains a serious impediment to the even-handed enforcement of the present national labour policy.

Relevance of the American Experience to Canada

In discussing the American experience many of the points of difference between the two countries have been mentioned. There are thus
many areas of labour law which may apply in the United States that would not apply in Canada due to the particular environment in which the laws were enacted in the United States. The labour injunction owes its present views to the past abuses of its use. In other words, a historical bias is present in today's American thinking. However, the mere fact that the remedy has been retained under Federal law and State law, as shown in the discussion, points out the fact that it can not be completely eliminated from the arena of labour management disputes.

It appears to this writer that in Canada we must make certain that the injunctive remedy does not favour one side or the other but that it remain as a remedy which is available if needed to maintain and protect the right to private contract and to private property.

Some of the guidelines from the United States experience that have been considered as relevant to Canada are as follows:

1. the affirmation that the court retain the traditional ability to give injunctive relief

2. that a speedy trial be available to make sure that both sides have a chance to voice their views. Coupled with this that a right to a speedy appeal be available as well. However this does not mean abolishing the ex parte injunction where irreparable damage to property may occur. This right must be preserved.

3. The idea of a Board to replace the courts is a corollary to point 1; if a Board were adopted in British Columbia or Ontario this would mean that the individual right to a court relief would be confiscated by a government official.

The main inference to be drawn between the two countries is that the State courts do grant injunctions in the same kinds of cases as we
do in Canada today. Thus both countries have the injunctive remedy and utilize it to combat the same types of unlawfullness.
CHAPTER IV

THE CANADIAN EXPERIENCE: ONTARIO
AND BRITISH COLUMBIA

1. HISTORICAL DEVELOPMENT OF CANADIAN LABOUR LAW

Prior to the presentation of the use of the injunction in Ontario and British Columbia, the writer will briefly outline the history of Canadian labour legislation. This will assist the reader in better understanding the present situation, as well as the differences between Canadian, Australian, British and American labour development. In Canada, largely because of the uncertainty of the law of picketing, the law of the labour injunction is nebulous. The injunction owes its origin in the English legal system and it is an exceptional legal remedy to which the common law provinces of Canada are heir.

Prior to Confederation Canadian labour laws were rooted in the English conspiracy laws of the eighteenth century and thus as in England, the injunctive remedy was available but used infrequently. In Canada, as in England, those who felt themselves aggrieved as the result of labour disputes, had resort to the criminal law for their remedy. Canada's early labour law (1867-1930's) can be spoken of merely as the law of strikes and picketing. It wasn't until the 1930's that the Dominion and provinces enacted collective bargaining laws and thus there emerged a distinct body of labour relations doctrine.

Prior to Confederation, Canadian labour law was patterned exclusively after English legislation. Confederation brought about certain changes in legislative power and eventually in legislation. The Division of
legislative power between the Dominion and provinces is outlined in the British North America Act. The Parliament has general power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Provinces. Specific subject matters assigned to the Federal Parliament include trade and commerce, navigation, criminal law and local works and undertakings expressly excepted from those assigned to the provinces. Section 92 of the Act sets out the legislative powers of the provinces. They include property and civil rights, municipal institutions and local works and undertakings. For instance, provincial jurisdiction over property and civil rights brings within the laws of the provinces questions of freedom of association and contracts between employers and employees. Against this, where the activities of the association are such as to bring it within the ambit of the criminal law, the matter comes under the Dominion's laws.

While provinces through their jurisdiction over property and civil rights have jurisdiction over collective bargaining and conciliation, the Dominion has jurisdiction over these matters if they are within a field specifically assigned to the Dominion, such as transportation and works declared by the Government of Canada for the general advantage of Canada or two or more provinces.

Thus we find the provinces enacting legislation governing civil rights relating to freedom of association in trade unions while the Dominion governs any criminal aspects. Thus there is both Dominion and provincial legislation dealing with labour relations. Canada's labour legislation can be traced along this division of legislative power as provided under the B.N.A. Act of 1867.
Following Confederation Canada's first crisis in labour law occurred in 1872 and incited Parliament to consider the legal status of unions. Under pressure from the trade union movement, Parliament seized upon the English reform legislation of 1871 to declare that the purposes of a trade union are not unlawful merely because they are in-restraint of trade, and to legitimize peaceful picketing by taking it out of the criminal law. Injunctions again where not a major issue, as organization and growth were in the early stages of development.

By 1900 Canadian criminal law recognized the legality of combinations of workmen, the use of the strike and picketing peaceful in form. About this time various provinces tried, unsuccessfully, to promote a voluntary process of collective bargaining. The Federal Parliament also attempted to further collective bargaining by passing the Conciliation Act of 1900, which was founded on the United Kingdom Conciliation Act of 1896. There was, however, one major difference and that was that the Canadian statute was imposed as a device of government policy, whereas the English statute grew out of voluntary practices that were already in existence without legislative assistance. This difference marked a divergence in the courses of the two countries, one toward a tightly operated statutory scheme, the other away from legalism in industrial relations.

The Act allowed the Minister of Labour to invade any situation of actual or potential conflict. It imposed a modicum of intervention in the form of conciliation, marking the beginnings of the two-step procedure of conciliation officer and conciliation board, and the Industrial Inquiry Commission that are characteristic of the present Canadian law. Canada's main contribution to the law of industrial relations was compulsory
conciliation and suspension of the right to strike. This was expressed in the Industrial Disputes Investigation Act of 1907 (Lemieux Act).

This legislation was the result of several situations of crisis resulting from strikes. The Act, however, had a basic weakness. The Act established a bargaining relationship, but gave unions no protection from counter-actions of employers, calculated to discourage employees from organizing. The employer had to merely submit to conciliation and even when a collective agreement was negotiated it had no status in law unless the parties agreed to be bound by the board's recommendations. Constitutional problems were encountered and as a result the Act was amended and restricted to disputes falling within the realm of Dominion jurisdiction, applicable in those provinces that enacted a statute declaring the Dominion Act applicable. In the years that followed all provinces but Prince Edward Island enacted laws bringing the Act into force. The enabling provincial Acts were repealed by British Columbia in 1937, Alberta in 1944 and Saskatchewan in 1945. Thus the Act did not become a lasting guide to industrial collective bargaining.

The Years From 1918 to 1940

During the period from the enactment of the Industrial Disputes Investigation Act to 1936 some of the provinces passed legislation of limited scope respecting conciliation and investigation of disputes. There are two provincial Acts of this period still in existence. One is the Quebec Public Service Employees Disputes Act and the other an Alberta Provincial Statute of 1928 dealing with disputes not covered by the 1907 Act.

A different situation arose following the economic depression of the
early 1930's. The labour conditions during the depression forced the governments to take a new look at the labour legislation. The injunction was not considered the major difficulty that it was in the United States during this same period. One explanation for this is that Canada was too young at this time to be experiencing the same strife. Union labour organization came later in Canada than in either the United Kingdom or the United States and so the labour movement of the 30's did not find the injunction remedy a major problem area. Labour was voicing disapproval but to no great extent. In 1937 and 1938 labour began requesting an amendment to the relevant statute "to prevent the issuance of writs of injunctions in all matters pertaining to the internal affairs of labour organization," and also requested legislation "restricting the use of the injunction in industrial disputes." Professor B. Laskin did at this time criticise the use of the injunction in labour disputes, but it was not because it was being used to any great extent. For example, of the reported cases in Ontario from 1925 to 1936 there were only three instances in which the injunction was issued. Laskin's criticisms were more of a warning to Canadian law so that the injunction would not be used as it had been in the United States prior to 1932.

There were other areas that needed alteration. One development in legislation was the extension of basic protection to the process of collective bargaining by protecting freedom of association from employer harrassment and by imposing on the employer a statutory duty to bargain. The statute or one similar to it was adopted by all provincial legislatures but Ontario and Prince Edward Island. In 1938 British Columbia amended this new law to require the employer to recognize a union as such and spelled out the two-stage conciliation procedure of officer and board.
In 1943 Ontario enacted new labour policy. They outlined the procedure regarding selection and representation by union and so developed the first administrative policy in Canada for general collective bargaining law. Prior to World War II all provinces had made advances toward securing collective bargaining by protecting freedom of association and providing a procedure for settling questions of union representation.

World War II and Post War Developments

With the advent of World War II the Federal Government assumed jurisdiction over most labour legislation under the War Measures Act. This Act merely extended the application of the Industrial Disputes Investigation Act to industries which, in peacetime, were under provincial jurisdiction.

During the period of transition from war to peace, public policy and existing labour legislation received close scrutiny. In 1952 the Federal Government passed the Industrial Relations and Disputes Investigation Act, which is still in existence today. The Act retained the compulsory arbitration features but rejected the compulsory supervised strike vote.

British Columbia enacted a new Industrial Conciliation and Arbitration Act in 1948. The Act met considerable union opposition and as a result a new Act, the Labour Relations Act became law in 1954, and is still in existence.

Carrothers summarizes existing Federal and Provincial legislation in the following way:

"Although there is extensive variation in detail, present federal and provincial legislation may be summarized as embracing, with few exceptions five principles:

1. employee freedom of association and recognition of unionism
2. The right to collective bargaining, established through machinery of conciliation, statutory compulsion to engage in collective bargaining, state intervention in conciliation and postponement of the right to strike and to lock out.

3. Prohibition of unfair labour practices by employers and unions, to protect union organization, individual rights and the process of collective bargaining.

4. The attribution of status to the collective agreement and the concomitant of enforceability, and the settlement of disputes during its term without stoppage of work in brief the establishment of the sanctity of the collective agreement.

5. The establishment of extraordinary machinery of investigation, as it had originated in 1900 and as it had been effected in wartime by the creation of the Industrial Disputes Investigation Commission. The statutes require permanent machinery for their administration, in the tradition of the Wartime Labour Relations Board.9

Following World War II Canada began to experience its first real difficulty with the injunctive remedy. It became a focal point of dissention during the late 1950's, and since then has continued to grow in magnitude. In June, 1966 union leaders from across Canada met to decide their strategy in their fight against injunctions. It was decided to step up the battle against injunctions by mapping a country-wide campaign for the abolition of injunctions in industrial disputes. Since that time the injunctive remedy question has received even more attention, than ever before. It is certainly one of the most debated issues in labour relations today.

Canada provides for a much greater degree of state intervention in the ordinary case than does the United States and it operates a system radically different from the United Kingdom's. In recent years there has been a steady trend toward making unions suable entities, making collective agreements binding in civil action and regulating internal
II. ONTARIO'S EXPERIENCE

Ontario, because of its population and industrial concentration, is experiencing considerable strife in its labour-management relations. From 1958 to 1966 Ontario has had 1,368 strikes or lockouts. This is 54.2 per cent of the total 2,523 that existed in Canada. In Ontario in this same period there were 314 injunctions, or one for every fourth strike. The manufacturing and construction industries together account for 79.4 per cent of the strikes and lockouts in this eight year period (Ontario). The time lost, work stoppages, lost contracts and so forth resulting from these difficulties represent considerable economic damage. The year 1966 has been a particularly trying one for Ontario. Failure to enforce laws concerning picketing have been a major factor in the recent attacks in Ontario on the use of the injunction in strikes.

The labour injunction in Ontario will cover the period from 1958 to 1966. The 1958 date has been chosen as the starting point because in 1960 the Ontario Judicature Act was amended to put certain restrictions on the use of interim and ex parte injunctions. Thus any changes that may have occurred because of the amendments in the Act will be revealed by the study of the two years preceding the Act.

There is also one major judicial difference between Ontario and British Columbia. In Ontario a union can not be made a defendant in its own name. There is provision for bringing a representative action in such a way that if there is a judgment for damages execution can be levied against the assets of the union. However, such a procedure is awkward.
Post-war expansion occurred until approximately the mid 1950's. From 1958 to 1961 Canada experienced its highest post-war unemployment, and there was a slackening in the upswing of production. Thus the economy during this period experienced slow growth. The number of injunctions applied for and granted in this period is shown in Table I.

### Table I

<table>
<thead>
<tr>
<th>Year</th>
<th>Applications For Ex parte Injunctions</th>
<th>Applications For Injunctions on Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Granted</td>
<td>Made</td>
</tr>
<tr>
<td>1958</td>
<td>21</td>
<td>3</td>
</tr>
<tr>
<td>1959</td>
<td>22</td>
<td>4</td>
</tr>
<tr>
<td>1960</td>
<td>19</td>
<td>7</td>
</tr>
<tr>
<td>1961</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>76</td>
<td>30</td>
</tr>
</tbody>
</table>

*Palmer, The Labour Injunction, p. 87.

From the statistics in Table I it would appear that following the amendment of the Act there were fewer ex parte injunctions granted, and that there was an increase in the number of injunctions applied for and granted on notice.

Prior to amendment Section 17 of the Act read as follows:

**Section 17 (1)** In this section "labour disputes" means any dispute or difference between an employer and one or more employees as to matters or things affecting or relating to work done by the employee or employees or as to the privileges, rights, duties or conditions of employment of the employer or employees.

**Section 17 (2)** An ex parte interim injunction to restrain any person from
doing any act in connection with any labour dispute shall not be for a longer period than four days. 12

Section 17 of the Judicature Act was amended in 1960 to read as follows:

Section 17 (1) In this section "labour dispute" means a dispute or difference between an employer and one or more employees as to matters or things affecting or relating to work done or to be done by the employee or employees or as to the terms and conditions of employment or the rights, privileges or duties of the employer or the employee or employees.

(2) An interim injunction to restrain a person from any act in connection with a labour dispute shall be granted only upon at least two days notice to the person or persons to be affected thereby and shall not be for a longer period than four days.

(3) An interim injunction under subsection 2 may be granted ex parte where the Court is satisfied that a breach of the peace, injury to the person or damage to property has occurred or an interruption of an essential public service has occurred or is likely to occur.

(4) Where the employee or employees to be affected by an interim injunction under this section are members of a labour organization, the notice under subsection 2 shall be deemed to have been given to such employee or employees if personal service thereof is effected upon an officer or agent of such labour organization.

(5) Where the employee or employees to be affected by an interim injunction under this section are not members of a labour organization, the notice under subsection 1 shall be deemed to have been given to the employee or employees to be affected by the interim injunction if the notice is posted up in a conspicuous place on the business premises of the employer where it can be read by such employee or employees.

(6) Where some of the employees to be affected by an interim injunction under this section are members of a labour organization and others are not, the notice under subsection 2 shall be deemed to have been given to all such employees if subsection 4 and 5 are complied with.

These changes occurred following a Report of the Select Committee on Labour Relations of the Ontario Legislation. The Committee recommended that there be no ex parte injunction granted except in cases of emergency and that the rules of the Supreme Court be amended to require notice to both parties or that prior to granting, application be made to the Labour Relations Board and permission of the Board be obtained. These recommendations were made in 1958 because it was felt that the ex parte injunction
gave the defendant no opportunity to be heard and that the injunction in the early stages of a strike gave an employer increased bargaining power. It can be observed that the changes that occurred did not follow the recommendations. In fact, it has been argued that in certain industries the amendment did not discourage the granting of ex parte injunctions. This is true in the construction industry. Very nearly half of the labour cases reported between 1948 and 1966 were cases in which the ex parte injunction had been granted. Of the ten reported cases involving injunctions restraining picketing since 1960 (year of amendment) it appears that in at least four cases ex parte injunctions were granted. When discussing the injunctive relief the question of the nature of picketing becomes the major issue. The right to picket is the way that unions publicize the labour dispute. However, the right to picket does not confer on the pickets a right to engage in acts of obstruction, assault, battery and intimidation. Chief Justice Gale made the following statement:

"There appears to be a misconception among certain leaders and members of trade unions concerning the respective privileges of employers and employees. They seem to think that once a strike is called, the employer must close his doors to await the outcome. At present, that is not the case. Employees have the right to strike, but, by the same token, employers have the right to continue their operations and to protect their property. This is usually the basis upon which a court order injunction restricts picketing activities of a union."

An example of the relationship between injunctions and picketing is illustrated in Table II.

It can be observed from this table that the highest number of the acts enjoined in injunctions where discouraging or interfering with customers, deterring people from entering and leaving, threatening, intimidation, preventing free access, watching and besetting, inducing breach of contract, aiding and abetting in the commission of an enjoined
### TABLE II

**NUMBER OF SPECIFIC ACTS WHICH WERE ENJOINED**

**IN INJUNCTIONS ISSUED**

**1958-1966**

<table>
<thead>
<tr>
<th>ACTS ENJOINED</th>
<th>ON NOTICE</th>
<th>ON EX PARTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Persuading employees not to work</td>
<td>8</td>
<td>37</td>
</tr>
<tr>
<td>Preventing employees from working</td>
<td>26</td>
<td>89</td>
</tr>
<tr>
<td>Discouraging or interfering with patrons</td>
<td>35</td>
<td>121</td>
</tr>
<tr>
<td>Deterring people from entering or leaving</td>
<td>52</td>
<td>154</td>
</tr>
<tr>
<td>Threatening</td>
<td>45</td>
<td>150</td>
</tr>
<tr>
<td>Molesting</td>
<td>24</td>
<td>58</td>
</tr>
<tr>
<td>Intimidating</td>
<td>48</td>
<td>153</td>
</tr>
<tr>
<td>Assault</td>
<td>22</td>
<td>84</td>
</tr>
<tr>
<td>Publishing false or defamatory statements</td>
<td>3</td>
<td>84</td>
</tr>
<tr>
<td>Causing a nuisance</td>
<td>3</td>
<td>19</td>
</tr>
<tr>
<td>Preventing free access</td>
<td>38</td>
<td>110</td>
</tr>
<tr>
<td>Obstructing</td>
<td>16</td>
<td>65</td>
</tr>
<tr>
<td>Watching and besetting</td>
<td>72</td>
<td>172</td>
</tr>
<tr>
<td>Tresspassing</td>
<td>12</td>
<td>26</td>
</tr>
<tr>
<td>Interfering with contractual relations</td>
<td>13</td>
<td>25</td>
</tr>
<tr>
<td>Inducing breach of contract</td>
<td>56</td>
<td>126</td>
</tr>
<tr>
<td>Conspiracy to commit an unlawful act</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Declaring a strike</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>ACTS ENJOINED</td>
<td>ON NOTICE</td>
<td>ON EX PARTE</td>
</tr>
<tr>
<td>------------------------------------------------------------------</td>
<td>-----------</td>
<td>-------------</td>
</tr>
<tr>
<td>Supporting a strike</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Picketing</td>
<td>74</td>
<td>203</td>
</tr>
<tr>
<td>Aiding and abetting in the commission on an enjoined act</td>
<td>68</td>
<td>178</td>
</tr>
</tbody>
</table>

*Palmer, p. 95. Note: the number of injunctions granted on notice for this same period is 92 and on ex parte 222.*
act and picketing. Most of these activities, though not actually labelled as picketing occur in association with picketing.

Another problem that is present in Ontario is secondary boycotting. The term may be defined as a refusal to patronize a business or a refusal to work or both. A secondary boycott is action taken by a union against an employer or his employees who are not directly involved in a labour dispute. This may be done by threatening or picketing of the innocent third party, or by refusing to handle goods or work alongside his employees. Such practices often lead to the granting of injunctions, for example, because of mass picketing or intimidation. This problem does not exist in British Columbia as secondary boycotting has been outlawed.

**Period From 1962 to 1966**

The period from 1962 onward can be described as one of rapid expansion. There was a substantial reduction in unemployment levels. From 1961 to 1965 the unemployment rate fell from 5.5 per cent to 2.5 per cent. Over the past few years productivity as a whole has advanced less rapidly than in the United States, while average hour earnings have risen more quickly. Consequently labour costs per unit of output have risen faster in Canada than in the United States. The general upswing in demand, economy and employment has resulted in tight labour market conditions and in concern over price inflation. In summary, from 1958 to 1966 the provincial and Canadian economy has passed through a mild recession followed by rapid growth. The period manifested overall price stability, but inflationary tendencies appeared toward the end. The emergence of a tight labour market, and the other developments mentioned were associated with higher levels of industrial conflict than prevailed during the middle
years of the period studied. Table III illustrated the number of injunctions that occurred in the period from 1962 to 1966.

**TABLE III**

NUMBER OF INJUNCTIONS GRANTED 1962-1966*

<table>
<thead>
<tr>
<th>Year</th>
<th>Applications For Ex parte Injunctions</th>
<th>Applications For Injunctions on Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Granted</td>
<td>Made</td>
</tr>
<tr>
<td>1962</td>
<td>42</td>
<td>12</td>
</tr>
<tr>
<td>1963</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>1964</td>
<td>53</td>
<td>19</td>
</tr>
<tr>
<td>1965</td>
<td>26</td>
<td>23</td>
</tr>
<tr>
<td>1966</td>
<td>11</td>
<td>19</td>
</tr>
<tr>
<td>Total</td>
<td>146</td>
<td>89</td>
</tr>
</tbody>
</table>


By comparing Table I with Table III it can be observed that, even though Table III covers five years as opposed to four, the increase in the number of both types of injunctions is substantial. The number of ex parte injunctions has almost doubled, while the number of injunctions on notice applied for and granted has tripled. During this period there was also a parallel increase in the number of strikes and lockouts. There was an increase in each succeeding year from 1958 to 1965 from 132 to 269. The increase was moderate between 1960 and 1964 but spurted in 1965 to more than 100 per cent above the 1958 level. The pattern of strikes over this period reflects changing economic conditions and certainly the sharp increase in 1965 can be largely attributed to the
rapid economic advances of that and the preceding year.

In this period, as in the preceding one, picketing appears to be closely associated with the injunction. The Canadian Manufacturers' Association analysed fourteen injunctive cases whose records were lodged at Osgood Hall, Toronto. In eleven cases the picketing was being conducted for a proper purpose, a legal strike, but was being conducted in an allegedly improper manner—mass picketing, denial of access, personal injury and property damage. In the three other cases the picketing was being conducted for an improper purpose—secondary boycotting and recognition picketing. In the second group the courts are not concerned with the manner in which picketing is carried on, as it is the picketing itself which is unlawful and is totally prohibited. Of the first group of eleven, six of the injunctions were originally ex parte ones. Thus it appears that the injunction restraining picketing has become a necessary part of law enforcement. Table II gives support to this opinion. As previously mentioned, the acts enjoined with the injunction are usually ones that occur in conjunction with picketing.

In Ontario 1966 proved to be a particularly trying year, in relation to the labour injunction. One of the developments was the Tilco Plastics Strike which began December 15, 1965. On December 20th a court injunction was issued limiting the number of pickets. On February 20th, 1966 thirty-five union locals decided to hold a mass demonstration at the Tilco Plastics plant. The Chairman of a special labour injunction committee said the demonstration could continue a week and that the demonstrators would carry signs protesting against the use of ex parte court injunctions to break legal strikes. The demonstration was not specifically directed against Tilco. The injunction was defied and the
demonstration took place. Plant officials were booed. On February 25th, twenty-eight pickets, including key union leaders were served with notice of contempt of court proceedings against them. It was stated on behalf of the pickets that "they had no intention to hold the court in contempt but what they did hold in contempt was the law governing injunctions, which they feel is a bad law." On the 26th of February the O.F.L. announced that it would pay the legal costs of the trade unionist charged with contempt of court. The Federation stated that it was convinced that the mass demonstrations in face of the injunction restricting picketing was a reasonable protest against the unfair use of court injunctions in labour-management disputes. On June 8th, 1966 twenty-six of the pickets were found guilty; twenty-five were jailed, five for two months each and the others for fifteen days each. At that time Chief Justice Gale stated that:

"the lawlessness displayed ought not to be condoned or allowed to be repeated. If trade unions feel that present legislation is unfair or unrealistic and that they should have unbridled power to use mass picketing, then they should seek proper channels for bringing about a change..... Any program, no matter how worthy the ultimate goal, which prescribes wilful defiance of the law can only be regarded as an exercise in irresponsibility."^21

Another important strike concerning the injunction occurred on January 26th, 1966; the Oshawa Newspaper Strike. 22 On January 28 and 29 a mass picket line in support of the strike occurred. Printers and Pressmen did not go through the picket line. A writ was filed to prohibit picketing. The Oshawa Labour Council stated that it was prepared to take on a battle against injunctions if the courts issued the asked for injunction. On February 1, 1966 a few hours after injunctions were served on members of the striking unit, 150 pickets staged a
half hour demonstration at the newspaper building. The injunction limited the number of pickets to a total of seven. On the 3rd of February demonstrators prevented a Sheriff from reading the injunction over a loud speaker. No one seemed to want to take the initiative for enforcing the injunction. Picketing continued and on the 7th the Ontario Section of the Bar Association called on the Ontario Government to take all measures necessary to enforce the rule of law in Oshawa. They state: "it is an essential condition of order in a civilized state that the rights and privileges of citizens shall not be subverted by mob violence or intimidation of such violence." Ontario N.D.P Leader D. MacDonald had an opposing view and felt that for years the law had been worded so that management could use the courts to secure injunctions to break legal strikes and that this should be changed. A settlement of the dispute occurred on February 11, 1966. Eleven days had elapsed between the issuing of the injunction and the settlement. During that time masses of pickets flouted the courts order and no effect was made to enforce the law. It was because of this lack of enforcement that the mass picketing occurred in the Tilco Strike. The success in the Oshawa incident prompted labour to try the same remedy again. On February 11 the war against the injunction took on a nation wide flavour. Directors of forty unions met in Oshawa to outline a Canada wide campaign aimed at eliminating the use of injunctions in labour-management and at assisting unions in dealing with injunctions when they arose in the strike situation. The President of the O.F.L. told the representatives that the tactics used in Oshawa in the Newspaper strike could not be applied in every situation in every strike but where they could be, big labour supporting small labour, they should be. Also, that the Oshawa
tactics should be carried over to the Tilco situation. This did occur, but as previously noted, the same lawlessness was not allowed to continue.

On June 28, 1966, following the sentencing of those involved in the Tilco affair, union leaders again met regarding their strategy in their fight against injunctions. Union officials felt the sentences imposed were severe to the point of vindictiveness and that labour, following such treatment, should take on the injunctive issue as it had never taken it on before. Union leaders met with Premier Robarts who promised a public examination of the question of picketing and injunctions in labour disputes. At the same time union leaders laid plans for province-wide demonstrations against injunctions. O.F.L. President Archer summed up the temper of union leaders in these words: "There was a tremendous feeling we should not succumb to injunctions. We hope we can demonstrate legally and peacefully. If we can't find ways of conforming to the directions of the court we will have to disobey the court order." Attorney General Wishart had these words to say regarding individuals who defy the law.

"Any person who would defy the law, any person who says it is to be disregarded, flouted, disobeyed and set at naught, anyone who by word or deed seeks to bring about disrespect for the judgment of the courts of this land, is seeking, whether he realizes it or not, to destroy the society under which he lives."24

Thus, for Ontario and for Canada, the year 1966 had been the year of the full-scale war on the use of court injunctions to maintain law and order on the picket lines. The war has been fought on two fronts. First, a massive propaganda assault aimed at convincing the rank and file of labour and the public at large that the injunction in an inequitous device used by arrogant employers with the toadying help of the courts; second, open defiance of injunctions which have been issued.25
In the light of these events Premier Robarts announced in July 1966 that a royal commission would investigate laws affecting labour, including the use of injunctions in labour disputes. The commission was headed by Mr. Justice Rand and his report was published in August 1968.

The Rand Report

Considering Ontario's experiences with the labour injunction and the general labour management unrest, it is not surprising to see Justice Ivan C. Rand propose certain far reaching changes in the law and in attitudes as regards strikes, picketing and industrial conflict generally. Basic to his recommendations is the establishment of an Industrial Tribunal whose task would be to accommodate the immediate parties to a dispute, in the light of public interest. Rand comes to grips with the problems that precipitated the Trade unions Act of 1959 in British Columbia, namely the making of unions legal entities and the definition of picketing activities. Rand depicts the following activities as illegal: mass picketing; secondary picketing; ally picketing; recognition, organization and sympathetic picketing; and mystery picketing. The recommendations pertaining to picketing would be controlled to a great extent by the broad powers given the Tribunal. These activities, as will be discussed in the British Columbia section, have been dealt with in 1959 although not as specifically. Rand's recommendations are more expansive than the scope of this paper and thus only his recommendations and comments pertaining to the labour injunction will be presented. Rand criticised the present procedure followed for obtaining injunctions, especially the ex parte injunction. He criticised two points; firstly the use of affidavits on an application, and secondly the apparent failure of resort to police
action in some cases. He virtually recommends the elimination of the ex
parte injunction with the following words:

"Unless otherwise agreed upon, injunctions will be
permitted only on evidence given viva voce and on notice,
except in cases of emergency. In all cases adequate police
assistance and protection must be shown to have been
unavailable."^7

Rand recommends that injunctions in labour disputes be given on
notice and that all the evidence be presented orally. He stresses that
in all applications for injunction it must be shown that reasonable efforts
to obtain police assistance have been unsuccessful for protection and action
to prevent or remove the danger of damage to property, injury to persons,
obstruction of/or interference with lawful entry or exit from the premises
of the employer, or breach of peace. Rand is on the one hand regulating
the activities of picketers more stringently, and then he states that
the ex parte injunction would be virtually unnecessary because the
picketing activities which were often enjoined would now be definitely
illegal and thus should not be carried out. In the writer's view Justice
Rand does not feel there would be irreparable harm if mystery picketers
were not enjoined instantly. He feels this situation should be handled
by the union and management prior to any application for an injunction.
Both parties would thus be placed in a position of solving the difficulty
without court intervention. In effect, Rand is attempting to keep the
court out of the dispute unless irreparable damage may occur.

Rand goes a step further in trying to confine the labour disputes
to the parties themselves and keep the issuance of court injunctions
to a minimum by suggesting that it would be desirable to place the
issuance of injunctions in labour disputes wholly within the jurisdiction
of the Tribunal. He foresees a constitutional question in giving this
Administrative Tribunal injunctive powers and thus their taking on of court functions. However, he feels that to eliminate the need for many injunctions the Tribunal could issue orders, when applied for, to specify the numbers and conditions of picketing.

Thus, throughout Rand's recommendations run a tone of greater regulation of the labour relations scene. His suggestion for eliminating much of the unrest is to transfer far reaching powers to the Administrative Tribunal. The need or the attitude of the public is interpreted as one of requesting a more regulated labour relations atmosphere for Ontario. In light of the writer's study, Rand would definitely restrict court intervention to situations where both parties knew that court action was being sought. He does not recommend elimination of the injunction from labour disputes but does appear to favour the issuance of labour injunctions through the Administrative Tribunal.
III. BRITISH COLUMBIA'S EXPERIENCE

In British Columbia, as in Ontario, labour disputes have been bitter and the labour injunction has been criticised by labour in the same manner as in Ontario. It is not the intention of the writer to pursue British Columbia's labour relations history in great depth. The major point which must be stressed when looking at the labour legislation in British Columbia is that it has gone further than most provinces in providing legislation to make the concept of collective bargaining operative. The Trade-unions Act, or Bill 43, has dealt with many of the points such as mass picketing, organizational picketing, mystery pickets and secondary boycotts. Ontario's problems are due to the above mentioned factors and many of the injunctions are issued to stop such behaviours.

British Columbia's present labour legislation is based on two fundamental concepts:

1) the right to private property
2) the right to private contract.

An elaboration on both points will place the framework of the injunctive remedy in proper perspective. Firstly, the right to protect private property against unlawful confiscation must be viewed under strike conditions. Bill 43 has restricted picketing activities in order to guarantee this right and hold the dispute to the employer and the union immediately involved. The right to ownership also carries with it a right of protection against trespass and a right of uninhibited access or egress. Secondly, the right to private contract has been recognized in British Columbia's legislation. A unilateral refusal to contract and the resort to strike action cannot be allowed to impair the contractual
### TABLE IV

**NUMBER OF INJUNCTIONS GRANTED 1946-1955**

<table>
<thead>
<tr>
<th>Year</th>
<th>EX PARTE</th>
<th></th>
<th></th>
<th>ON NOTICE</th>
<th></th>
<th></th>
</tr>
</thead>
</table>
|      | Granted  | Denied | Granted | Denied | Granted | Denied |(
<p>| 1946 | 2 | | | | | |
| 1947 | | | | | | 1 |
| 1948 | | | | | | 1 |
| 1949 | | | | | | 10 |
| 1950 | | | | | | 5 |
| 1951 | | | | | | 1 |
| 1952 | | | | | | 11 | 1 | 2 | 1 |
| 1953 | | | | | | 27 | 1 | 1 | 1 |
| 1954 | | | | | | 4 | | 2 | |
| 1955 | | | | | | 3 | 1 | | |
| | | | | | | | | | | | Total |
| | | | | | | | 63 | 4 | 5 | 3 |</p>
<table>
<thead>
<tr>
<th>ACTIVITY</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct picketing during the course of negotiating a collective agreement:</td>
<td></td>
</tr>
<tr>
<td>a) by a certified union</td>
<td>42</td>
</tr>
<tr>
<td>b) by an uncertified union</td>
<td>17</td>
</tr>
<tr>
<td>Secondary picketing</td>
<td>4</td>
</tr>
<tr>
<td>Grievance picketing</td>
<td>3</td>
</tr>
<tr>
<td>Unclassified</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>75</td>
</tr>
</tbody>
</table>

*Carrothers, Injunction in B. C., P. 194.*
capability of the other party. The union may attempt to persuade others not to do business with a struck employer, but they may not deprive the employer of his right to private contract with others, either for employment or the purchase of goods and services. In looking back at the types of behavior in Ontario, primarily activities of picketers were enjoined. Many of the activities were not defined as precisely as in British Columbia, thus a resort to the use of the injunction.

The remainder of the Chapter will be divided into three main parts; the first covering the period from 1946 to 1955 and the second from 1956 to 1966. One must keep in mind that the Trade-unions Act was enacted in 1959 to define picketing in labour disputes more clearly and to confine the disputes to the parties concerned. The latter part of the chapter will express the attitudes of labour, management and the legal profession regarding the use of the labour injunction.

Period From 1946 to 1955

From 1946 to 1955 twenty-two unions applied for a total of seventy-five injunctions. The lumber industry filed the most applications for injunction; a total of 27 during the years 1952 and 1953. The other two industries most actively involved were the shipping and wharfing and the construction industry. The general circumstances in which injunctions were applied for are outlined in Table V.29

Table V indicates that most of the injunctions were applied for in circumstances in which the union (either certified or uncertified) was in the process of negotiating a collective agreement or inducing the employer to acknowledge the union for purposes of collective bargaining. It can be observed that sixty-seven of the applications were in conjunction with
picketing. Thus, as in Ontario, there is a high correlation between injunctions and picketing.

The principal reasons alleged for seeking injunctive relief are shown in Table VI. The highest number of reasons for seeking injunctions are intimidation, mass picketing, picketing, trespassing, defamation and assault and battery. Many of these are the same or similar to the ones that were enjoined with injunctions in Ontario. During this period Ontario interim injunctions were limited to four days, whereas there was no equivalent provision in British Columbia.

Of the thirty cases in which the parties were heard before or at trial, the court concluded in five that an injunction was not warranted; in twenty-four that it was, and in one case did not decide the issue. In thirty-six of the seventy-five cases the proceedings went no further than obtaining an ex parte interim injunction. Only in three cases did the merits of the action go to trial.

Carrothers states that criticism of the injunction for upsetting the "status quo" of the parties is not merited. This criticism must be based on the assumption that the union was acting lawfully; otherwise it is merely a complaint that the injunction obliges the union to act within the law. He continues, "that the total abolition of the remedy of the injunction in labour disputes does not find serious advocacy; its use in proper cases cannot solemnly be questioned."

During this period unionization in British Columbia was higher than in any other major industrial province; compulsory collective bargaining was more prevalent. Under these conditions the resort of labour and management to the economic sanctions of strike, picket, boycott and lockout can be expected to be more frequent. It is in the use of such
<table>
<thead>
<tr>
<th>Reason</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault and Battery</td>
<td>14</td>
</tr>
<tr>
<td>Shooting</td>
<td>1</td>
</tr>
<tr>
<td>Destruction of property</td>
<td>9</td>
</tr>
<tr>
<td>Power supply cut off</td>
<td>1</td>
</tr>
<tr>
<td>Blocking entrance to premises</td>
<td>8</td>
</tr>
<tr>
<td>Barriers and barricades</td>
<td>3</td>
</tr>
<tr>
<td>Rioting</td>
<td>1</td>
</tr>
<tr>
<td>Intimidation</td>
<td>33</td>
</tr>
<tr>
<td>Mass picketing</td>
<td>16</td>
</tr>
<tr>
<td>Accosting employees</td>
<td>5</td>
</tr>
<tr>
<td>Interfering with employees</td>
<td>3</td>
</tr>
<tr>
<td>Accosting customers</td>
<td>4</td>
</tr>
<tr>
<td>Obstructing highway</td>
<td>2</td>
</tr>
<tr>
<td>Defamation, libel, slander, or false statement</td>
<td>13</td>
</tr>
<tr>
<td>Placing employer on defaulters' list</td>
<td>1</td>
</tr>
<tr>
<td>Boycotting</td>
<td>2</td>
</tr>
<tr>
<td>Trespassing</td>
<td>10</td>
</tr>
<tr>
<td>Sit-in strike--trespass</td>
<td>4</td>
</tr>
<tr>
<td>Illegal strike</td>
<td>3</td>
</tr>
<tr>
<td>Picketing where there is no dispute</td>
<td>5</td>
</tr>
<tr>
<td>Picketing--where it was the main complaint</td>
<td>19</td>
</tr>
</tbody>
</table>

*Carrothers, Injunctions in B. C., p. 196.*
economic weapons that acts of illegality can be expected to occur more frequently. Where the injunction is sought, not to protect a legal right, but to gain an economic advantage, there is abuse of the legal process. The injunction is to protect legal rights; the right to private property and the right to private contract.

Period From 1956 to 1966

The incidence of the use of the labour injunction during the period from 1956 to 1965 as compared to the previous ten year period has risen four-fold. Table VII illustrates the figures for this period.

**TABLE VII**

INJUNCTIONS GRANTED, MODIFIED OR DENIED

FROM 1956-1965*

(includes Vancouver, Victoria, New Westminster, Cranbrook, Kamloops)

<table>
<thead>
<tr>
<th></th>
<th>ALL INJUNCTIONS</th>
<th>PICKETING ONLY</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ex parte</td>
<td>Notice</td>
</tr>
<tr>
<td>Applications</td>
<td>244</td>
<td>56</td>
</tr>
<tr>
<td>Granted</td>
<td>173</td>
<td>23</td>
</tr>
<tr>
<td>Modified</td>
<td>49</td>
<td>12</td>
</tr>
<tr>
<td>Denied</td>
<td>17</td>
<td>1</td>
</tr>
</tbody>
</table>

*Submission of B.C. Federation of Labour, p. 13.

The breakdown of the statistics (see Table VII) shows that a high percentage of ex parte injunctions are again associated with picketing. Further statistics provided by the British Columbia Federation of Labour's study indicate that out of the total 280 applications 216 were in the Vancouver registry. The data reveals that injunctions are still being
used primarily to enjoin the acts of picketers whether during legal or illegal strikes. Unfortunately available statistics do not reveal if the 237 applications involved legal strike situations. The injunctions have been concentrated in a small number of industries, particularly construction and shipping.

Some individuals who are actively involved in the labour relations field feel that one contributing factor to the increased use of the injunction is the Trade-union Act of 1959. This is a debatable point, as the Act expressly permits peaceful picketing at the employer's place of business when a legal strike is in progress. Thus the Act merely sets out the limits regarding picketing in a more precise manner, and when these are not complied with the injunctive remedy can be sought.

Attitudes with Respect to the Labour Injunction in British Columbia

1) Labour's Attitude

The B.C. Federation of Labour in particular criticises the ex parte injunction. Their opposition is based on their belief that management uses the ex parte injunction as an effective weapon to break a strike in the early stages. However, no indication is made by the Federation to define permissible conduct on the picket line. Hence a return to the right to protect private property: there is no concept more basic to the collective bargaining process as this inherent right. It may be that the B.C. Federation of Labour is expressing its dislike of the Trade-unions Act of 1959, which essentially defines picketing behavior. The Act has been described as, "An Act Pertaining to Free Speech and the Communication of Information."
In reviewing the statistics quoted, labour states that there has been purposeful resort to the use of the injunction as a weapon against them and that it has been encouraged by the ease with which they have been granted. The injunction no longer appears to be an extra-ordinary remedy as intended, but rather normal procedure. They further state that management deliberately uses the weapon as a tool in industrial relations to weigh the balance in their favour.\(^{31}\)

The main attitude expressed toward the previously cited statistics, by labour, is that the injunction decidedly favours management. They say that eighty-five per cent of the injunctions are directed at picketing and they indicate that without picketing there can be no effective strike. This is an extremely broad statement and has connotations of criticising the limits of picketing as established by Bill 43. They further express the attitude that the court's interpretation of lawful picketing has been so restrictive (to the obtaining and communicating of information) that it is close to "saying picketing is wrongful if it is effective."\(^{32}\) They further go on to state that strikes themselves, if effective, are viewed as wrong, and that the effect of the injunction is to reinforce the restrictiveness of the anti-picketing interpretation; again a direct criticism of Bill 43.

To further exemplify the attitude of labour toward the injunction the following statement is appropriate. Labour feels that when courts grant an ex parte injunction at the crucial point in a strike, as a result of the highly exaggerated allusions to "intended" violence, the strike may be easily lost or greatly weakened, even if it is perfectly legal. The employer may then, as they often do, notify customers and employees that the strike has been declared illegal by the courts and thus eliminate
the primary boycott entirely legal under Bill 43. By the time the hearings occur, rectification of the situation is too late. The fact that few of the injunctions are ever taken to trial by employers is interpreted as a reflection of the effectiveness of the injunction. It disposes of the entire case, to all intents and purposes, at the critical time—during the first few days of a strike or walkout. Thus it can be concluded that the employer does not have to go to trial to get what he wants—he obtains what he wants ex parte, without a trial or even having proven his case. Labour's attitude toward the use of the injunction is reflected by the following statement:

"Injunctions issued to prevent organization and to break strikes, invite disrespect for judges and for the law...To permit such a situation to continue can only increase tension and add fuel to the fire of industrial strife."34

The following points are a summary of the reasons, from labour's vantage point, that reflect the need for restriction in the use of the injunction:

1. after an employer has obtained the injunction he seldom takes his case further. He usually does not even file a Statement of Claim, much less go to trial.

2. often when employers apply to renew ex parte injunctions and notice is given, man people immediately assume that the union must be wrong.

3. there is a question of the prestige of the courts; so long as the Courts continue to intervene in labour disputes ex parte. They will be open to the charge that they are biased against labour, owing to the political background of the judges. Most judges are appointed by Liberal and Conservative governments while in B. C. approximately one-third of the people vote N.D.P.
4. Judges often do not make a proper inquiry, when application for an ex parte injunction is made, as to why notice has not been given to the Union. Most trade unions are responsible organizations and if they are given notice that an injunction is being sought, and if it appears to them that they are breaking the law, they are likely to stop. However if the employer goes ahead with an ex parte injunction without the union being notified, there is a very human tendency for the man on the picket line to resent the intervention of the Courts, and there is more likely to be defiance of the Courts.

5. The Courts are not usually aware of the dynamics of labour disputes. Picketing is usually conducted to support a strike. Consequently, if the Court curtails picketing, the strike will be lost.

6. The Courts have held that one unlawful act by pickets justifies the Court in issuing a blanket injunction prohibiting all picketing. The Courts have failed to recognize that when men are on the picket line and their jobs and the livelihood of their families are at stake, they are likely to use expressions such as "scab" and "strike-breaker". These expressions offend the ear of the judges who have had little exposure to industrial disputes at the job level.

7. Picketing is a form of the exercise of the right of freedom of speech and freedom of association. Judges should be a great deal more cautious than they are about issuing orders that curtail or even deny these fundamental rights.35

Thus, the B.C. Federation of Labour feels the granting of injunction is at the discretion of the courts. They would like to see injunction granted on notice. This at least, in their view, would prevent
the present practise of obtaining injunctions on the basis of biased, suggestive and usually misleading affividavits without benefit of cross-examination.

Prior to the development of management's attitude toward the labour injunction the writer will examine the views expressed by the B. C. Federation of Labour. Throughout the review of the injunctive process the Federation is critical of the law of picketing, the judicial attitudes and the resort to use of the remedy to break a strike at a critical stage. At no point does the Federation discuss that lawful picketing is quite clearly defined and if picketing were conducted in a responsible manner, the frequency of use of the remedy would indeed decline. It is indeed a strong statement when the Federation implies that judges are biased and not knowledgeable in matters pertaining to picket lines. It is the emotions of the picketers which often causes management to resort to the use of the ex parte injunction. In a labour dispute an injunction, ex parte or otherwise, will not be issued to restrain lawful picketing. An employer must have recourse to a speedy remedy if such acts as mass picketing and other forms of intimidation prevail. He should only use the ex parte in these cases. The judges are cognisant of the critical nature of ex parte injunctions in these situations. The writer is supportive and sympathetic with the Federation's view that the ex parte be used in only emergent situations. It is not the intent for the injunction to be used to gain an economic advantage. As Carrothers states, "The injunction was not fashioned as a sword of collective bargaining but as a shield of legal rights."36

In summary, Bill 43 is not a unilateral piece of legislation, it grew out of the need to define picketing and confine it to the legal strike
situation, and also limit the use of the ex parte to only four days. No
definition of time limit existed prior to 1959. The writer must again
refer to the concept of the right to private property and the right to
private contract as essential in interpreting the views of Labour. The
injunctive remedy is the only recourse management has to protect his
property against unlawful behaviour. The Federation must recognize that
if unions are responsible as quoted, there should be no question as to
what lawful behaviour is on the picket line.

2) Management's Attitude

Mr. D. A. S. Lanskail, the Assistant Manager and Counsel for
Forest Industrial Relations, is one individual who has elaborated on
management's views regarding the injunction. To begin with, he feels
the issue has been confused in the public mind and this is attributable,
in part, to the vigorous propaganda campaign conducted by labour leaders
and to the lamentable silence of management, bar associations and other
interested groups. This viewpoint was indeed confirmed by G. Wilkinson,
Vice President of Marwell Construction, when he stated that management
speaks in fourteen different voices while labour speaks in one issue with
one voice, Mr. Lanskail believes the campaign against injunctions is
pure camouflage intended to disguise an attempt to bring about fundamental
changes in the present balance of the collective bargaining relationship.
He concludes that elimination of the injunctive remedy would effectively
destroy the collective agreement.

What are the essentials of our resultant collective bargaining
system and the essential elements of the framework of labour law? To
summarize, the essentials of the Canadian system are:
1. compulsory recognition by employers of their employees right to organize and upon winning support of a majority, the union is entitled to apply for certification as a collective bargaining agent;

2. upon certification the union can compel the employer to bargain and establish the agreement;

3. the statutory agreement has a minimum term of one year;

4. the employees benefit from the agreement with improved wages and working conditions;

5. the only compensation the employer has is the prospect of having his labour cost constant for the term of the agreement, and also the promise of a predictable period of uninterrupted operation;

6. the next step is the right of the union to strike against the employer if not satisfied with the proposed wages and conditions of the new agreement, and to communicate the fact of the strike by establishing peaceful picket lines around the employer's premises;

7. the employer has the right to protect his business and property to the best of his ability by using supervisory personnel or any other person who is willing.

With these essentials and if all concerned were reasonable, rational and law-abiding, the collective bargaining process would carry on without incident and agreements would be honoured, as are the vast majority of other contracts. Unhappily the idyllic situation does not prevail. Many employers are subject to the threat and reality of breaches in the form of wildcat strikes, slowdowns and overtime bans. The remedy for breach of contract cannot be compared to the case of commercial contracts because it is difficult, if not impossible, to successfully sue a union for damages. The employer must have other remedies open to him, and his only course is
to try and prevent the damage from occurring, or to minimize it as much as possible. With the injunction the employer has protection by preventing excessive damage resulting from illegal action.

What would happen if the injunction were removed? Four areas invite consideration: union organization, mystery pickets, form of picketing in a legal strike and pickets during an illegal strike. First, the union has the right to organize workers if they can meet the simple democratic test of getting majority support without the use of coercion or improper influence. The unions now want the right to compel union organization even when the majority do not support them. The unions would then resort to what is termed "organizational picketing". Therefore the employer would be picketed because his employees have expressed a desire not to support a particular union. What action would the employer be able to exert to restore peace? One, he could force his employees to join the union, or he could remove the illegal pickets by using the injunction.

The next area which needs consideration is that of "mystery pickets". These hidden or secret pickets could be sponsored by a union seeking to extract some concession from an employer. In effect, the union could hire professional pickets. One mystery picket exploiting the almost hysterical devotion to the sanctity of the picket line could tie up an entire operation, depriving hundreds of their employment. The only remedy management has is to remove the picket by injunction.

The third situation which would or could occur if the injunction were removed would be the form of picketing during a legal strike. At present the employer has the right to carry on his operations by using his supervisors. In these circumstances the union may employ the use of
mass picketing or some other form of physical intimidation intended to prevent supervisors or owners from entering their own plant. In response to this type of improper and illegal procedure the employer can only capitulate or seek injunctive relief to prevent intimidation and restore peaceful picketing.

The last point to consider is that of illegal strikes. One of the compensations an employer derives from a labour agreement is the prospect of the stability intended by the agreement. Wildcat strikes during the term of the agreement destroy this stability. Under these circumstances the injunctive remedy is sometimes appropriate for an aggrieved employer and it tends to reduce the problem of illegal strikes. What labour leaders seek now is the removal of all effective restraint against wildcat strikes and a license to picket without restriction. This would convert the collective agreement into a unilateral instrument that the union could break anytime. Viewed in this light, the anti-injunction campaign becomes, in effect, an attack on the integrity of the collective agreement as an institution, and as such would be a threat to the basic system of collective bargaining in Canada.

Let us examine the English system, where a collective agreement has no real status and the union can go on strike at anytime. All this has really done is brought about widespread feather-bedding. It has become so notorious that Prime Minister Wilson, elected and supported by labour, has had to crack down on wasteful union practises. He is quoted in the course of criticising feather-bedding, in the British newspaper industry, as recommending a form of strike insurance for management so that they could "resist what he can only describe as blackmail." He further states:
"there is too much fear and timidity on the part of some managements—a fear of interference with production—which may, and probably will, have to be faced."

If these words by Prime Minister Wilson reflect the labour management relations in Great Britain there is no doubt that Canada would prefer to see the present system of free collective bargaining which leads to a fixed contract term and which provides for stability during that term. Management's attitude, as presented by Mr. Lanskail, is one of preserving our present system of collective bargaining and that the attack by labour on the use of the injunction is an attack on the Trade-Unions Act.

3) Legal Attitudes

In this section the writer will present views of two lawyers from British Columbia. Their views are indeed conflicting and their arguments warrant attention. The lawyers are B. W. F. McLoughlin and Tom Berger. These views are expressed during a conference conducted by the British Columbia Federation of Labour.

The context of McLoughlin's views are in support of the injunctive remedy in labour disputes. He says that injunctions cannot be obtained to prevent the lawful exercise of rights. He quotes John Osler, a leading labour lawyer in Ontario and friend of labour, as saying: "The injunction represents a form of preventative justice that, in the long run, no civilized state could afford to do without." Mr. McLoughlin states that there are an infinite variety of circumstances under which the injunction can be the only effective remedy available. He also points out that with the body of law and general principles to guide them, the courts are best equipped to act in an accurate and rapid manner to make the remedy effective. He feels the Labour Relations Board would be an
ineffective body.

The next basic point made is that the real question is not who uses the injunction most, but who commits most of the wrongful acts leading to the use of the remedy. He points out that the remedy is there to deal with irresponsible people on both sides and this right must be preserved. Examples of employees and unions using the injunction are:

1. an employee against his own union, to prevent them from removing him from the union roll, perhaps without a fair hearing and thus his loss of job;
2. the union against the employer, to prevent unfair labour practises, when the employer in breach of the Labour Relations Act attempts to influence his employees against union activity;
3. employees against employer to prevent him dismissing non-union employees;
4. local union against the international union to prevent a take-over;
5. one union against another to prevent breach of contract between the first union and the employer.41

McLoughlin answers the question—Why is there so much controversy over the injunction? He says the answer lies in three things:

1. the enforcement of the injunction by sending men to jail has been felt to be unjust and has given rise to arguments in favour of civil disobedience;
2. there have been abuses in the use of the injunction;
3. the campaign by unions seeking to strengthen their bargaining position.42

The last two points have been discussed in previous sections of the presentation and thus concentration will be on point one. The point made is that both labour and management have ignored the injunctions in the name of justice through civil disobedience. These individuals have brought
our laws and the administration of the law into contempt and have thereby weakened the fabric of our society. The way to change the law, if it is truly a bad one, is through duly elected representatives and not by bringing it into contempt through disobedience.

To cite the use of injunctions and contempt of court the writer explored recent cases of contempt in which the injunctions were applied against the employers. An example is the Upholsterers International Union of North America v. Hankin and Struck Furniture Limited. The company was charged with unfair labour practise. They induced or compelled employees from becoming associated with the trade union. They disobeyed the order by attempting to induce employees not to become members. A fine was imposed for contempt.

To further illustrate McLoughlin's first point concerning civil disobedience and the contempt of the law, the Lenkurt Electric case can be considered. Court orders were obtained by the employer to restrain unlawful picketing. Both court orders were ignored. The trial court found the demonstrators guilty of contempt of court and sentenced 26 of them to imprisonment. The appeals against the sentences were dismissed. The reasons stated were that the conduct of the appellants clearly showed that the demonstrations were in part designed as a protest against the use of the injunction is such disputes and a challenge to the authority of the courts to grant and enforce restraining orders. The courts were attacked in a manner bordering on riotous conduct.

In reference to the Lenkurt Electric case, labour admits that it has taken something as severe and drastic as the jailing of decent and hard-working people in the manner of common criminals to effectively bring the problem to the attention of the public. Civil disobedience
is not the way to change the law. In concluding, the point is made that if both management and labour would adhere to the law and their bargains, the need for the injunction would virtually disappear.

Naturally, being an N.D.P. member of the Provincial parliament, Mr. Berger supports labour's views. One of Mr. Berger's first points is that the B. C. Trade Unions Act of 1959 drastically curtailed the right of peaceful picketing (as well as the right to disseminate information by other means, such as through the news media and by pamphlet) and the increase of the use of injunctions since that time is entirely attributable to the curtailment of peaceful picketing by the Act. Berger makes an interesting observation pertaining to the issuance of labour injunctions. He asks the question: "Should the courts have the power to issue injunctions?" He feels the responsibility for sorting out labour management disputes should be transferred from the courts to a reconstituted full-time Labour Relations Board. Only this Board would have the right to issue cease and desist orders against either party. The function of the Board in any case where a cease and desist order was applied for, would be to look at the total picture. It would be the Board's responsibility to make certain no order was given unless notice was also given to either side. There would have to be open hearings, witnesses would have to be called and there would have to be an opportunity for cross-examination. The Board would have to be satisfied that the employer had been bargaining in good faith before an order would be granted. Mr. Berger makes no mention of the union having to bargain in good faith. Another stipulation is that no order be granted where the result would be to paralyze the union's ability to function on behalf of its members.

There would have to some means of insuring that orders made by the
new Board were enforced. Provision already exists in the Labour Relations Act for registering orders made by the Board in the Supreme Court. If any proceedings for contempt were called for, the legislation should also provide that anyone who is charged with contempt have the right to trial by jury. Mr. Berger's proposal to eliminate the courts from labour disputes probably has some merit. The idea to set up a Board which deals specifically with labour disputes could indeed become an efficient tool for handling future disputes. His proposal is to transfer the injunctive powers to the Board and thus eliminate the ex parte injunction. He still, however, leaves the contempt issue unresolved. He now wants to use the Supreme Court to review contempt orders by jury trial.

Mr. Berger's proposal does not seem to improve any situation which presently exists. He is merely transferring the use of injunctive powers from the courts, who he feels do not understand labour disputes and thus issue injunctions without analyzing the facts too carefully. As far as the writer can ascertain, his proposal is an attack on the competence of the present court procedures with respect to the use of injunctions. The law as it now stands, is interpreted as insufficient, and thus must be changed. Again the attack is primarily against Bill 43, where Berger feels the employee's right to free speech has been unduly restricted.

From the foregoing review it can be seen that the labour management situation in British Columbia is quite similar to that in Ontario. The use of the injunctive remedy is clearly associated with unlawful behavior during strike situations. In British Columbia the use of the remedy cannot be separated from Bill 43. This Bill defined picketing behavior which is allowable and attempted to confine labour disputes to the parties concerned. The incidence of the injunction may have increased since the
inception of the Act due to activities not enjoined prior to 1959. Specifically, the B. C. Federation of Labour quotes that 15% of the injunctions issued during the period 1956 to 1966 were to enjoin mystery pickets. The question to consider is if this is unlawful behavior, why are mystery pickets used? This is direct defiance of the law. Can the trade union movement be placed above the Law?
CHAPTER V

SUMMARY AND CONCLUSIONS

It was hypothesized that the use of the injunction is a function of attitudes and that its use increases during periods of intense labour management strifes. In studying the experience of the labour injunction of three countries it was evident that the particular elements in labour matters were organic growths from local conditions of the society, historical events and special factors. It was shown that in Great Britain the attitude of individualism and abstention from labour disputes has changed due to the pressures of the economic conditions prevalent. The attitude of greater intervention in order to combat inflation and the growing resentment toward union power.

The Australian review showed a lack of controversy over the labour injunction and the determining factor was the attitude of both labour and management towards the Awards. These Awards are sacred and thus reliance by both parties on them is the governing factor in the disputes. As Justice Rand says, the Australian worker seeks security, receives it and has become well adjusted to the administrative organs which determine it.

The United States experience revealed that the use of the labour injunction grew out of the attitudes of the judges toward union growth in the pre Norris-La Guardia era. It was virtually eliminated at the federal level by that Act, however as the study progressed it illustrated that the frequency of the labour injunction at the state level was increasing. It is being used to control much of the unlawful activities of picketers as it is in Canada today.

The writer hypothesized that the injunction was still a necessary
remedy open to both parties in labour disputes. From the background of the United Kingdom and Australian structural systems, it would appear that our system of collective bargaining is somewhere in between the two. In Canada the bargains are struck by the two parties with no compulsory arbitration, while in England the collective agreement is not even a contract in the eyes of the judges. It appears, at this point in time, that the Canadian collective bargaining system requires some modification in order to protect the public, the third party, from strikes in essential industries or services.

The labour legislation in British Columbia has been built around the concepts of the right to private property and the right to private contract. These were the basic concepts with which the United States has developed its labour legislation and its particular attitudes toward the labour injunction. During the discussion pertaining to Ontario the basic concepts of the right to private property and the right to private contract were again the vital issues in question. Rand's recommendations were far reaching when he recommended the Tribunal inquire into any labour dispute, terminate any strike and limit picketing. He also empowered this Tribunal to make binding awards in essential industries and services, and in other areas to act, on request, as a board of binding arbitration. Rand's recommendations appear to increase the pressures on both management and labour toward agreements with minimum of external intervention, as stated in the writer's comments pertaining to his recommendation on the virtual exclusion of the ex parte injunction.

When reviewing British Columbia's experience with the labour injunction it was shown that the principal criticism with the injunction was the ex parte. The criticisms were also levelled at the Trade-unions
Act, which defined picketing and the place of such activity. Rand dealt with the ex parte by forcing both parties to make an effort to settle their differences before asking the courts to intervene. Rand suggested that the Tribunal be empowered to issue injunctions in labour disputes; however he also commented that a constitutional question may be involved on both the provincial jurisdiction to clothe such an administrative Tribunal with injunctive powers and the factual situations in which that authority could be exercised. Rand does have difficulty in separating the right the individual has to private property and private contract, and his Tribunal would usurp these rights and deny both management and labour the use of the court to preserve these basic rights. The concept of creating a body to deal with all matters pertaining to labour management disputes is a plausible recommendation. However it appears that the right to the use of the courts must be preserved.

The writer suggests that some type of Labour Court be set up as an extension of the present judicial system to examine matters pertaining to management labour disagreements. This proposal is not to criticize the present involvement of the courts in labour matters, instead it is an attempt to free the courts from these matters. If such Labour Courts were established, they would be staffed with judges specialized in dealing with labour disputes.

In conclusion it is recommended that the court retain the power to grant injunctive remedy and thereby protect the individual's right to court relief. Expansion of our present judicial system to encompass a labour division would provide a more efficacious system. In disputes the participants must be able to avail themselves of an immediate trial. Coupled with this right is the availability of a speedy appeal. These
recommendations are geared at improving labour management relations. Abolishment of the ex parte injunction where irreparable damage to property may occur cannot be advocated. The incidence of the issuance of the ex parte injunction may be reduced through the streamlining of the judicial procedures, but the remedy cannot be removed unless labour and management and the public are prepared to establish a new system not based on the right to private property and the right to private contract; these rights being fundamental to all aspects of our society.
FOOTNOTES

Chapter I


3. Ibid., p. 5.


9. Ibid., p. 4.

Chapter II


Chapter II (continued)

3 Ibid., p. 611.

4 Ibid., p. 612.

5 Ibid., p. 614.


7 K. W. Wedderburn, Strike Law, p. 616.

8 Ibid.

9 Ibid., p. 624.


12 Ibid.

13 Wedderburn, Strike Law, p. 662.

14 Ibid., p. 663.


18 Ibid., p. 21.
Chapter II (continued)


26. Ibid., p. 712.


28. Ibid., p. 141.


Chapter III


Chapter III (continued)


5 Mathews, Labor Relations and the Law, p. 625.

6 Frankfurter and Greene, loc. cit.


8 Ibid., pp. 106-108.

9 Ibid., p. 108.


11 Ibid., p. 295.

12 These contracts were pledges by workmen, as a condition of employment, that they would not join a labour union. The great value which it had for the employer was that the courts treated it as a property right and efforts by unions to organize workmen who had entered such contracts were regarded as tortious attempts to destroy the employer's property and were enjoined.


14 Aaron, The Labor Injunction Reappraised, p. 296.


16 Aaron, loc. cit.

17 Aaron, op. cit., p. 297.

18 This idea will be expanded in later chapters when discussing the Ontario and British Columbia experiences with the remedy.
Chapter III (continued)


20 Aaron, The Labour Injunction Reappraised, p. 297 (The vote was 75 to 5 in the Senate and 362 to 14 in the House).

21 Aaron, op. cit., pp. 298-299.


25 B. Aaron, Labor Injunction in the State Courts (Los Angeles: Institute of Industrial Relations, University of California, Reprint No. 144, 1965).

26 Ibid., p. 53.

27 Aaron, The Labor Injunction Reappraised.

28 Aaron, Labor Injunction Reappraised, p. 327.

29 Submission of Manufacturers' Association, p. 46.


31 Ibid.

32 Aaron, Labor Injunction Reappraised, p. 331.

Chapter III (continued)

34 The conflicting opinions and details of the Sinclair case and Section 301 are discussed by B. Aaron in an article Stikes in Breach of Collective Agreements: Some Unanswered Questions (Los Angeles: Institute of Industrial Relations, University of California, Reprint no. 126, 1963).

35 Aaron, Injunction in State Courts, p. 978.

36 Ibid., p. 979.

37 Ibid., p. 1161.

Chapter IV


4 Ibid., p. 166.

5 Chrysler, Labour Relations and Precedents in Canada, p. 43.


8 Chrysler, op. cit., p. 69.

Chapter IV (continued)


12 Ibid., p. 12.

13 Ibid., pp. 11-12.

14 Ibid., p. 13.


17 Ibid., p. 161.

18 Ibid., p. 228.


21 Ibid., pp. 332-33.


23 Ibid., p. 339.

24 Ibid., p. 321.

25 Ibid., p. 332.
Chapter IV (continued)


27. Ibid., p. 37.

28. Trade-unions Act (1959, c. 90, s. 1).


30. Ibid., pp. 209-10.

31. Submission of B. C. Federation of Labour, p. 3.

32. Ibid. (The Federation has quoted Carrothers as the source of the statement, but in viewing the original statement (Carrothers, Injunctions in B. C., p. 67) it appears to have been taken out of context).

33. Ibid., pp. 3-4.

34. Ibid., p. 4.

35. Ibid., p. 7.


38. Ibid., p. 5.

39. Ibid., p. 6.


41. Ibid., p. 3.

42. Ibid., p. 4.
Chapter IV (continued)


46 B. C. Federation Submission, p. 3.


Alberta Provincial Statute, 1928.


*Camden Exhibition Ltd. v. Lynott*, 3 All E. R. 28 (1965).


Conciliation Act, 1896 (Great Britain).

Conciliation Act, 1900 (Canada).

Conspiracy and Protection of Property Act, 1875. 38 and 39 Victoria (Great Britain).


Industrial Conciliation and Arbitration Act, 1948; 1954 (British Columbia).

Industrial Disputes Investigation Act, 1907 (Canada).
Industrial Relations and Disputes Investigation Act, 1952, (Canada).

Judiciary Act, 1873. 36 and 37 Victoria (Great Britain).


Labour Relations Act, 1954. (British Columbia).


Submission of the Ontario Division of the Canadian Manufacturers' Association to the Honorable Ivan C-Rand, Commissioner, Royal Commission Inquiry into Labour Disputes, January, 1967.


Trade Union Act, 1871. 34 and 35 Victoria. (Great Britain).

Trade Unions Act, 1872. (Canada).

Trade Unions Act, 1959. (British Columbia).


