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*Feb. 13, 14, 15

*Jun. 27.

ROBERT WILLIAMS *et al* *(Defendants)* ..... APPELLANTS;

AND

ARISTOCRATIC RESTAURANTS (1947) LTD. *(Plaintiff)* ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Picketing—Labour—Certified union having no members among employees —No strike—Patrolling with truthful placards—Whether criminal offence—Whether common law nuisance—Trade-unions Act, R.S.B.C. 1948, c. 342, ss. 3, 4—Industrial Conciliation and Arbitration Act, R.S.B.C. 1948, c. 155—s. 501 of the Criminal Code.

PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock, Estey, Locke and Cartwright JJ.

A trade union, certified pursuant to the *Industrial Conciliation and Arbitration Act,* R.S.B.C. 1948, c. 155, as the bargaining authority for the employees of one of the employer's five restaurants, known as unit No. 5, failed to negotiate a collective agreement with the employer. Conciliation proceedings were then taken pursuant to the Act but the report made thereunder was rejected by the union. Although under the Act the union remained the bargaining agent for unit No. 5, it lost all its members among the employees therein; and none of the employees in unit 6 and 7 was a union member. The union picketed these three restaurants by having two men walk back and forth on the sidewalk in front of them each bearing a placard to the effect that the employer did not have an agreement with the union. No strike vote was taken among the employees and in fact no strike occurred. The action by the employer to enjoin this picketing and for damages was dismissed by the trial judge but was maintained by a majority in the Court of Appeal for British Columbia.

Held, reversing the judgment appealed from and restoring the judgment at the trial, that the picketing did not amount to a criminal offence or to a common law nuisance. It was authorized by s. 3 of the *Trade-unions Act,* R.S.B.C. 1948, c. 342 and was unaffected by the provisions of the *Industrial Conciliation and Arbitration Act.*

Per the Chief Justice and Locke J. (dissenting): The conduct complained of constituted a private nuisance which should be restrained by injunction.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, Robertson J.A. dissenting, the decision of the trial judge which had dismissed the action to enjoin the picketing and for damages.

John L. Farris K.C. for the appellants.

David A. Freeman for the respondent.

The dissenting judgment of the Chief Justice and Locke J. was delivered by:—

LOCKE J.:—In this action the respondent company, the operator of five restaurants in the City of Vancouver, sought to restrain the appellant union, its officers, servants and agents from watching, besetting and picketing its premises; for a declaration that the appellants had unlawfully combined to injure the respondent in its trade by illegal means, that they had created a nuisance in and adjacent to the said premises, and for damages. On the *ex parte* application of the respondent supported by affidavits, Wilson, J. granted an interim injunction restraining

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the defendants from watching, besetting or picketing the premises until further order. On the application of the appellants to set aside the interim injunction supported by affidavits filed on the defendant's behalf, the matter was by arrangement treated as a motion for judgment and Wilson, J., while granting an injunction restraining the defendants from:—

> establishing a line about the plaintiff's places of business and from stating to prospective patrons that there is a picket line about the said places of business,

dismissed the other claims advanced in the action. No oral evidence was taken and there was no cross-examination upon any of the affidavits.

By the judgment of the Court of Appeal (1) which reversed this finding, it was directed that judgment be entered in favour of the respondent:—

> restraining and enjoining the defendants from watching, besetting and picketing any of the places of business of the plaintiff and from engaging in any activity intended to restrict or limit the plaintiff's business and by directing that the plaintiff recover from the defendants damages to be assessed and by directing that the plaintiff recover from the defendant the costs of the trial and of the assessment of damages.

The action raises questions of great importance affecting the relations of employers of labour and trade unions and their members in the Province of British Columbia and it is necessary in determining them that there be a clear appreciation of the facts disclosed by the material.

The appellant union is a trade union within the meaning of that term as used in the *Industrial Conciliation and Arbitration Act* (R.S.B.C. 1948, c. 155). Under the provisions of that Statute the Labour Relations Board (B.C.) on September 21, 1949, certified the union as the bargaining authority for all the employees in one of the respondent's restaurants referred to as Unit No. 5 at 2501 Granville Street in Vancouver, except those excluded by the *Act*. Following this, negotiations were carried on between the union and the employer for a collective agreement without result. The Board then acting under the provisions of the Statute appointed a Conciliation Officer to confer with the parties, and, no agreement being reached, a Board of Conciliation was appointed consisting of a chairman and

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one nominee of the employer and one of the employees. This Board met and the union presented what it said was a standard form of agreement which the employer had declined to sign. The chairman and the employer's nominee in a majority award recommended that an agreement be made between the parties, differing substantially from that thus proposed by the union. In place of a clause designated a closed shop clause by the majority but a union shop clause by the representative of the employees, the agreement recommended by the majority would embody a preferential hiring clause. The award recited that the union's representative had stated that all the members of the union who voted at the time of certification were no longer in good standing and that the union was unable to supply the necessary help, and further that, as there were no present members of the union employed in the unit, a maintenance of membership clause would have no value. It further stated that the wage rates requested by the union applied only to some twenty out of seven hundred restaurants in Vancouver and that, as the company had operated at a loss for the past year the existing rates should be continued, and in other respects recommended variations in the proposed agreement. The employees' representative delivered a minority report recommending that the standard agreement should be executed.

According to an affidavit filed on the motion to dissolve the injunction made by A. R. Johnstone, the International Vice-President and General Organizer of the union, he had some further negotiations with the employer following the award of the Conciliation Board. Referring to a conversation which he had with Mr. Freeman, the solicitor for the respondent, he said that he informed the latter that the local union, having rejected the award:—

> the next natural action of Local 28 would be to request that Aristocratic operations be placed on the unfair list of the Vancouver District Trades and Labour Council,

and that if this was done the trade unionists and their friends in the City of Vancouver would be requested not to patronize the Aristocratic operations and that:—

> if the request did not have the effect that we hoped and expected that we might use the medium of picketing to bring the matter more vividly to the attention of the trade unionists in Vancouver.

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According to Johnstone, not having heard from the employer after a lapse of some twelve days, he:—

arranged to engage in picketing activity as of May 15th.

What followed thereafter is described in the affidavits filed on behalf of the respondent on the motion for the interim injunction. On the morning of May 15 two men commenced to walk back and forth in front of the two restaurants of the respondent designated as Units Nos. 6 and 7 bearing placards which read:—

Aristocratic Restaurants have no union agreements with Hotel and Restaurant Employees' International Union, Local 28 affiliated with Vancouver and New Westminster Trades and Labour Council.

The union was not the bargaining representative of the employees in either of these restaurants. In conversation with the men engaged in what was obviously regarded both by the union and the employer as picketing, Alder Hunter, the respondent's manager, was informed that they were members of the Seamen's Union and had been told that the picketing would continue until 10:00 at night, that there were two shifts of pickets and that they were being paid at the rate of one dollar per hour for their work. Later in that day the pickets left Unit No. 7 and moved to Unit No. 5 and thereafter from 9:00 a.m. until 10:00 p.m. Units Nos. 5 and 6 were picketed on May 16 and 17 and on May 18 until the interim injunction was granted. There is some dispute as to the activities of the so-called pickets. Walter Jansen, the manager of the respondent's Unit No. 6, stated that he had observed the men talking to people who were apparently intending to enter the restaurant some of whom turned and went away, and on one occasion these pickets were joined by from one to three other persons who walked with them for short intervals. Another employee of Unit No. 6 said that on May 15 she had heard the pickets speaking to people coming to the door of the restaurant using words to the following effect:—

You are not supposed to go in there. This is a picket line,

and that the pickets commenced to accost customers in this fashion at about 8:00 p.m. that evening and a substantial number of the people approached turned away. George Cooke, one of the seamen employed by the union, however denied that he had told anyone that they were not supposed

to go in to the restaurant, or words to that effect, and said that the only satement he had made was "This is a picket line," except that he had answered questions directed to him by persons who first spoke to him. An affidavit by George Hotra, one of the other seamen who accompanied Cooke, was to the same effect and both of these men swore that their actions in walking back and forth along the sidewalk did not constitute an impediment to the flow of pedestrian traffic.

Wilson, J. considered that there was no evidence of a conspiracy to injure the plaintiff but, being of the opinion that to state to a man "This is a picket line," suggested a state of siege or even of peril in the act of crossing the line and was unlawful, he granted an injunction against a repetition of such acts or of any acts of intimidation or coercion. In rejecting the claim of the respondent that the other actions of the so-called pickets amounted to a nuisance, he said that to establish this it would be necessary to prove not merely that these persons obstructed traffic but that they did so in such a way as to cause the plaintiff damage and that neither had been proved. The learned trial judge was further of the opinion that the actions of the appellants in the present matter, with the above noted exceptions, were in any event permitted by the provisions of section 3 of the *Trade-unions Act,* R.S.B.C. 1948, c. 342, which reads as follows:—

> No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

O'Halloran, J.A. expressed the view that there was nothing either in section 3 or section 4 of the *Trade-unions Act* which justified the form of picketing patrol employed. Dealing with a different aspect of the matter, he considered that any immunities in respect to picketing granted

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by the *Trade-unions Act*, assuming what took place here came within the meaning of that statute, were suspended by the *Industrial Conciliation and Arbitration Act* until a strike vote of the employees had been taken under section 33 of that *Act* and the majority of the employees had voted to strike and that any such activities were prohibited until this had been done. Since the majority report of the Conciliation Board had never been submitted to the employees for their acceptance or rejection, he considered that no right to picket by anyone had arisen at the times in question and could not arise in any event until the majority vote of the employees was first obtained favouring the strike. Sidney Smith, J.A. did not consider that the matter was to be determined under the provisions of the *Industrial Conciliation and Arbitration Act* but, considering that at common law picketing is watching and besetting and as such illegal, said that any justification for it must be found in some statute and that there was no such justification in the *Trade-unions Act*. Robertson, J.A. who dissented, found that there was no nuisance committed and agreed with the learned trial judge that there was no evidence of a tortious conspiracy and that the matter was not affected by the provisions of the *Industrial Conciliation and Arbitration Act*. In his opinion, section 3 of the *Trade-unions Act* applied and was a defence to the action.

In my opinion, the decisive point in the case is as to whether the actions authorized by the defendants amounted in law to a nuisance causing damage to the respondent. I think it is unnecessary for the dispostion of the matter to consider whether there was evidence of a conspiracy to injure the respondent of the nature referred to in *Crofter* v. *Veitch* (1). In the absence of other evidence than that contained in the material, if there was a nuisance it was, in my opinion, a private one. The question of nuisance or no nuisance is one of fact but as the matter was disposed of upon affidavit evidence alone, we are in an equally good position to determine that question as was the learned trial judge.

A private nuisance is a civil wrong and in the exercise of the equitable jurisdiction of the courts its continuance may be restrained by injunction whenever substantial dam-

(1) [1942] A.C. 438.

age might be recovered in respect of it by an action at law (*Crump* v. *Lambert* (1)). That the establishing of the patrol of pickets resulted in damage to the respondent is established by the affidavits. It is, I think, of some significance that in the reasons for judgment at the trial it is said that the actions of the pickets who warned prospective patrons that "this is a picket line" were unlawful and that to say this suggested a state of siege, an element of wrongfulness or even of peril in the act of crossing the line. The learned trial judge said further as to this:—

> The words, "This is a picket line" are words of intimidation. Pickets have no right to establish a line about an employer's place of business. This action of the picketers was unlawful and the repetition of similar acts and the doing of any acts of intimidation or coercion are enjoined.

The formal judgment entered following these reasons restrained the appellants from, *inter alia*:—

> establishing a picket line about the plaintiff's places of business and from stating to prospective patrons that there is a picket line about the said places of business.

There is no appeal against this portion of the judgment and indeed in the appellant's factum it is said that they had never asserted any right to so conduct themselves and never objected to an injunction in that form.

It is abundantly clear from the affidavit of Johnstone above referred to that he at least considered that the establishment of the patrols outside of the respondent's premises was "picketting activity" intended apparently, to adopt his language, to be carried on for the purpose of bringing the matter more vividly to the attention of the trade unionists in Vancouver. To trade unionists and their friends and indeed, in my opinion, to the vast majority of the people in the City of Vancouver, the establishment of the patrol, with two men constantly walking up and down outside the premises bearing these placards, would be regarded as a picket line in exactly the same manner as if the placards declared that it was a picket line, or the men carrying them told prospective customers or other persons that it was a picket line. Looking at the matter from a practical standpoint I am unable, with respect, to appreciate the distinction.

(1) (1867) L.R. 3 Eq. 409.

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In considering whether or not this conduct amounted to a private nuisance, the intention or purpose of those responsible for the conduct of the so-called pickets is to be borne in mind. In Clerk and Lindsell on Torts, 10th Ed. p. 544, the learned authors essay to define nuisance thus:—

> Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (*a*) a right belonging to him as a member of the public, when it is a public nuisance, or (*b*) ownership or occupation of land or of some easement, quasi-easement or other right used or enjoyed in connection with land, when it is a private nuisance.

Salmond on Torts, 10th Ed. p. 221, says:—

> The generic conception involved in nuisance may, however, be found in the fact that all nuisances are caused by an act or omission whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right or with his health, comfort or convenience as the occupier of such land.

As to the nature of the damage sufficient to support the action, it is said that any such interference with the physical comfort or convenience of persons occupying the premises is a sufficient interference with the beneficial use of them upon which to found the claim. In Pollock, 14th Ed. pp. 322, 323, the learned author says that in the modern authorities nuisance includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, and quotes Blackstone's phrase that it is "anything done to the hurt or annoyance of the land, tenements, or hereditaments of another" done without any lawful ground of justification or excuse. These statements by leading text book writers appear to me to accurately state the result of the authorities.

In determining whether or not the conduct of the appellants should be so classified, little assistance is to be obtained from the authorities. In *Lyons* v. *Wilkins* (1), there are, however, some general statements of the law which are of assistance. Lindley, M.R. at p. 267, referring to the expression "watching and besetting" which appears in section 7 of the *Conspiracy and Protection of Property Act 1875,* said that such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset and would support an action at

(1) (1899) 1 Ch. 255.

common law, referring to *Bamford* v. *Turnley* (1); *Broder* v. *Saillard* (2); and *Walter* v. *Selfe* (3). Chitty, L.J. at 271, expressed the opinion that the conduct of the so-called pickets who use no violence or intimidation or threats constituted a nuisance and that:—

> To watch or beset a man's house for the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance of an aggravated character.

In *Quinn* v. *Latham* (4), Lord Lindley said that picketing is a distinct annoyance and if damage results is an actionable nuisance at common law, but that if confined merely to obtaining or communicating information it was rendered lawful by section 7 of the Act above mentioned.

If the matter be considered as if the rights of the parties were to be determined by the common law unaffected by statute, I think it to be clear that the conduct of the appellants amounted to a private nuisance. It is not, I think, oversimplifying the matter to consider whether such conduct would be restrained by injunction if the picketing was carried out at the private house of an employer or other person instead of at business premises. If, by way of illustration, a trade union formed for the purpose of advancing the interests of domestic servants were to organize patrols to walk up and down before the residence of a private individual who employed a servant who did not belong to the union, bearing placards stating that the individual, naming him, did not employ a member of the union, or that the person employed was not a member of the union, it cannot be doubted that such an interference with the peaceful enjoyment of his home by the owner would be restrained by injunction. The expression "watching and besetting" in section 501 of the *Criminal Code* and in section 7 of the *Conspiracy and Protection of Property Act* is not defined in either statute, and by that name does not appear to have been a criminal offence at common law. "Watching", as pointed out by Pallas, C.B., in *Rex.* v. *Wall* (5), implies something more continuous and less temporary than "merely attending" within the meaning of that expression in the *Trade Disputes Act 1906,* s. 2(1). To conduct

(1) (1860) 3 B. & S. 62.
(2) (1876) 2 Ch. D. 692, 701.
(3) (1851) 4 De G. & S. 315.
(4) [1901] A.C. 495, 541.
(5) [1907] 21 Cox 401 at 403.

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such a continuous patrol outside a man's house would, in my view, fall within the meaning of that expression. The legal meaning to be assigned to the word "besetting", originally a military term, appears to me to be unsettled. It is not, however, necessary that the conduct complained of should fall within the meaning of those terms as used by Lindley, M.R. in *Lyons'* case above referred to. To have one or more men parading up and down outside the owner's property hour after hour bearing placards with statements of this nature, however truthful, would be, in my opinion, such an intereference with the comfort and convenience of the occupier of the land as a court would restrain by injunction.

In the case of business premises the pickets patrolling outside of the employer's premises, though merely carrying placards stating that the Aristocratic Restaurants had no agreements with the union, continuing parading throughout the day, constituted, in my opinion, a picket line and would be understood as such by the general public including members of trade unions and was intended to be such by the officers of the union, as indicated by the affidavit of Mr. Johnstone. The effect of such a picket line and the effect which it was intended to produce would be to drive away customers from the respondent's premises, both members of trade unions and their friends who would not cross a picket line and others who, seeing such a line established, would be apprehensive of crossing it, and also people who might consider that their own business or professional interests would be jeopardized by patronizing the restaurants under the eyes of the pickets. I think that, as in the case of a private house, this continuous watching of the respondent's premises by a patrol conducted in the manner described in the material was at common law a private nuisance.

The terms of section 3 of the *Trade-unions Act* of British Columbia are as above stated. The statute in substantially its present form was first enacted by the Legislature of British Columbia by chapter 66 of the Statutes of 1902, following the decision of the House of Lords in *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants* (1), and presumably in consequence of it. Section 3

(1) [1901] A.C. 426.

by its terms exempts a trade union, its officers, agents or servants from liability for communicating facts respecting employment or hiring by or with any employer to "any workman, artisan, labourer, employee or person." I think it unnecessary to decide whether the "person" referred to is to be construed *ejusdem generis* with the words immediately preceding it, as to which there has been disagreement in decisions of the courts of British Columbia. While that portion of the section which excludes liability for "persuading or endeavouring to persuade by fair or reasonable agreement without unlawful threats, intimidation or other unlawful acts" such persons "at the expiration of any existing contract" does not affect the present matter, where there had been no contract, I think the concluding portion of the section reading:

> to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

applies. Section 4 reads:—

> No such trade-union or association, or its officer, member, agent, or servant, or other person, shall be enjoined or liable in damages, nor shall its funds be liable in damages, for publishing information with regard to a strike or lockout, or proposed or expected strike or lockout, or other labour grievance or trouble, or for warning workmen, artisans, labourers, or employees or other persons against seeking, or urging workmen, artisans, labourers, employees, or other persons not to seek, employment in the locality affected by such strike, lockout, labour grievance or trouble, or from purchasing, buying, or consuming products produced or distributed by the employer of labour party to such strike, lockout, labour grievance or trouble, during its continuance.

If the appellants were justified in establishing and maintaining the picket line here complained of, the justification must be found in this legislation. While it was true that none of the employees of the respondent were members of the appellant union, it still retained its status as the bargaining authority of the employees of Unit No. 5 under the provisions of the *Industrial Conciliation and Arbitration Act*. The majority award of the Board of Conciliation was unacceptable to the union and in its capacity as bargaining representative it maintained the attitude that the standard form of agreement should be signed by the employer. I think this was a labour grievance within the meaning of that expression where used in section 4. While the affidavit of Johnstone, in which he described the reasons that led him to instruct the picketing, stated the reason as

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being that, as the union had standard agreements with some twenty restaurant operations in the City of Vancouver where the wage rates were considerably above those paid by the respondent and the operators of these had made representations to the union, saying that their agreements requiring them to pay a higher wage placed them at a disadvantage in competition with non-union operators:—

> and that to protect the union operators and to protect the wage rates of the employees in the union shops, we were obligated to bring to the attention of the trade unionists and their friends in Vancouver the status of the various operations of the plaintiff company.

and fails to state that they were endeavouring to advance the interests of those employees of the respondent whose bargaining representative the union was, I think it should be taken that this was one of the union's reasons for the course of action followed.

Sections 3 and 4, while exempting unions, their officers and servants from liability for communicating information of the nature described for the defined purposes, makes no attempt to define the manner in which this may be done. The British Columbia Act was followed in 1906 by the enactment in England of the *Trade Disputes Act*. Section 2 of that *Act* provided that it should be lawful for one or more persons acting on behalf of a trade union to attend "at or near a house or place where a person resides or works or carries on business or happens to be" if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." Neither sections 3 or 4 of the British Columbia Act contain the above quoted language but I think, in order to give the sections a reasonable interpretation, they should be construed as if they were included. While the statements contained on the placards carried by the pickets conveyed certain information "respecting employment or hiring by the respondent" and the statements were true, to convey the information in the manner adopted is not, in my opinion, authorized by the statute. The language of the sections is not capable of interpretation as meaning that such information might be conveyed in a manner which would be at common law a private nuisance. Very clear language indeed would be required to justify any such

invasion of the common law rights of employers and none such is to be found, in my judgment, in the *Trade-unions Act*. I think the injunction granted by the Court of Appeal should be continued and the appeal dismissed with costs.

In the view that I take of this appeal, it is unnecessary to consider the other questions which were so fully and ably argued by counsel for both parties.

The judgment of Kerwin and Estey, JJ. was delivered by:

KERWIN J.:—The respondent, Aristocratic Restaurants (1947) Ltd. operates five restaurants in Vancouver known as units 5, 6 and 7. It is the plaintiff in an action in the Supreme Court of British Columbia and the defendants appellants are Robert Williams and D. P. Morrison, on behalf of themselves and all others, members of Hotel and Restaurant Employees' International Union, Local 28, and as officers and trustees of the said local, and the local itself. Williams and Morrison are respectively President and Secretary of local 28. An *ex parte* injunction having been granted by Wilson J., a motion before him for its dissolution was by consent treated as the trial of the action upon the pleadings and the affidavits filed. The result of that trial was as follows: (1) An injunction was granted restraining the establishing of a line about the respondent's places of business and from stating to prospective patrons that there is a picket line about the said places of business: (2) The respondent's claim to a perpetual injunction restraining the appellants and each of them, their servants and agents, from watching, besetting and picketing any of the restaurant units operated by the respondent in the City of Vancouver was dismissed. (3) The respondent's claim to a declaration that the appellants did unlawfully combine, conspire and agree with each other and others wilfully together to injure the respondent in its trade, and to advance their own interests by illegal means and to watch, beset and picket the places of business of the respondent with the intention of compelling the respondent to enter into an agreement with them, was dismissed: (4) The respondent's claim to a declaration that the appellants, their, and each of their servants or agents, have unlawfully injured the respondent in its trade, by creating a nuisance in and adjacent to the premises occupied by the respondent at the

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City of Vancouver, and by watching, besetting and picketing the respondent's premises was dismissed: (5) The respondent's claim to damages from the appellants was dismissed: (6) Each party was ordered to bear his own costs.

In the Court of Appeal (1), Robertson J. A. would have dismissed the appeal but the majority, consisting of O'Halloran J.A. and Sidney Smith J.A. allowed the appeal with costs and the order made was that judgment be entered in favour of the respondent restraining and enjoining the appellants from watching, besetting or picketing any of the places of business of the respondent and from engaging in any activity intended to restrict or limit the respondent's business, and that the respondent recover from the appellants damages to be assessed, and that the respondent recover from the appellants the costs of the trial and of the assessment of damages. From that judgment the present appeal is taken.

The Court of Appeal and the trial judge do not differ as to the facts as shown by the affidavits. On September 21, 1949, pursuant to the *British Columbia Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948, c. 155, hereafter referred to as the Conciliation Act, the local union was certified by the Provincial Labour Relations Board as bargaining agent for the employees of respondent's unit 5. Thereupon the local and the respondent entered into negotiations with a view to reaching an agreement concerning rates of pay and conditions of service in that unit. Upon the failure of these negotiations and following the procedure laid down in the Conciliation Act, a Board of Conciliation was appointed to try to negotiate an agreement and, failing that, to recommend terms upon which the local and the respondent should agree. No agreement was reached, and in February, 1950, majority and minority recommendations of the Board were issued. The union did not accept the majority report, nor did it hold a strike vote amongst its members who were employees in unit 5, as provided for by section 31 of the Conciliation Act and in fact no strike occurred. Either because the employees dropped their union membership, or because they resigned and were replaced by non-union workers, by May 15, 1950, no employee of unit 5 was a member of the local.

(1) [1951] 1 D.L.R. 360.

While by virtue of the first sentence in subsection 7 of section 7 of the Conciliation Act, the Board might at any time cancel the certification of the union, if it was satisfied that the union had ceased to be a labour organization or that the employer had ceased to be the employer of the employees in unit 5, neither of these conditions existed. However, the second sentence of the subsection applied, by which the Board might cancel the certification of the union, but only after the expiration of ten months from its date, if the Board were satisfied that the union had ceased to represent the employees in the unit. As that period had not expired at the relevant date, the union continued to be the bargaining agent for unit 5. As to units 6 and 7, not one of the workmen therein was a union member.

On May 15, 1950, persons employed and paid by the local, and therefore its agents, commenced to picket not only unit 5 but also units 6 and 7. At unit 6 two men walked back and forth in front of the restaurant each carrying a placard bearing these words "Aristocratic Restaurants have no union agreements with Hotel and Restaurant Employees' International Union, Local 28, affiliated with Vancouver and New Westminster Trades and Labour Council." At the same time the picketers accosted prospective customers and said to them: "You are not supposed to go in there. This is a picket line", or merely, "This is a picket line". Units 5 and 7 were also picketed by two men, in each case, but they did not address any words to prospective customers. As a result of the picketing the respondent suffered damage through a falling off in its business.

Upon these facts the appellants admit they were not justified in establishing a picket line about respondent's place of business and in stating that there was such a line; that is, the admission is that the statement combined with the picketing was unlawful and not that peaceful picketing *per se* was unlawful. Reading in that way what I have described as (1) in the trial judge's order, no question arises as to its propriety. On the other hand, the third item in that order is not now disputed by respondent, that is, that there was no evidence of unlawful conspiracy on the part of the appellants. With these two clauses out of

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the way there still remain to be determined important questions touching the rights of labour unions and employers of labour in British Columbia.

So far as the criminal law is concerned, the matter is dealt with by section 501 of the *Criminal Code*, R.S.C. 1927, chapter 36, the relevant part of which, as amended by section 12 of chapter 47 of the Statutes of 1934, reads as follows:—

> 501. Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,
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> * * *
>
> (*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be;
>
> (*g*) attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

Since the appellants are not charged with having committed an offence, we are not directly concerned with this section but it is important to note that one who besets or watches within clause (*f*) with a view to compelling any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain, is guilty of an offence if he does so wrongfully and without lawful authority. In *Reners* v. *The King* (1), it was decided that such actions were wrongful and without lawful authority if they amounted to a nuisance or to a trespass or if those engaged constituted an unlawful assembly. That was before clause (*g*) was added by the 1934 amendment although, as appears at p. 505, because of the facts in that case, it would have had no application.

By chapter 111 of the Revised Statutes of British Columbia, 1948, the civil law of England as it existed on November 19, 1858, if not inapplicable from local circumstances is in force in the province but modified by all legislation having the force of law. The position in England as of 1858 was that the Statute of Labourers and the Com-

(1) [1926] S.C.R. 499.

bination Acts had been repealed in 1825 although the enactment of that year left unrepealed that part of the common law under which it was generally held at the time that the combination or agreement to alter conditions of work was a conspiracy because it was a combination in restraint of trade. This statute repealed one of the preceding year which had been more helpful to trade unions and workmen than the Act of 1825. Of course, the various English statutes subsequent to 1858 never were in force in British Columbia.

The *English Trade Disputes Act of 1906* amending the *1875 Conspiracy and Protection of Property Act* was anticipated in British Columbia in some respects by the *Trade-unions Act,* chapter 66 of 1902, which with immaterial verbal changes is now R.S.B.C. 1948, chapter 342. The present *Act* consists of four sections, of which the first merely gives the short title, and in view of the result reached we are not concerned with section 2 which deals with the non-liability for damages of trade unions and their trustees for any wrongful act in connection with any strike, lockout or trade or labour dispute except under certain conditions. Section 3 is as follows:—

> 3. No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee, or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributer of the products of labour.

I agree with the trial judge that the holding aloft of the placards was a "communicating" to "a person" facts respecting employment or hiring by the respondent. There is no reason that the word "person" should be read *ejusdem generis.* It is only the last part of the section, commencing with the words "or for persuading or endeavouring to persuade" that is related to the words "at the expiration of any existing contract". No opinion is expressed as to section 4 since, for its application, it would be necessary to find that

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there was a labour grievance or trouble although, notwithstanding the local continued to be the bargaining agent under the Conciliation Act with reference to unit 5, actually at the time of the acts complained of no member of the union was an employee of the respondent at that unit and, furthermore, it might be argued that section 4 had no relevancy to the picketing of units 6 and 7.

There is no question here that the appellants did not trespass or engage in an unlawful assembly but did the picketing amount to a nuisance? It could not be said that one picketer would commit a nuisance by walking up and down in front of the respondent's premises, carrying the placard and in my opinion neither did the two pickets. On this point several decisions were cited, particularly *Lyons* v. *Wilkins* No. 1 (1), *Lyons* v. *Wilkins* No. 2 (2) and *Ward Lock and Company* v. *Operative Printers' Assistants' Society* (3). It is difficult to reconcile all the statements that appear in the several opinions expressed in these cases but I think one fact emerges and that is that the approach to labour questions has changed materially down through the years. This change of approach is evidenced particularly in the decision of the House of Lords in *Crofter Hand Woven Harris Tweed Company Limited* v. *Veitch* (4). Such an approach places workmen and unions in a position, comparable at least to some extent to that held by employers, and does not relegate them forever, even at common law, to the conditions existing at the time of the Statute of Labourers, the Combination Acts, the English Acts of 1824 and 1825, in 1899, or even in 1906 the date of the *Ward Lock* decision. It was said, at page 506 of the *Reners* case, that the judgments in the *Ward Lock* case and the *Lyons* case concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. Picketing is a form of watching and besetting but that still leaves for decision, in each case, what amounts to a nuisance. Whatever might have been held some years ago, in those days the actions of the appellants did not constitute a nuisance.

It is argued that the provisions of the Conciliation Act affect the matter. This *Act*, after providing for the right

(1) (1896) 1 Ch. 811.
(2) (1899) 1 Ch. 255.
(3) (1906) 22 T.L.R. 327.
(4) [1942] A.C. 435.

of an employee to be a member of a trade union or employees' organization, and the right of an employer to be a member of an employers' organization, prohibits the latter to interfere with the formation or administration of a trade union. Then follows sections 5 and 6, to which specific reference will be made later. Subsequent sections authorize the Labour Relations Board to certify a bargaining authority, such as local 28, and provision is made for collective bargaining by agreement, and failing that, for the appointment of a Conciliation Board and sending of copies of the reports of such Board, and the prohibition of strikes or lockouts until that has been done. It is to be remembered that in the present case no strike or lockout occurred. Sections 5 and 6 read as follows:—

5. (1) Except with the consent of the employer, no labour organization and no person acting on behalf of a labour organization shall attempt at the employer's place of employment during working-hours to persuade an employee of the employer to join or not to join a labour organization.

(2) No labour organization and no person acting on behalf of a labour organization and no employee shall support, encourage, condone, or engage in any activity that is intended to restrict or limit production.

(3) No act or thing required by the provisions of a collective agreement for the safety or health of employees shall be deemed to be an activity intended to restrict or limit production.

6. No person shall use coercion or intimidation of any kind that would have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a labour organization.

Even if it could be said that there was an attempt to persuade an employee to join a union within subsection 1 of section 5, there was no such attempt *at* the respondent's place of employment. The words "during working-hours" and in fact the whole tenor of the subsection indicate that what is aimed at are attempts in or on the employer's place of employment. The decision in *Larkin* v. *Belfast Harbour Commissioners* (1), to which we were referred, is on an entirely different point under the *Conspiracy and Protection of Property Act of 1875* as amended by the *Trade Disputes Act of 1906,* and Larkin, without permission, addressed a crowd of workmen on a quay, the property of the Belfast Harbour Commissioners. On the evidence there is no basis in fact for the suggestion that any of the appellants supported, encouraged, condoned, or engaged in any activity

(1) (1908) 2 Ir. R. 214.

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that was intended to restrict or limit production within the meaning of subsection 2 of section 5 of the Conciliation Act. The matter dealt with by that subsection is an entirely different one. There was no intention to restrict or limit the preparation of meals at the restaurants in the sense that it might be said that under given circumstances certain actions were intended to slow down any manufacture. Again, as to section 6, once it is held that there was no nuisance, there is no factual foundation for the argument that the communicating, in the manner described, of the fact that the respondent had no union agreements with the union was coercion or intimidation.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial judge restored.

RAND J.:—In this appeal the question is whether the so-called picketing of the three restaurants was unlawful in the sense that it was a civil wrong. It consisted of two men walking back and forth on the sidewalk in front of a restaurant each bearing a placard to the effect that the proprietor did not have a labour agreement with a named union. The provisions of three statutes are relevant to the determination of the question, and I will deal, first with section 501 of the *Criminal Code*.

That section provides penalties against intimidation. The offence is committed by one

> who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do or to do anything which he has a lawful right to abstain.

does certain acts described in six items of particulars. The article applicable here is paragraph (*f*):—

> Besets or watches the house or other place where such other person resides or works or carries on business or happens to be,

and it is qualified by paragraph (*g*):—

> Attending at or near or approaching to such house or other place as aforesaid in order merely to obtain or communicate information shall not be deemed a watching or besetting within the meaning of this section.

This language has been taken almost verbatim from clause (4) of section 7 of the Imperial statute entitled *Conspiracy and Protection of Property Act, 1875* and it has come before the English Court of Appeal for interpretation directly in

at least two cases. The first was *Lyons* v. *Wilkins* reported, on the appeal from an interlocutory injunction, in (1896) 1 K.B. 811, and on the appeal from the final judgment, in (1899) 1 Ch. 255. As expressed by Lord Lindley, then Lord Justice, speaking for himself, at p. 825 in the report of 1896 it was found and held that, "They (the defendant workmen) are there to put pressure upon Messrs. Lyons by persuading people not to enter their employment; and that is watching and besetting within clause (4), and is not attending merely to obtain or communicate information": such conduct was a private nuisance which at common law gave rise to an action on the case. This may mean that the conduct envisaged by the proviso excludes compulsion as the object in view. If it does, then with every respect for this high authority, I am unable to follow it; unless the conduct within the exception has that object it would not be within the first part of the definition: it is assumed in determining a question under clause (4) and the proviso that there was an intention to act with a view to compel by "attending at or near . . . in order . . . to communicate information." If the meaning is that the compulsion cannot be brought about by persuasion, I confess I am equally unable to follow the reasoning. For what conceivable use or purpose would information be furnished if not to win support by the persuasive force of the matter exhibited? The persuasion is not ordinarily or necessarily sought of the person to be compelled; economic pressure is to affect him; but that pressure, quite legitimate by those who exert it, may easily be set in motion by persuasion exercised upon either workmen or the public is a frequent experience of labour controversy. If "attending at or near or approaching to such house" for the purpose mentioned is not to be taken as a form of watching or besetting, then likewise it is outside of the penalized conduct and could not be excepted from it. It is no doubt probable that Parliament was guarding against the interpretive inclusion of doubtful conduct, but the object of compulsion remains, in any case, an essential element.

The word "communicate" signifies, as I interpret it, to pass on information at the place of attending and not subsequently at another place, and it contemplates matter different from that "obtained" there. If "persuading" means

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to influence by the force of rational appeal, then the interpretation given the proviso, if it is to be applied in all cases without exception, seems to me to be unwarrantably restrictive; certainly it would appear to be so where the appeal is to the public, and it is not necessary to decide whether it is impossible in the case of workmen. In Lyons, the objects of persuasion were persons continuing at or seeking work in defiance of a strike, and in the special circumstances of the case it may be difficult to imagine what persuasive information could be passed on to them. But that could not be said of members of the public here. The interpretation must meet this group as well and it may be that the judgment is properly to be taken as turning on the finding that there was not in fact any real communication of information. There is nothing in the statute placing a limit of time on the "attending"; but there is a difference between watching and besetting for the purpose of coercing either workmen or employer by presence, demeanour, argumentative and rancorous badgering or importunity, and unexpressed, sinister suggestiveness, felt rather than perceived in a vague or ill defined fear or apprehension, on the one side; and attending to communicate information for the purpose of persuasion by the force of a rational appeal, on the other. That difference was acted upon by Wilson J. at the trial in this case in the limited injunction granted.

In the later case of *Ward Lock* v. *Printers Society* (1), with substantially similar facts, the Court of Appeal in 1906 held the conduct to be within the proviso and to be unobjectionable. The section generally was interpreted to attach to certain acts, already at least tortious, certain penal consequences, but neither to add to nor diminish civil remedies. Assuming the conduct to be within the proviso, it became a question of the right or remedy at common law: that would, in any event, be the effect here under section 501. The proviso was taken to include peaceable persuasion by the communication of information in the vicinity of the premises and its inclusion in the section to be a matter of legislative caution. As persuasion, the conduct was justified by the interest of the Society in the labour dispute; and as conduct, it was not productive, to ordinary sensibilities, of that degree of annoyance, disquiet and discomfort which

(1) (1906) 22 T.L.R. 327.

materially impairs the enjoyment of property. To compel by the lawful effects of such persuasion for such a purpose is a normal incident of industrial competition. The general view of the section was followed by the Court of Appeal in *Fowler* v. *Kibble* (1).

There is next the *Trade-unions Act* of British Columbia. Section 3 absolves every person from liability for

> communicating to any workman, artisan, labourer, employee, or person facts respecting . . . employment . . . by or with any employer . . . or consumer or distributor of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-mentioned workman . . . or person, . . . to refuse to become the employee or customer of any such employer, consumer, distributor of the products of labour.

This language is seen to deal with persuasion both by spoken words and written communications. Section 4 likewise absolves the publishing of information respecting a strike or other labour grievance or trouble or for urging any person from purchasing, buying or consuming products distributed by the employer who is a party to any labour grievance or trouble. In both sections, the mode of communication and publishing is undefined, and I take the word "person" to include members of the public.

There was clearly a trade dispute as well as a grievance in this case and the information conveyed by the placards as clearly was relevant to the patronage of the restaurants by consumers. The question, then, is whether the mode of persuasion followed was authorized. How could information be effectively communicated to a prospective customer of such a business otherwise than by such means? The appeal through newspapers or at a distance might and probably would be utterly futile. The persons to be persuaded can, with any degree of certainty, be reached only in the immediate locality, and I must take the legislature to have intended to deal with the matter in a realistic manner. What was attempted was to persuade rationally rather than to coerce by insolence; there was no nuisance of a public nature, and the only annoyance would be the resentment felt almost at any act in the competitive conflict by the person whose interest is assailed. That those within the restaurant, either employees or patrons, were likely to

(1) (1922) 1 Ch. 487.

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be disturbed to the degree of apprehensive disquiet already mentioned, could not be seriously urged. Through long familiarity, these words and actions in labour controversy have ceased to have an intimidating impact on the average individual and are now taken in the stride of ordinary experience; but the information may be effective to persuade and it is such an appeal that the statute is designed to encourage.

Since, then, the conduct was not criminal either under the Code or at common law, any common law civil liability has been removed by these sections. But even if they should not extend to a public appeal, I should hold the act innocent where it is done for such an object: the public is obviously and substantially interested in the fair settlement of such contests.

There remains the question whether the conduct was in violation of the *Industrial Conciliation and Arbitration Act*. That statute deals somewhat comprehensively with labour disputes. It provides by section 10 for the certification of a labour organization as the bargaining agent for all employees in an employment unit, and so long as that certification continues, the bargaining representative by section 13 has exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement. That appointment, with its investment of authority, embraces all such incidental and subsidiary authority as may be necessary to enable the labour organization to accomplish its purpose. Section 14 provides for a notice from either side for the commencement of collective bargaining; section 16 requires that the bargaining commence within five days after notice, and forbids the employer to alter any terms or condition of employment until either a collective agreement has been concluded or the report of a conciliation board has been submitted to a separate vote of employers and the employees affected. If the vote of both is in favour of acceptance, the employer is forbidden to cause a lockout and the employees to go on strike. Section 33 forbids a strike until after a vote "of the employees in the unit affected" has been taken and the majority have voted in favour of it. The employer and the bargaining agent were

unable to conclude an agreement, and a conciliation board was appointed. Its report was made, but it was not submitted to a vote of the employees of the unit. It is said to have been rejected by a vote of the union, but as can be seen, that is quite different from a vote of the employees. Since there was no such vote, the provision of section 16 forbidding a strike did not become operative.

In such circumstances, then, is the action of the union in making an appeal to the public forbidden? I cannot think so. There is nothing in the Act that touches these ancillary means of advancing the interests of either party. It seems to me that the prohibitory provisions are carefully limited, and I can find no necessary implication that subsidiary action not incompatible with express provisions is intended to be affected.

I do not take it to be obligatory to submit the conciliation report to a vote of the employees. Even where the vote is for acceptance, there is only the prohibition of a strike thereafter; the terms of the report themselves are not declared to constitute an agreement. If no vote is taken, the parties, subject to the Act, are again in negotiation with all its legitimate modes of waging the contest. To imply a ban against any of them in that unsettled situation would tend to a stalemate and to force a strike vote, both against the policy of the statute. If, by further negotiation or through persuasion, an agreement were brought about, that policy would be promoted. Once the report of the conciliation board is submitted, the parties are restricted only by the conditions of strike and lockout and, in the absence of a vote or its dispensation or of an agreement, by the maintenance of the existing terms of employment; within that area all lawful steps are open.

The fact that two of the restaurants were not within the unit of employees for which the union was authorized to act does not affect the question; the owner's economic strength is derived from his total business; and it is against that that the influence of information is being exerted.

I would, therefore, allow the appeal and restore the trial judgment with costs throughout.

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KELLOCK J.:—The material facts out of which this appeal arises are as follows. On September 21, 1949, the appellant union was certified pursuant to s. 12 of the *Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948, c. 155, as the bargaining authority for the respondent's employees in "Unit No. 5," one of a group of five restaurants operated by the respondent in the City of Vancouver. The union thereupon made certain demands upon the respondent, including a demand for a union shop, and submitted for execution by the respondent its standard form of agreement. As the respondent did not accede to the union's requests, conciliation proceedings were taken in pursuance of the statute, resulting in February 1950 in majority and minority reports.

The points of difference related to wage rates and the question of union shop. The respondent accepted the award, but the union at its meeting in the month of March rejected it.

Subsequently, during the month of April and into the month of May, the parties carried on negotiations, the union insisting on the substance of the minority report. Ultimately the union advised the respondent that its next step, failing agreement, would be to request that the respondent be placed on the "unfair list" of the Vancouver District Trades and Labour Council, which meant that trade unionists in the city would be requested not to patronize the respondent. The union further advised the respondent that if this did not have the desired result, "picketing" might be resorted to. Some discussion took place as to the possibility of a joint survey of the respondent's operations being made by representatives of both parties for the purpose of seeing if improvements in the respondent's operations could be brought about, but when nothing came of this, the union commenced the activities which are the immediate subject of this litigation. Briefly, commencing on the 15th of May, 1950, two men began walking back and forth on the public street in front of three of the respondent's five restaurants, carrying placards bearing the following words:

> Aristocratic Restaurants have no union agreements with Hotel and Restaurant Employees International Union Local 28, affiliated with Vancouver and New Westminster Trades and Labour Council.

It is admitted on behalf of the appellant that the purpose of these activities was to bring pressure to bear upon the respondent to accede to the demands of the union through loss of custom which it was hoped would result. It is in evidence that there was some accosting of persons on the street, apprising them that "this is a picket line," but an injunction was granted with respect to this latter activity, and no question arises with respect to it on this appeal. The conduct complained of continued from May 15 to May 18 when the writ was issued. The learned trial judge dismissed the action, but his judgment was reversed on appeal (1), Robertson J.A. dissenting.

It is provided by s. 12, subsection 2 of the statute already referred to, that where a labour organization applies for certification as a bargaining authority for a "unit," if the board has determined that a "unit" is "appropriate for collective bargaining," and is satisfied that the majority of the employees in the unit are members in good standing of the labour organization, the board shall certify the applicant as the bargaining authority of the employees in the unit. Subsection 3 of s. 12 provides that, for the purposes of the statute, a "unit" means simply a group of employees. Accordingly, the appellant, by reason of the certification, became the bargaining authority for the group of employees of the respondent's restaurant No. 5, and it is clear, by reason of the provisions of s. 12 that at the date of certification, the board was satisfied that the majority of this group were members in good standing of the appellant union. It is provided by s. 13 that where a bargaining authority is certified for a unit, that bargaining authority "shall have exclusive authority to bargain collectively on behalf of the union and to bind it by a collective agreement until the certification is revoked."

S. 12, subsection 7 provides for the revocation of certification in the following cases: (*a*) if the board is satisfied that the labour organization has ceased to be such, or (*b*) that the employer has ceased to be the employer of the employees in the unit, or (*c*) if ten months have elapsed after certification and the board is satisfied that the labour organization has ceased to represent the employees in the unit.

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It appears from the report of the conciliation board that, at the time of the hearings before it, all the employees of the unit who had been members of the appellant union at the date of the certification, had since ceased to be members. This fact, however, is not one of the circumstances which, under the statute, affect the status of the appellant union as the certified bargaining agent, and as ten months had not elapsed after certification, the provisions of s. 12, subsection 7 do not apply. It is not shown that there was any change in the personnel of the group at any time after certification. Accordingly, the appellant union continued to have the exclusive right to bargain collectively on behalf of the group of employees concerned, and to bind them by a collective agreement as provided by s. 13 (*a*).

By s. 2, subsection 1, "collective bargaining" is defined as negotiating with a view to the conclusion of a collective agreement or the renewal thereof, or to the regulation of relations between an employer and employees, and it is provided by s. 14 that where the board has certified a bargaining authority for employees in a unit and no collective agreement is in force, the bargaining authority may by notice require the employer to "commence" collective bargaining.

It is contended on behalf of the respondent, that because there were no members of the appellant union remaining in the group of employees in question at the time of the award of the conciliation board, it would have been out of the question for the board to have acceded to the union's demand that an agreement should have been settled containing a union shop clause, as it would have meant that after a limited period, which respondent's counsel suggested might be six months, the respondent would have been obliged to discharge all employees in the group who were unwilling to become members of the union. Counsel further contends that when the appellant union continued to insist on such a term in the negotiations occurring subsequent to the conciliation award, it in effect repudiated its true function under the statute as agent for the employees in the group, and became a protagonist in its own interests as distinct from theirs.

I am unable to accede to this view. In my opinion, it breaks down on the facts. It is in evidence that the

original instructions of the appellant union included a demand for a union shop clause, and it does not appear that these instructions were at any time countermanded or altered. Further, it is provided by s. 8 of the statute that nothing therein is to be construed as precluding the insertion in a collective agreement of a provision requiring, as a condition of employment, membership in a specific labour organization.

I therefore conclude that, at the time of the activities in question, the appellant union retained exclusive authority to negotiate with respect to the conclusion of a collective agreement or with respect to the regulation of relations between the respondent and the group of employees in question.

The respondent refers to s. 16(*b*) of the statute, which prohibits an employer from increasing or decreasing rates of wages or from altering any term or condition of employment until after the conciliation board has reported to the Labour Relations Board and until the question of acceptance or rejection of the award has been submitted to a vote of the employees affected, and seven days have elapsed after the vote has been reported to the Labour Relations Board. The respondent contends that, as there was no vote in the present case, the employer was prohibited from acceding to the union's demands and consequently the activities of the union designed to have the employer accede to these demands, involved something which the respondent was prohibited by statute from doing. It is therefore said that the activities in question were wrongful.

Clause (*c*) of s. 16, however, provides that the Labour Relations Board may make regulations authorizing an employer affected by clause (*b*) to increase or decrease wages or alter any term or condition of employment. Consequently, the respondent, had it seen fit, might have applied to the Board for such purpose, and that being so, I do not think it can be said that it was wrongful for the union to have taken steps to induce the respondent so to do.

In the opinion of O'Halloran J.A. (1), what the appellants had done was specifically prohibited, in the circumstances, by s. 5(2) of the statute. Robertson J.A. was of a contrary opinion. In a sense, to induce customers not to buy will have the effect of limiting the output of the person from

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whom the buying might otherwise take place, but I do not think that the subsection is directed at the sort of thing in question here, nor, in any event, could it reasonably be interpreted so as to conflict with the express provisions of ss. 3 and 4 of the *Trade-unions Act,* R.S.B.C. 1948 c. 342, with which I will subsequently deal.

This brings me to the question as to whether or not the picketing here in question gave rise to any cause of action on the part of the respondent. This resolves itself, in the present instance, into the question as to whether or not such conduct was, in itself, unlawful. The learned trial judge held that this conduct did not amount to a common law nuisance, and in any event, was authorized by s. 3 of the *Trade-unions Act.* In the Court of Appeal (1), Robertson J.A. was in substantial agreement with the learned trial judge. In the view of the majority, however, the respondents were guilty of a watching and besetting illegal at common law and not authorized by the provisions of the statute just referred to.

With respect to ss. 3 and 4 of the statute, it is not possible to peruse the course of legislation with respect to picketing, and the decisions thereunder, without concluding that the draftsman had in mind their subject matter, but the rather odd thing is that in neither of the sections is "watching or besetting" expressly referred to. Before considering these sections further, however, it would seem relevant to refer to the history of the legislation.

It is not necessary to go farther back than the Canadian Act of 1872, 35 Vict. c. 31, which, so far as material, reproduces the essential provisions of the English statute of 1871, 34-35 Vict. c. 32. By s. 1 every person who

> 3. molests or obstructs any person in manner defined by this section—
>
> * * *
>
> (*e*) being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him—

shall be guilty of an offence and punishable by imprisonment. Subsection 4 provides that for the purposes of the statute, a person shall be deemed to molest or obstruct another person if

> (*c*) he watches or besets the house or place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place . . .

(1) [1951] 1 D.L.R. 360.

In his charge to the grand jury in the *Cabinet-Makers' Case*, reported in a note in (1899) 1 Ch. at 262, the late Mr. Russell Gurney said, in terms described by Lindley M.R. in *Lyons* v. *Wilkins* (1), as "a masterly statement of the law as it stood in April 1875":

> And here you must observe that the question is, not whether they have endeavoured to take their stand by themselves refusing to work, and by persuading others not to work: this they have a right to do; but the question is whether they have tried to effect that object in a way that is forbidden by the Act, and with that purpose. That they did watch the place of business, probably, there is no doubt, but there are some purposes for which they had a perfect right to watch. When a contest of this sort is going on, it is not unusual, I believe, to watch, in order to see that none of the men who receive what is called "strike pay", are also receiving wages from the employer. But the more important object, no doubt, that the watchers had in view was, to inform all comers when, for instance, any might have been attracted to come there by the advertisements which had been inserted in the newspapers to inform them of the existence of the strike, and endeavour to persuade them to join them. All this is lawful so long as it is done peaceably, without anything being done to interfere with the perfect exercise of free will on the part of those who were otherwise willing to work on the terms proposed by the employer.

In the following August, the *Conspiracy and Protection of Property Act*, 1875, 38-39 Vict. c. 86, was passed, repealing the Act of 1871 and enacting s. 7 as follows:

> Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—
>
> * * *
>
> 4. watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place . . .

should, on conviction, be liable to a penalty. The section was subject to a proviso that

> Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

This legislation had its counterpart in Canada in 39 Vict. c. 37, s. 2. It is apparent that while attending to obtain or communicate information was expressly authorized in accord with the construction of the earlier statute referred to above, persuasion, even though by peaceful means, was not ex-

(1) (1899) 1 Ch. 255 at 268.

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pressly mentioned. Following this statute, *Regina* v. *Bauld* (1) was decided, and it was held by Baron Huddleston that watching and besetting for the purpose of persuading was not permitted. In *Lyons* v. *Wilkins,* No. 1 (2), the same view was taken by the Court of Appeal, which held that any conduct going beyond that described in the proviso to s. 7 was expressly prohibited by the statute.

In *Lyons* v. *Wilkins,* No. 2 (3), which was the same case as the above but after trial, the first decision having been on a motion to continue an injunction, it was argued for the defendants that "watching and besetting" under the Act of 1875 should have the same meaning as in the Act of 1871, so as not to prohibit peaceful persuasion. It was contended that the proviso to s. 7 was merely put in *"ex majori cautelâ"* and was not an instance of *"expressio unius exclusio est alterius."* It was also argued that, by reason of the presence in the statute of the word "wrongfully," it must be shown, apart from the statute, that some legal right of the plaintiff had been infringed by the acts complained of. These arguments, however, were expressly rejected.

With respect to the argument founded on the words, "wrongfully and without legal authority," Lindley M.R. was of opinion that it was not necessary to show the illegality of the overt acts complained of by evidence other than that which proved the acts themselves, if no justification or excuse for them was reasonably consistent with the facts proved. That this was the correct construction was, in his Lordship's view, clear from the fact that under subsection 1 of the section,

> uses violence to or intimidates such other person or his wife or children, or injures his property.

such acts were wrongful in themselves. Accordingly, the words in question were superfluous with respect to the acts described in subsection 1, and in order to construe the various subsections consistently, it must be held that the statute intended to prohibit the conduct described in each subsection, if done with the view mentioned in the beginning of the section. The same view was taken by Chitty L.J. In the view of the majority, therefore, these words meant "without lawful excuse or justification."

(1) (1876) 13 Cox 282. (2) (1896) 1 Ch. 811.

(3) (1899) 1 Ch. 255.

On the other hand, Vaughan Williams L.J. was of opinion that the words meant "unwarranted by law." Notwithstanding, however, the learned judge took the same view as did the majority insofar as the subsection dealing with watching or besetting was concerned, in that he expressly held that the statute rendered illegal all watching and besetting which could not be brought within the proviso. He said at p. 273:

> Then came the Act of 1875, which, in my opinion, is intended to *define* what kind of watching and besetting shall in future be warranted by law; and the definition, in my opinion, means that watching and besetting shall in future be confined to "watching and besetting merely for the purpose of obtaining or communicating information." . . .
>
> If the persuading takes any other shape than that of a communication within the meaning of the proviso contained in s. 7, this would, in my opinion, make it unwarranted by this section, *even though this persuasion might not otherwise be of such a character as to constitute a nuisance at common law.* And, even if the persuasion does take the shape of such a communication, yet it may be made in such a manner as to constitute a common law nuisance, and thus be wrongful.

He also said:

> I think that the fact that the communication invites the men to discontinue working for the master as soon as they lawfully may does not thereby cause the communication to cease to be a communication within the meaning of the proviso.

While Lindley M.R. and Chitty L.J. considered that the conduct in question in the case constituted a common law nuisance, Vaughan Williams L.J. was of a contrary opinion.

This legislation was again considered in 1906 by the Court of Appeal in *Ward Lock & Company* v. *Operative Printers' Assistants Society* (1), the court, consisting of Vaughan Williams, Stirling and Fletcher Moulton L.JJ., taking, in my opinion, a fundamentally different view of the statute from that taken in the *Lyons Case.* Vaughan Williams L.J. in the *Ward Lock Case,* said at p. 329:

> When the Act of 1875 was passed, the employers had a good cause of action for various forms of nuisance. The Legislature, by the Act of 1875, gave in respect of some of these nuisances, as to which there was a civil remedy, a summary remedy by summons before a magistrate for acts done for which there was previously only a civil remedy. And it seems to me that the words in the first clause of the section, "wrongfully and without legal authority," were introduced for the very purpose of limiting the remedy by criminal prosecution to cases so tortious as to give a civil remedy.

(1) (1906) 22 T.L.R. 327.

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I find it impossible to reconcile this statement with the statement of the same learned judge in the *Lyons Case* quoted above:

> If the persuading takes any other shape than that of a communication within the meaning of the proviso contained in s. 7, this would, in my opinion, make it unwarranted by this section, *even though this persuasion might not otherwise be of such a character as to constitute a nuisance at common law.*

Although Fletcher Moulton L.J. expressed himself as following the authority of Lindley M.R. in the *Lyons Case,* reaching his conclusion, as he said, by a different route, I am, with great respect, unable to appreciate any agreement between the two as to the proper construction of the statute.

In *Reners* v. *The King* (1), upon evidence involving trespass, a conviction for picketing was upheld. Both the *Lyons Case* and the *Ward Lock Case,* as well as the later case of *Fowler* v. *Kibble* (2), were considered, and in the opinion of the majority, the decisions in the *Lyons* and *Ward Lock Cases* concurred in the view that watching or besetting, if carried on in a manner to create a nuisance or otherwise unlawfully, constituted an infraction of the statute. That was sufficient for the case in hand. It is to be observed that the proviso as to attending &c. for the purpose of obtaining or communicating information was not in the Criminal Code at the time of this decision, it having been dropped when the Code was enacted in 1892. It was, however, re-enacted in 1934 and is now part of s. 501 (*g*) of the Code, which reproduces in substance s. 7 of the English statute of 1875.

So far as the English authorities are concerned, it may be significant that, shortly after the decision in the *Ward Lock Case,* the Act of 1875 was amended. By 6 Ed. VII c. 47, the proviso in s. 7 was repealed and it was enacted that it should be lawful to attend not only for the purpose of peacefully obtaining or communicating information, but also for the purpose of peacefully persuading any person to work or abstain from working.

In this state of the authorities I come back to the *Trade-unions Act.* S. 3 exempts the unions, their members, etc., from liability to injunction or damages for

> communicating to any workman, artisan, labourer, employee or person facts respecting employment or hiring by or with any employer, producer

(1) [1926] S.C.R. 499.

(2) (1922) 1 Ch. 487.

or consumer or distributor of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee or person, at the expiration of any existing contract, not to renew the same or to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

While the section covers communication of information and use of persuasion, the authority conferred by the section is expressly conferred apart from "unlawful acts," which leaves open the question as to the legality of the means employed in the communication or persuasion.

As already mentioned, the conduct in question in the case at bar has been found by the learned trial judge and by the learned dissenting judge in the Court of Appeal, not to amount to a common law nuisance, and in that opinion I respectfully concur. No other illegality in connection with the activity carried on is alleged apart from the provisions of s. 501 of the *Criminal Code*, and, in my opinion, the conduct here in question falls squarely within the provisions of paragraph (*g*). Insofar as the statement contained on the signs carried by the pickets was intended to persuade customers or prospective customers not to deal with the respondent, I would agree with the view expressed by Vaughan Williams L.J. in *Lyons* v. *Wilkins*, No. 2, with respect to the invitation contained in the signs in question in that case, which I have quoted above. Accordingly, it is not necessary to consider the question as to whether a breach of s. 501 could form the basis for a civil suit. The contrary appears to have been the opinion of the Court of Appeal for Ontario in an analogous situation; *Transport Oil Company* v. *Imperial Oil Company* (1).

In my opinion, therefore, on the facts proved, s. 3 of the statute affords express authority for what was done by the appellants in the case at bar. Should the proper construction of the section require that the word "person," where used therein the third and fourth times, be read *ejusdem generis*, I know of no ground upon which the signs would become unlawful, merely because in the ordinary course of events, others might also read them.

In the result, therefore, I would allow the appeal and restore the judgment of the learned trial judge, with costs here and below.

(1) [1935] O.R. 215.

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CARTWRIGHT J.—The relevant facts of this case are sufficiently stated in the judgments of other members of the Court and do not require repetition.

I am in agreement with the view that the conduct described in the record cannot be said to be criminal, being saved by clause (*g*) of section 501 of the *Criminal Code*. It remains to be considered whether it is actionable and so liable to be restrained by injunction.

Those portions of the judgment of the learned trial judge against which no appeal was taken restrain the defendants "from establishing a line about the plaintiff's places of business and from stating to prospective patrons that there is a picket line about the said places of business." The judgment of the Court of Appeal (1), in addition to this would restrain the defendants "from watching, besetting or picketing any of the places of business of the plaintiff and from engaging in any activity intended to restrict or limit the plaintiff's business" and would award the plaintiff damages to be assessed.

It does not seem to me to be necessary or desirable to attempt to formulate general rules which will be applicable to all cases, and I propose to confine myself to a consideration of the facts of this particular case.

What is complained of is the fact that two paid agents of the defendant Union, continuously through the hours during which the plaintiff's places of business were open, walked up and down the highway outside such places of business carrying placards bearing the following words:—

> Aristcratic Restaurants have no Union agreements with Hotel and Restaurant Employees' International Union, Local 28, affiliated with Vancouver and New Westminster District Trades and Labour Council.

It appears from the material before the Court that the actions of these agents at no time impeded traffic or interfered with the free and usual use of the highway in such manner as would constitute a public nuisance. It is not suggested that the statements on the placards were not true. It appears from the material that the activities of the defendants' agents caused a falling off in the plaintiff's business and thereby caused damage to the plaintiff. It is conceded that this result was intended by the defendants.

(1) [1951] 1 D.L.R. 360.

For the respondent it is argued that at common law, on the facts stated, the plaintiff would have had a cause of action for a private nuisance. It is said that the conduct of the defendants, mentioned above, resulted in a continuous injury to the plaintiff in the enjoyment of the property of which it is in possession causing it annoyance, inconvenience and actual damage and that, while the defendants' intention may not be material in determining the existence of a nuisance, the intention to injure will be a factor to be considered by the Court in determining whether or not to award an injunction where a nuisance has been held to exist.

I do not think it necessary to decide whether the acts of the defendants would have amounted to an actionable private nuisance at common law. I will assume, for the purposes of this appeal, that they would have done so, but I think it clear that but for the circumstance of the carrying of the placards no nuisance could have been found to exist. It was the conveyance of the information on the placards to the members of the public using the highway, including the prospective patrons of the plaintiff, which caused the annoyance, inconvenience and damage of which complaint is made and on the facts of this case it appears to me that without the conveyance of such information there would have been neither nuisance nor damage.

Having reached this conclusion it seems to me that whether or not the conduct complained of would have been actionable at common law the right of action in this particular case is expressly taken away by section 3 of the *Trade-unions Act*, R.S.B.C. 1948, c. 342. The section reads as follows:—

> 3. No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee, or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributer of the products of labour.

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I agree with my brother Rand that the word "person" as used in the section includes members of the public. I cannot read the words of the section as limited to cases where the conduct of the persons engaged in communicating facts would not be actionable at common law. In such cases no statutory protection or immunity would be required, and the section must be construed, if possible, as serving some useful purpose. Its purpose seems to me to be to provide that the communication of facts, by those mentioned in the section, shall not be actionable whether or not such communication would but for the section have been actionable. The section does not, in my opinion, render lawful any conduct which would be unlawful without the element of the communication of facts, such as, for example, trespass, nuisance or the publication of false statements, but, in the case at bar, as I have already indicated, it seems to me that but for the communication of the facts stated on the placards, the conduct of the defendants would not have been actionable at common law and the Legislature has seen fit to confer immunity from action upon the making of such communications. If the sum total of the conduct of the defendants minus the element of the communication of the information on the placards could be shown to be actionable then, in my opinion, the section would not assist them, but since this cannot be shown, I think they are protected. The fact that in this particular case the plaintiff appears to have suffered a grave hardship can not affect the duty of the Court to give effect to the words of the statute.

For the reasons given by my brother Kellock I agree with him that the conduct of the defendants is not rendered illegal by the provisions of the *Industrial Conciliation and Arbitration Act*.

I would allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellants: *Farris, Stultz, Bull and Farris.*

Solicitors for the respondent: *Freeman, Freeman and Silvers.*