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Inducing Breach of Contract in Trade Disputes: Development of the Law in England and Canada

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(A) Introduction

> [I]f a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong.

In the course of his judgment in the *Posluns* case Gale J., now Chief Justice of the High Court of Ontario, thus defined the tort of inducing breach of contract.[2] The *Posluns* case was an action by a stockbroker against the Toronto Stock Exchange, but it is in the context of trade disputes, especially in cases of picketing, that the tort of inducing breach of contract is significant in Canada. In the confused fact situations arising out of trade disputes Canadian courts have not always been as careful as was Gale, J. to identify each of the elements of the tort, with the result, for example, that liability has been imposed where it was not shown that there was any contract actually breached.

In English trade dispute law, on the other hand, inducing breach of contract is treated as a clearly defined tort consisting of five elements. There must be an act of inducement, which usually takes the form of persuasion of one of the parties to a contract, knowledge of the contract in question, an intention to cause breach of the contract and to injure the plaintiff thereby, and special damage caused by the breach. There must also be an absence of what will be regarded in law as justification.[3] Other considerations enter where what is alleged is indirect inducement of breach of contract by an act illegal in itself, but both direct and indirect inducing breach of contract are bases of tortious liability that, in English law, are carefully circumscribed.

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1 This article is taken, substantially unchanged, from chapter IV of the writer's book, The Liability of Strikers in The Law of Tort; A Comparative Study of Judicial Development of the Law in England and Canada, to be published by the Queen's Industrial Relations Centre.

2 *Posluns* v. *Toronto Stock Exchange and Gardiner* (1965), 46 D.L.R. (2d) 210, at p. 261.

3 See *Rookes* v. *Barnard*, [1964] A.C. 1129 (H.L.), per Lord Devlin at p. 1212.

Not only has liability been imposed in Canada where English law would not recognize that the tort of inducing breach had been committed but, there are other reasons, sounder at least in judicial logic, why the tort has a more important place in Canadian law of industrial conflict. For one thing, there is no statute, like the English Trade Unions & Trade Disputes Act, 1906,[4] that prevents "inducing breach" being based on breach of employment contracts. Almost as important is the fact that in recent cases judicial notice has been taken of 'the rule" against crossing a picket line. Canadian judges now take it as established fact that the ethic of trade unionism is such that unionists will, as a predictable consequence, refuse to "cross another man's picket line". Therefore, it has been held,[5] the picket may be said to have effectively caused any resulting breaches of contract. The English concept of liability for indirect inducement, which is relevant in such a situation, does not seem always to have been clearly understood. Moreover the concept of justification has not been developed to take into account the protection of union interests under a collective bargaining agreement, although Canadian collective bargaining legislation demonstrates irrefutably the legal legitimacy of those interests.

There is, of course, no longer any reason why the law in this country should not depart from that of England where the facts of Canadian life call for it. But the departure should be conscious, to meet the needs of a different environment, and not the result of reliance on a complex and misunderstood head of tortious liability in which substantial changes are made for reasons that can only be guessed at.

(B) The Law In England

The law of inducing breach of contract in England was formed mainly in pre-twentieth century cases that can, with some distortion, be called "labour" cases. In 1906, by Act of Parliament, the "inducer" in such cases was relieved of liability where the contract was one of employment, as it had been in the principal cases up to that time. This political intervention meant that thereafter, the tort was the subject of judicial consideration in cases that, for the most part, did not involve industrial conflict. There were, naturally enough, a considerable number of "labour" cases concerning the scope of ap-

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[4] 6 Edw. 7, c. 47.

[5] *Smith Brothers Construction Co. Ltd.* v. *Jones*, [1955] 4 D.L.R. 255 (Ont. H.C.); *Hersees of Woodstock* v. *Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.); and see *infra*, footnotes 288-239 and accompanying text.

plication of the Act of 1906, and the decisions on this point may well be of more importance in the law of England than the cases on "inducing breach" itself. In what follows, the development of the tort of inducing breach of contract in the 19th century is considered first, followed by a consideration of section 3 of the Trade Unions Trade Disputes Act, 1906 (U.K.) and its effect on liability for inducing breaches of contracts of employment. The next two heads deal with twentieth century refinements relating to the questions of what consititutes "inducing" and when there may be said to be "justification". The concluding part of this section is an examination of the complex basis of liability for indirect inducement of breach of contract that has been developed in two of the leading English labour cases of recent years.[6] It may be that liability for such indirect inducement is really something quite different from the *sui generis* tort of inducing breach. Whether that is so or not, it is an area of the law that deserves, and demands, analysis.

Development of the tort of inducing breach of contract in the 19 century

In the early common law a master who, by violence to his servant, was deprived of the man's services had a right of action against the wrongdoer. The Statute of Labourers of 1349,[7] and the Statute of Labourers, 1350,[8] gave a master an action for the enticement of his servants out of his service, even where there was no violence.[9] The modern, and such restricted,[10] action *per quod servitium amisit*, which is based on interference with the status of the servant in the master servant relationship,[11] has evolved from these roots.[12] Whatever the derivation of these rights of action it was clear in the 19th century that there was a right of action for interference with contractual relations, but it was limited to interference with contracts of service.

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[6] *J. T. Stratford and Son Ltd.* v. *Lindley*, [1965] A.C. 269 (H.L.); *Thomson* v. *Deakin*, [1952] Ch. 646 (C.A.).

[7] 23 Edw. III.

[8] 25 Edw. III.

[9] See Sayre, *"Inducing Breach of Contract"* (1923) 36 Harv. L. Rev. 663.

[10] *I.R.C.* v. *Hambrook*, [1956] 2 Q.B. 641.

[11] *A.G. for New South Wales* v. *Perpetual Trustee Co. Ltd.*, [1955] A.C. 457, at p. 483.

[12] So, too, did the action for wrongful retainer, which was based on interference with the contract of service. *Blake* v. *Lanyon* (1795), 6 T.R. 221; 101 E.R. 521. See Jones, *"Per Quod Servitium Amisit"*, (1958) 74 L.Q.R. 39.

From this material, in *Lumley* v. *Gye*[13] in 1853, the Court of King's Bench created, a new cause of action. Miss Johanna Wagner, an operatic performer of unique talents, had contracted with the plaintiff to sing exclusively in his production. The defendant persuaded her to perform for him, in breach of her contract with the plaintiff. It was argued for the defendant that, because Miss Wagner's was not a contract of service, but a contract to perform services, no action would lie for inducing her to act in breach of it. The court was, however, not to be influenced by the novelty of their argument. Said Crompton J.,

> The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time...[14]

Counsel had also argued on the broad ground that a wrong intentionally done to another must always give him a right of action. Crompton J. did go on to say that, while he based his decision on the narrower ground of analogy to a master's right of action where he has been deprived of his servant's services, he did not wish to be taken as saying that the wider argument advanced by counsel was not tenable. Nor was he confining the right of action for "malicious" inducement of breach of contract to cases involving contracts for personal services.

Erle J. agreed in the result but based his decision on the broad ground that the "procurement of the violation of a right is a cause of action in all instances", including breach of contract.[15] Wightman J., however, said that it was not necessary to rely on such general principles and, like Crompton J., he based his decision on a master's historic rights of action. In his opinion the right of action for procuring persons to quit service antedated the Statute of Labourers. It was not limited to menial servants and others to whom the Statute applied and extended to persons who had contracted for personal service for a time. Coleridge J., who dissented, took the opposite

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[13] (1853), 2 E. & B. 216; 118 E.R. 749 (Q.B.).

[14] *Ibid.*, at p. 227 (E. & B.), p. 753 (E.R.).

[15] *Ibid.*, at p. 232 (E. & B.), p. 755 (E.R.). Erle J. stands out as the foremost exponent in the 19th century of a judicial attitude which seemed based on " 'Laisez faire' as a legal rule rather than a political maxim", to borrow the phrase used in Finkelman. *"The Law of Picketing in Canada: II"* (1937-8) 2 U. of T. L.J. 344, at p. 355.

view. In his opinion such rights of action were based on the Statute of Labourers, and were not to be extended.

These judgments did not receive reported consideration until *Bowen* v. *Hall*,[16] in 1881. In the opinion of the Court of Appeal, the facts in that case fell clearly within the rule in *Lumley* v. *Gye*. The only question, said Brett L.J., with whom Lord Chancellor Selborne concurred, was whether that case should be approved by a Court of Error.[17] It seemed to His Lordship that the dissenting judgment of Coleridge J. had been "as nearly as possible, if not quite, conclusive,"[18] that the right of action for interference with contracts of service was based on and confined to such contracts as were covered by the Statute of Labourers.[19] On the wider ground of the decision in *Lumley* v. *Gye*, that taken by Erle J., the case was, however, in His Lordship's opinion, correctly decided; that is,

> if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act... and... an actionable act if injury ensues from it.[20]

It then seemed an obvious step for his lordship, sitting as Lord Esher M.R., in *Temperton* v. *Russell*, a decade later, to suggest that there was no distinction between inducing persons to breach contracts already existing and inducing them not to enter into contracts. "There was the same wrongful intent in both cases, wrongful because malicious".[21]

In *Allen* v. *Flood*, however, the majority of the House of Lords thought that the step that Lord Esher had taken was far from obvious. Said Lord Herschell,

> So far from thinking it a small step from the one decision to the other, I think there is a chasm between them...

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[16] (1881), 6 Q.B.D. 333 (C.A.).

[17] *Ibid.*, at p. 337.

[18] *Ibid.*, at p. 340.

[19] In *De Francesco* v. *Barnum* (1890), 63 L.T. 514 (Ch. Div.) it was held that *Bowen* v. *Hall* and *Lumley* v. *Gye* were authority that the action for wrongful retainer did not depend on the Statute of Labourers, by then repealed.

[20] *Supra*, footnote 16, at p. 338.

[21] [1893] 1 Q.B. 715 (C.A.) at p. 728.

The other two members of the Court of Appeal simply based their decisions on the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person or get a benefit for himself, commits an actionable wrong; per Lopes, J., at p. 730. To the same effect, see A. L. Smith, L.J., at pp. 732-33. Lopes, L.J. did not decide on the broad ground that Lord Esher, M.R. did, nor did he say that it is actionable for *one* person to induce others not to enter contracts. Lord Macnaghten, in *Quinn* v. *Leathem*, [1901] A.C. 495, (H.L.), at p. 508 seems to indicate that that is what Lopes, L.J. did say.

> I thing this was an entirely new departure. A study of the case oi *Lumley* v. *Gye* has satisfied me that in that case the majority of the Court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action.[22]

Lord Macnaghten, while he took the same view, pointed out that *Bowen* v. *Hall* and *Temperton* v. *Russell* did stand as authorities that the action for procuring a person to break a contract was not confined to contracts for personal services, but like Lord Herschell,[23] he declined to give the authority of the House of Lords to the action for inducing breach of contract.[24] In the words of Lord Shand,

> If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration.[25]

Nor did the House of Lords deal with this head of liability in *Quinn* v. *Leathem*, where their Lordships' concern was to demonstrate that *Allen* v. *Flood* applied only to acts of individuals. In the process they rehabilitated *Temperton* v. *Russell*, but it was *Temperton* v. *Russell* "disembarrassed of the expressions which Lord Esher unfortunately used".[26]

In *Quinn* v. *Leathem* Lord Macnaghten, however, did use, by way of illustration of a broader principle, the following words which have been heavily relied on in some later cases [27] (and now stretched to their uttermost limits by Canadian courts in trade dispute cases [28]);

> [I]t is a violation of a legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.[29]

The right of action for inducing breach of contract as established in English law by the turn of the century,[30] nevertheless, clearly

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[22] [1898] A.C. 1 (H.L.), at p. 121. See also Lords Watson, Davey and James of Hereford at pp. 109, 171 and 179.

[23] *Ibid.*, at p. 123.

[24] *Ibid.*, at p. 153.

[25] *Ibid.*, at p. 168.

[26] [1901] A.C. 495 (H.L.), per Lord Macnaghten at p. 509. Their lordships were concerned only with the "conspiracy to injure" aspects of *Temperton* v. *Russell*.

[27] E.g. *D. C. Thomson & Co. Ltd.* v. *Deakin and Others*, [1952] Ch. 646 (C.A.); *Fokuhl* v. *Raymond*, [1949] 4 D.L.R. 145 (Ont. C.A.).

[28] See *infra*, footnotes 111 and 196 and accompanying text. However, in a context not involving trade unions tbe orthodox English approach has recently been affirmed. See *Posluns* v. *Toronto Stock Exchange and Gardiner* (1964), 46 D.L.R. (2d) 210, at p. 266, per Gale, J., affirmed without adverse comment on this point by the Ontario Court of Appeal in (1965), 53 D.L.R. (2d) 193, especially at pp. 195 and 207.

[29] *Supra*, footnote 26, at p. 510.

[30] E.g. see *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland & Wales and others*, [1902] 2 K.B. 732.

required "interference with actual contracts".[31] *Allen* v. *Flood* established such a requirement to be the law, and it has continued to be a necessary element in establishing liability where there is no conspiracy or intimidation.[32] In 1964 Lord Donovan said in the course of delivering one of the majority judgments in *Stratford* v. *Lindley*,

> the argument that there is a tort consisting of some undefinable interference with business contracts, falling short of inducing a breach of contract, I find as novel and surprising as I think the members of the House who decided *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*[33] would have done.[34]

The requirement that the breach of an actual contract be shown is implicit in the judgments in *South Wales Miners' Federation* v. *Glamorgan Coal Co.*,[35] the first inducing breach of contract case decided by the House of Lords. In that case the defendant federation (a registered trade union)[36] had been formed to protect the interests of its members under an agreement setting up a sliding scale of the kind upon which miners's wages were based throughout most of England and Wales.[37] Wages rose and fell with the price of coal. The Federation, therefore, considered it to be in the best interest of its members to order a "stop day". Many thousands of men, in obedience to the order, broke their contracts of service. The action in this case was then brought by the Glamorgan Coal Company and seventy-three other coal companies, claiming damages for "wrongfully and maliciously procuring and inducing workmen in the collieries to break their contracts of service with the plaintiffs",[38] and alternatively, for conspiring to do so. The trial judge found that the defendant union officers had acted from an honest desire to forward the interests of the workmen, and in no sense from ill-will or a desire to injure the employers. His decision for the defendants was reversed by the Court of Appeal.[39]

The House of Lords upheld the decision of the Court of Appeal on the grounds, in the words of Lord Macnaghten, that

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[31] *Posluns Case, supra,* footnote 28, at p. 266.

[32] As outlined in *Rookes* v. *Barnard,* [1964] A.C. 1129 (H.L.), and see the writer's comment in (1964) 42 Can. Bar Rev. 464. Further with regard to the relationship between "inducing breach" and "intimidation" see *infra,* footnotes 139-141, and accompanying text.

[33] [1942] A.C. 435 (H.L.).

[34] *J. T. Stratford and Son Ltd.* v. *Lindley,* [1965] A.C. 269 (H.L.), at p. 340.

[35] [1905] A.C. 239 (H.L.).

[36] It had been decided in the *Taff Vale* case, [1901] A.C. 426 (H.L.), that a registered union was a suable entity.

[37] See Sharp, *Industrial Conciliation and Arbitration in Great Britain,* (1950) (London), Chapter II.

[38] *Supra,* footnote 35, at p. 239.

[39] [1903] 2 K.B. 545.

> It is not disputed... that the union... acting by its executive, induced and procured a vast body of workmen, members of the union, who were at the time in the employment of the plaintiffs, to break their contracts of service, and thus... knowingly and intentionally inflicted pecuniary loss on the plaintiffs.[40]

This, in his Lordship's opinion, was an actionable wrong. Lord Macnaghten then considered the argument that since there was no ill-will, but only an honest desire to further union interests there should be no liability. He said,

> It is no defence to say that there was no malice or ill-will against the masters... It is settled now that malice in the sense of spite or ill-will is not the gist of such an action as that which the plaintiffs have instituted.[41]

Lord Lindley pointed out that in such cases it is better to drop the word "malice" altogether, where all it means is "an intention to commit an unlawful act."[42]

It was thus established that the tort of inducing breach of contract had been committed, in that the defendants had knowingly and intentionally caused damage to the plaintiffs [43] by getting the miners to break their contracts, and a lack of spite or ill-will did not constitute justification for such behavior.

Section 3 of the trade disputes act, 1906 (U.K.)[44] *inducing breaches of contract of employment*

The Royal Commission on Trade Disputes and Trade Combinations of 1906 apparently felt almost as strongly about the sanctity of contracts of employment as did the House of Lords. The trade union right to strike, which the Commission recommended should be assured by statute, firmly excepted any privilege of breaking or inducing the breach of contracts.[45] However, Sir Charles Dilke added the first provision of what is now section 3 of the Trade Disputes Act, 1906 to the section as originally proposed in order to prevent

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[40] *Supra*, footnote 35, at p. 245, and see Earl of Halsbury, L.C., at p. 244, Lords Jamees and Lindley at pp. 250, 253.

[41] *Ibid.*, at pp. 245-6.

[42] *Ibid.*, at p. 255, see also Lord James at p. 250.

[43] "Damage is the gist of actions such as the present; that in order to succeed and make a good case for either damages or an injunction damage must be proved, not, indeed, damage in detail or special damage in the narrow sense of that epithet, but actual damage — damage... which has been, or, where an injunction is sought... will be, the natural consequence of the act complained of." *National Phonograph Co., Ltd.* v. *Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335 (C.A.), per Kenedy, L.J., at p. 370.

[44] 6 Edw. 7, c. 47.

[45] Cd. 2825, Summary of Recommendations Nos. 2 and 3.

the tort of inducing breach of contract from being used to defeat the right to strike.[46] That section provides:

> An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment...

Since 1906, therefore, the tort of inducing breach of contract has been of less importance in trade disputes.[47] Obviously, it becomes of importance in any case in which the contract in question is not one of employment [48] or where the court finds that the inducing was not done "in contemplation or furtherance of a trade dispute". Section 5(3) of the 1906 Act provides:

> In this Act and in the Cospiracy and Protection of Property Act, 1875,[49] the expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; (and in section 3 of the last mentioned Act, the words "between employers and workmen" shall be repealed).[50]

Attacks on the immunity formula in the 1906 Act, thus defined, have been frequent. In 1909, in *Conway* v. *Wade*,[51] the House of Lords held that there was no trade dispute where the trouble arose from a union official's attempt to force a recalcitrant member to pay a fine imposed by the union for breach of its rules, and to punish him for not paying it. Lord Chancellor Loreburn, with whom Lords Macnaghten and Correll concurred, said of this matter; "A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite and of real substance.[52] Before

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[46] Parl. Deb. (4th ser.) Vol. 162, Col. 1678. Canadian experience indicates how vital this protection is — see *infra*, footnotes 181-185 and accompanying text.

[47] See now the Trade Disputes Act, 1965, s. 1(1)(b), which makes the same exception to liability for *threatening* to induce breaches of contract of employment.

[48] E.g. *Bents Brewery Co., Ltd.* v. *Luke Hogan*, [1945] 2 All E.R. 570; *Thomson* v. *Deakin, supra*, footnote 27; *J. T. Stratford and Son Ltd.* v. *Lindley*, [1965] A.C. 269 (H.L.), as that case was seen by Lords Pearce and Donovan.

[49] The words in the 1906 Act granting immunity from liability for civil conspiracy to injure were added as an amendment to section 3 of the 1875 Act (38 and 39 Vict., c. 86).

[50] The scope of the protection offered by the Act is obviously dependant on the courts' interpretation of the words "all persons employed in trade or industry", as well on the matters considered in the text. On this see Hickling, M. A., *Restoring the Protection of the Trade Disputes Act: Some Forgotten Aspects* (1966) 29 M.L.R. 32, at pp. 33-39.

[51] [1909] A.C. 506 (H.L.).

[52] *Ibid.*, at p. 510.

the 1906 Act had been passed the immunity formula, as it appeared in The Conspiracy and Protection of Property Act, 1875, had been held to apply only where the dispute was between the defendant workmen and his own employer,[53] but Lord Loreburn pointed out that, under the new definition, immunity could not be considered to apply only to acts done by the immediate parties to the dispute. He then continued,

> If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity with other people's work or business, a jury would be entirely justified in saying that what he did was done in contemplation or furtherance, not of a trade dispute, but of his own designs, sectarian, political or purely mischievous, as the case may be.[54]

As was recognized in *Conway* v. *Wade*, the Act was quite clear that any dispute over the usual subjects of industrial disagreement fell within the immunity formula, and it left little doubt that ordinary sympathetic action was covered. However, Lord Loreburn's "meddler" and the requirement of "workmen" as necessary parties to a "trade dispute" could be a dangerous combination in the hands of courts who still tended to see all unions as meddlers bent upon taking advantage of, rather than acting for, workmen.[55]

That line of attack, however, was laid to rest in 1943 by Lord Wright when, in the course of his judgment in *N.A.L.G.O.* v. *Boulton Corporation*, he said,

> It would be strangely out of date to hold, as was argued, that a trade union cannot act on behalf of its members in a trade dispute, or that a difference

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[53] See Report of the Royal Commission on Trade Disputes and Trade Combinations Cd. 2825, Art. 62:

> It is to be observed that in the above proposed amendment we have omitted after the words 'trade dispute' the words between 'employers and workmen' which are found in section 3 of the Act of 1875. Our reason for so doing is that in *Quinn* v. *Leathem* [1901] A.C. 495 the House of Lords expressed their opinion that the third section of the Act of 1875 would in the case before them have afforded no exemption from criminal liability because the acts of the defendants were not acts, within the terms of the statute, in contemplation or furtherance of a trade dispute between employers and workmen.

[54] *Supra*, footnote 51, at p. 512.

[55] *Valentine* v. *Hyde*, [1919] 2 Ch. 129. See also the following decisions by the Court of Appeal, reversing trial judges who felt that the participation of a union took the industrial action in question out of the protection of the Trade Disputes Act: *Dallimore* v. *Williams & Jesson* (1912), 29 T.L.R. 67 (C.A.) and (1913), 30 T.L.R. 432 (C.A.), and *White* v. *Riley*, [1921] 1 Ch. 1 (C.A.). In *Hodges* v. *Webb*, [1920] 2 Ch. 70 and *Fowler* v. *Kibble*, [1922] 1 Ch. 487 (C.A.) jurisdictional disputes were held to be trade disputes within the meaning of the Act, following *Gaskell* v. *Lancashire & Cheshire Miners' Federation* (1912), 28 T.L.R. 518, at p. 520 per Cozens-Hardy, M.R.

between a trade union acting for its members and their employer cannot be a trade dispute.[56]

A similar line of attack has more recently found favour with the Irish courts,[57] the argument taking the form that where none of the union members are, at the time of the dispute, employees of the employer with whom the union is in dispute, the matter is not a "trade dispute" within the Act. In *Bird* v. *O'Neal*[58] the Privy Council, quoting Lord Wright in the *N.A.L.G.O.* case, rejected a similar argument. There is, therefore, good reason to think that the English courts accept the view that a union's participation in a dispute may provide the element necessary to satisfy the definition in such a case.[59] Somewhat the same issue was raised, for example, in *Beetham* v. *Trinidad Cement*[60] which arose out of a recognition dispute in which a union was attempting to force the employer to accept it as bargaining agent for his employees. The Judicial Committee of the Privy Council, again relying on the *N.A.L.G.O.* case, rejected the argument that a recognition dispute was a dispute between an employer and the union seeking recognition, rather than between "employers and workmen" within the terms of the Act. This would seem to accord with the aims of the 1906 Act because, in English industrial relations, there is no other way to gain recognition than, ultimately, by relying on the sanction of industrial action.

The realities of English Labour relations seem to have been given less consideration however in the recent case of *Stratford* v. *Lindley*.[61] In that case union officials, who ordered their members to refuse to work the plaintiff's barges because he had made a collective agreement with a rival union, were held by the House of Lords not to have been acting "in contemplation or furtherance of a trade dispute". In the Court of Appeal Lord Denning had held, with the concurrence of the other members of the court, that "[w]henever a trade union claims recognition (or negotiation rights, as it is sometimes called) on behalf of its members, and an employer declines to recognize that

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[56] [1943] A.C. 166 (H.L.), at p. 189; approved in *Bird* v. *O'Neal*, [1960] A.C. 907 (P.C.), and in *Beetham* v. *Trinidad Cement*, [1960] A.C. 132 (P.C.).

[57] *Doran* v. *Lennon*, [1945] I. R. 315. In the Irish Republic the 1906 Act was never limited as it was in England by the Trade Disputes and Trade Unions Act, 1927, 17 & 18 Geo. V, c. 22, repealed in 1946 and 9 & 10 Geo. VI, c. 52, so there have been many more cases before the Irish courts dealing with the nature of a trade dispute. See V. T. H. Delany, *Immunity in Tort and the Trade Disputes Act — A New Limitation ?* (1955) 18 M.L.R. 338.

[58] *Supra*, footnote 56.

[59] M. A. Hickling, *The Judicial Committee on Picketing and Trade Disputes*, (1961) 24 M.L.R. 375. But see *Larking* v. *Long*, [1915] A.C. 814 (H.L.).

[60] *Supra*, footnote 56.

[61] *Supra*, footnote 34.

claim, there is a trade dispute within the Act".[62] But, in the House of Lords it was considered important that no formal approach had been made to the plaintiff just before the embargo was imposed. Having failed to make the claim for rights the unionists could not purport to have taken action in contemplation or furtherance of a dispute over the plaintiff's failure to accede.[63] Moreover, this poor timing indicated to their Lordships that the defendants sought "merely the advancement of their union's prestige in rivalry with another union."[64]

If *Stratford and Lindley* is indicative of a more stringent attitude toward the immunity formula [65] in the 1906 Trade Disputes Act, the incidence of the tort of inducing breach of contract in English labour relations will be greatly increased.

Liability for inducing breach is likely to become even more frequent as a result of the Contracts of Employment Act, 1963 [66] in accordance with which many terms formerly contained only in collective agreements will be incorporated into contracts of employment. This problem has already been faced by the Court of Appeal in *Camden Exhibition and Display Ltd.* v. *Lynott.*[67] In that case shop stewards had procured collective refusal to work overtime despite the terms of employment which appeared to provide for certain required overtime. Only Lord Denning interpreted the working rule in question as having been breached, but his Lordship spoke for the court in holding that *prima facie* this was a dispute connected with the terms of employment under which the men were working. Unlike *Stratford* v. *Lindley,* this was a straightforward case of employees trying to force wage concessions from their employer by industrial action directly against the employer himself, but, even so, it was argued nevertheless that the demand for wages was really a specious cover for other ends. The demand, it was said, was made solely for disruptive purposes. The rejection of this argument makes the *Camden* case a valuable reaffirmation of the kind of judicial attitude that

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[62] *Ibid.*, at p. 281, and pp. 289 and 300.

[63] *Ibid.*, at pp. 334 and 341, per Lords Pearce and Donovan.

[64] *Ibid.*, at pp. 323 and 326-7, per Lord Reid and Viscount Radcliffe. Lords Pearce and Donovan express this view as well, *ibid.* Lord Upjohn simply said that the respondents had not made out a *prima facie* case that there was a trade dispute, at p. 337.

[65] See the forceful opinion of Mr. K.W. Wedderburn in his note on *Stratford* v. *Lindley* in (1965) 28 M.L.R. 205, at p. 209.

[66] C. 49, "s. 4(1) ... the employer shall give to the employee a written statement ... giving ... particulars of the terms of employment [as provided] ..."

[67] [1965] 3 W.L.R. 763; [1965] 3 All E.R. 28(C.A.).

made section 3 of the Trade Disputes Act a real source of protection for trade unionists in the years between *Conway* v. *Wade* and *Stratford* v. *Lindley*.

In *Stratford's* case the union did fail to make clear its demands before taking action so it may still be said that the Trade Disputes Act affords protection in the ordinary case of a trade union official calling out the members in breach of their contracts of employment in pursuance of a disagreement with the employer. In such a case the unionist will not be held liable for inducing breach of contract.

Twentieth century refinements

The law of tortious liability for inducing breach of contract, in spite of its inapplicability in most trade dispute cases, has undergone considerable refinement in this century. Rigby L.J. had said in 1896, "[I]t is not, as I understand the law, every procuring of a breach of contract that will give a right of action,"[69] but in the light of subsequent cases this reservation must be taken to have been a reference to cases in which knowledge, causal connection or some other element of the tort was held to be lacking. It now appears that the tort may be based on all classes of contracts.[70]

Lord Devlin, in *Rookes* v. *Barnard*, has given a recent authoritative statement of the tort;[71]

> What are the requisites for a cause of action for inducing breach of contract? There must be, besides the act of inducement, knowledge by the defendant of the contract in question and of the fact that the act induced will be a breach of it; there must also be malice in the legal sense, that is, an intention to cause the breach and to injure the plaintiff[72] thereby and an absence of justification; and there must be special damage, i.e., more than nominal damage, caused to the plaintiff by the breach. These three elements or

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[68] *Ibid.*, at p. 769, and see pp. 770 and 772.

[69] *Exchange Telegraph Co. Ltd.* v. *Gregory & Co.*, [1896] 1 Q.B. 147, at p. 157.

[70] See for example : *National Phonograph Co. Ltd.* v. *Edison Bell*, *supra*, footnote 43, to maintain list prices, etc.; *Goldsoll* v. *Goldman*, [1914] 2 Ch. 603, not to set up business within stated area; *G.W.K.* v. *Dunlop* (1926), 42 T.L.R. 376, to display tyres; *B.M.T.A.* v. *Salvadori*, [1949] Ch. 556, not to resell automobiles; *Bent's Brewery* v. *Hogan*, *supra*, footnote 48, not to disclose confidential information; *Thomson* v. *Deakin*, *supra*, footnote 27, to supply newsprint; *Jasperson* v. *Dominion Tobacco Co.*, [1923] A.C. 709 (P.C.), not to buy beyond limit authorized.

[71] [1964] A.C. 1129 (H.L.), at p. 1212. See also, in the *Crofter* case, [1942] A.C. 435 (H.L.), especially Viscount Simon's statement of this tort, at p. 442. (reproduced *infra*, footnote 232).

[72] On this point, see also *Thomson* v. *Deakin*, *supra*, footnote 27 per Lord Evershed, M.R., at pp. 676-7.

> requisites are the grounds on which an action for inducing a breach of contract must be based. If any one of them is missing, there is no cause of action.

This statement of the tort is probably the most complete judicial pronouncement to be found in the reports, but it leaves at least two points unclear: In the first place, what constitutes inducement; and in the second, what constitutes justification. Furthermore Lord Devlin's statement contains no mention of the concept of "indirect inducement". Although it might be argued that this concept is not properly considered as part of the law of inducing breach of contract at all ,it will be examined, following a consideration of the other two points.

What Constitutes Inducing

It is clear that the "act of inducement" may be an actual physical interference; to be actionable it must be an act in itself unlawful which prevents one party from performing his side of the contract,[73] including, apparently, physical restraint on one of the parties,[74] but in the form which the tort usually takes the inducing consists in persuading one of the parties to breach the contract.[75]

In the *Glamorgan* case[76] Lindley L.J. had appeared to distinguish between the stop-work order given by union officials to their members in that case and "advice" or "counsel".[77] In *Thomson* v. *Deakin,* before the Court of Appeal in 1952, Lord Evershed held that there was no inducement where a direct approach to the contract breaker amounted to nothing more "than a statement of the facts, as the members of the union understood them to be", although there was a "significant" reference to picketing.[78] In *Stratford* v. *Lindley,*[79] on the other hand, two of their Lordships held that there had been "inducement" on the following facts :

The defendant trade union officials first ordered their members not to work barges owned by the plaintiff and then informed the

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[73] *G.K. W.* v. *Dunlop, supra,* footnote 70; *Thomson* v. *Deakin, ibid.,* per Morris and Jenkins, L.J.J. at p. 702 and pp. 694-6.

[74] *Thomson* v. *Deakin, ibid.,* per Jenkins, L.J., at p. 695.

[75] Indirect inducement, as established in *Thomson* v. *Deakin, ibid.,* takes a different form. It is dealt with below, see *infra,* footnotes 106-135.

[76] *Supra,* footnote 35.

[77] *Ibid.,* at p. 254.

[78] *Supra,* footnote 27, at pp. 685-6, see also Jenkins, L.J., at p. 697, where he said that there is "nothing unlawful (...) in general appeals", where what is advocated could equally well be carried out by lawful means.

[79] *Supra,* footnote 34.

plaintiff's customers, who had hired barges from the plaintiff, that it would be impossible to return the barges to him. Because of the union embargo there would be no crew to take the barges back to the plaintiff's moorings. It was held by the House of Lords that ordering the plaintiff's barges "blacked" and informing his customers in this way amounted to inducing breach of the hiring contracts, which impliedly called for return of the barges. As Lord Pearce put it:

> The fact that an inducement to break a contract is couched as an irresistible embargo rather than in terms of seduction does not make it any less an inducement.[80]

Lord Pearce's statement may be thought to weigh against the strict view of what is necessary to establish "inducement," taken by Lord Evershed in *Thomson* v. *Deakin*. It is suggested, however that such is not the case. In fact only two of the judgments [81] treat the facts in *Stratford* v. *Lindley* as establishing a case of *direct* inducement of breach of contract, as that tort was outlined by Lord Devlin in *Rookes* v. *Barnard*.[82] The other three treated it as a case of indirect inducement. One of the prerequisites of liability under the latter head, as established in *Thomson* v. *Deakin*,[83] is an illegal act on the part of the defendants, aside from the inducement itself. Similarly, where there is to be liability for directly inducing breach by means *other than persuasion* those means *must themselves be illegal*.[84] Lord Pearce's statement, equating the effect of the giving of information in *Stratford's* case to "seduction", may therefore be taken to mean simply this: that to inform the other party to the plaintiff's contract that the performance of the contract has been interfered with by means illegal in themselves will give rise to liability as surely as would persuading that other party not to perform. This is a matter quite different from the question of whether or not a communication by the defendant amounted to persuasion, rather than the mere giving of information.

The question of whether the defendant has, by persuasion, brought about the breach is really one of causation.[85] It must be regarded as somewhat unsettled, although Lord Evershed, in *Thomson* v.

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[80] *Ibid.*, at p. 333.

[81] Lord Pearce and Lord Donovan, who concurred on the questions here under consideration.

[82] *Supra*, footnote 71, and accompanying text.

[83] *Supra*, footnote 27, and see *infra*, footnote 113 and accompanying text.

[84] *Supra*, see footnote 73.

[85] *Newell* v. *Barker and Bruce*, [1950] S.C.R. 385, per Estey, J., at p. 393; see *infra* footnote 241 and accompanying text; and see Payne, *The Tort of Interference With Contract* (1954) Curr. Legal Prob. 94, at p. 103; Street, *The Law of Torts* (3rd ed.) (1963) (London), at p. 345.

Deakin did indicate that the courts should not be too ready to find that merely to give information is to persuade. In fact it is probably impossible ever to establish a precise line of distinction between persuasion and advice "meaning by the latter a mere statement of, or drawing of the attention of the party addressed to, the state of facts as they were".[86] It has been held, for instance, that where advice "is intended to have persuasive effects"[87] the advisor may be held liable for inducing the ensuing breach of contract.

It is also clear, however, that "the contract breaker may himself be a willing party to the breach without any persuasion by the third party...."[88] This situation usually occurs in what may be regarded as a special type of inducing case:[89] the case in which the breach occurs because the other party to the plaintiff's contract makes a contract with the defendant inconsistent with the one he has with the plaintiff. In *B.M.T.A.* v. *Salvadori*,[90] Roxburgh J. was at pains to show "active steps" by which the defendant at least facilitated such a breach. His Lordship was prepared, if necessary to treat the offer of a price sufficiently high to make the seller "willing" as the necessary active step. In any such case, however, the defendant has clearly gained an advantage for himself, and that fact should, perhaps, be treated as making his approach something other than mere advice which is allowable because it does not amount to persuasion.[91]

Such cases of "inconsistent dealing" may also arise where the defendant made his contract without knowing of the plaintiff's previously existing one, but continued to take advantage of it, to the plaintiff's detriment, after he learned the facts of the matter.[92] Cases of this kind illustrate the importance of the element of knowledge required in the tort of inducing breach of contract,[93] because in such cases the defendant brings himself within the scope of liability not by entering the inconsistent contract, but by continuing to take advantage of it after he knows of its effect on the plaintiff's prior contract.

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[86] *Thomson* v. *Deakin, supra,* footnote 27, per Lord Evershed, M.R., at p. 686.

[87] *Camden Nominees Ltd.* v. *Forcey,* [1940] Ch. 352, at p. 366.

[88] *Thomson* v. *Deakin, supra,* footnote 27, per Jenkins, L.J., at p. 694.

[89] See H. Lauterpacht, *Contracts to Break a Contract* (1936) 52 L.Q.R. 494.

[90] *Supra,* footnote 70.

[91] But see *Batts Combe Quarry, Ltd.* v. *Ford,* [1943] Ch. 51.

[92] *Thomson* v. *Deakin, supra,* footnote 27, per Jenkins, L.J., at p. 694, quoting *De Francesco* v. *Barnum, supra,* footnote 19.

[93] *British Industrial Plastics, Ltd.* v. *Ferguson,* [1940] 1 All E.R. 479 (H.L.); *British Homophone Ltd.* v. *Kunz and Crystallate Gramophone Record Manufacturing Co. Ltd.* (1935), 152 L.T. 589.

What Constitutes "Justification"

In *Quinn* v. *Leathem* [94] Lord Macnaghten spoke of "justification" for interference with contractual relations. In the *Glamorgan Coal* Case their Lordships acknowledged that there might, in some situations, be justification [95] but they all made it very clear that the sort of trade union self-interest which is now considered a legitimate motive in cases of conspiracy to injure [96] has no place in the tort of inducing breach of contract. Lord James said,

> The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act.[97]

Although "justification" was, in this way, brushed aside almost impatiently by the House of Lords in the *Glamorgan* case, lack of justification survived [98] as an element of the tort of inducing breach of contract.

Then only justification aside from statute,[99] which the courts seem fully prepared to recognize is one based on a prior existing contract.[100] Where the person induced is party to a previous contract with the defendant, as Buckley L.J. observed in *Smithies* v. *National*

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[94] *Supra*, footnote 26.

[95] *Supra*, footnote 35, per Earl of Halsbury L.C., at p. 244, Lords James, Lindley and Macnaghten at pp. 251, 254 and 246.

[96] *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435. Fleming, *The Law of Torts* (3rd ed., 1965), at p. 668 and p. 659.

[97] *Supra*, footnote 35, at p. 252. See also Earl of Halsbury L.C. at p. 244, Lords Macnaghten and Lindley at pp. 246 and 254.

[98] In Lord Devlin's exposition in *Rookes* v. *Barnard*, for example. See *supra*, footnote 71 and accompanying text.

[99] *Stott* v. *Gamble*, [1916] 2 K.B. 504 may be considered to be an example of statutory justification.

[100] In the *Glamorgan* case, *supra*, footnote 35, at p. 254, Lord Lindley mentioned the duties of a parent or guardian as possible justification. Subsequent authorities mention a parent's right to persuade his daughter not to perform a contract to marry as an example of justification; see e.g. the *Crofter* case, *supra*, footnote 71, per Lord Simon, at p. 442; *Pratt* v. *B.M.A.*, [1919] 1 K.B. 244, at p. 265; and see also *Couldrey* v. *Orrin* (1955) unrep., referred to in *Salmond on Torts* (13th ed., 1961) (London), at p. 662. In *Brimelow* v. *Casson*, [1924] 1 Ch. 302, a plea of justification on behalf of the Joint Protection Committee of various actors' associations was allowed in an action against them for inducing the breach of contracts between theatre managers and the plaintiff, who ran a revue in which he drastically underpaid his chorus girls. This is the only case in which "justification" in a sense that negatives malevolence, or in any moral or economic sense based on public policy, has succeeded. e.g. see *Bents Brewery Co. Ltd.* v. *Lord Hogan*, [1945] 2 All E.R. 570, and the review of authorities by Simonds, J. in *Camden Nominees* v. *Forcey*, *supra*, footnote 87.

Association of Operative Plasterers,[101] the courts will not only consider inducing the breach of a subsequent inconsistent contract justified; the "inducer" may invoke the help of the courts in enforcing the prior contract and thus causing breach of the second one. Similarly, where the plaintiff, rather than the person induced, is party to a prior contract with the defendant, which is inconsistent with the one that has been breached, the courts may well regard this as giving the inducer (defendant) a right, amounting to justification,[102] to interfere with the subsequent contract.

It has been suggested [103] that the enforcement of a pre-existing collective bargaining agreement might be regarded, under these principles, as justification for trade union officials inducing the breach of an inconsistent contract. Although there is some authority upon which to base this proposition,[104] the fact that such agreements are generally considered not to be legally enforceable contracts might well be a stumbling block.[105]

Indirect inducement of breach of contract

In the case of *D.C. Thomson & Co. Ltd.*, v. *Deakin* [106] the Court of Appeal engendered a new concept, that of "indirect inducement" of breach of contract, which has since been accepted by the House of Lords in *Stratford* v. *Lindley.*[107]

The defendant in *Thomson* v. *Deakin* was General Secretary of the Transport and General Workers Union. The plaintiffs were employers of non-union labour, in the printing and publishing trade.

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[101] [1909] 1 K.B. 310 (C.A.), at p. 337; see also *Pratt* v. *B.M.A., ibid.*, at pp. 265-6.

[102] *Smithies* v. *National Association of Operative Plasterers, ibid.*, per Buckley, L.J., at p. 337.

[103] N. A. Citrine, *Trade Union Law* (2nd ed., 1960) (London), at pp. 470-1; Clerk and Lindsell on *Torts* (12th ed., 1961) (London), chapter 12, note 65.

[104] *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 K.B. 88 (Div. Ct.), 732 (C.A.), per Darling, J., at p. 96, and Stirling, L.J. in the Court of Appeal, at p. 742. Citrine, *supra*, footnote 103, at pp. 470-1, makes the same suggestion, where the plaintiff is a member of the defendant union, with regard to the rules of a trade union, which may be a lawful and valid contract, although, by section 4 of the Trade Union Act, 1871, not directly enforceable.

[105] This point is taken up in somewhat greater detail when the Canadian law is considered. In Canada collective agreements are, by statute, made binding on the parties to them, which allows much greater scope for contractual justification in trade disputes.

[106] [1952] Ch. 646 (C.A.).

[107] *Supra*, footnote 34.

Union opposition to this anti-union policy led to a strike of the plaintiff's employees, many of whom had organized secretly. Bowaters Ltd. had a contract to supply the plaintiffs with paper. In support of general exhortations by the defendant, to "black" the plaintiffs, Bowaters' truck drivers, who were members of the T.G.W.U., gave their employer notice that they might not be prepared to make deliveries to the plaintiffs on the following Monday. Bowaters' loaders took similar action. In fact, Bowaters never did call upon either its truck drivers or its leaders to service the plaintiffs, but simply informed the plaintiffs that they would not make deliveries.

On these facts the plaintiffs conceded that there was no actionable conspiracy to injure and Upjohn J., held that the defendants had not committed the tort of inducing breach of contract and could not be enjoined. He decided on the ground that

> There never was any direct action between the defendants or agents on their behalf and Bowaters with the object of persuading or causing Bowaters to break their existing contracts with the plaintiffs.[108]

The Court of Appeal, although they upheld the decision of Upjohn J., based their conclusion on the finding of fact that Bowaters had acted voluntarily in cutting off the plaintiff's supplies and had acted prior to any actual breach of contract by their employees which might have forced a stoppage of supplies to the plaintiff. The Court of Appeal did not share Upjohn J.'s opinion that the tort of inducing breach of contract could not be committed other than by direct procurement,[110] although on the facts of the case before them there was neither direct nor indirect procurement.

Harking back to Lord Macnaghten's reference to this tort (in *Quinn* v. *Leathem)* in wide terms of "interference with contractual relations",[111] the court, although it acknowledged that no such case had been decided before,[112] established, as authoritatively as was possible in light of the finding of fact, that liability for inducement of breach of contract is not limited to cases of direct procurement. Jenkins L.J. expressed the limits of liability for indirect inducement as follows;[113]

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[108] *Supra,* footnote 106, at p. 662.

[109] *Ibid.,* per Lord Evershed, M.R., at p. 685, Jenkins, L.J., at p. 695 and 699 and Morris, L.J. at p. 703.

[110] *Ibid.,* per Lord Evershed, M.R., at p. 687.

[111] *Supra,* footnote 29 and accompanying text. See Lord Evershed, M.R. in *Thomson* v. *Deakin, ibid.,* at p. 674; Jenkins and Morris, L.J.J., at pp. 693 and 700 also referred to Lord Lindley's statement in *Quinn* v. *Leathem,* at p. 535.

[112] *Ibid.,* per Lord Evershed, M.R., at p. 674, Jenkins, L.J., at p. 696.

[113] *Ibid.,* per Jenkins, L.J., at p. 696; Lord Evershed expressed a similar opinion at p. 679, Morris, L.J. concurred generally, at p. 702.

> ...I think that in principle an actionable interference with contractual relations may be committed by a third party who, with knowledge of a contract between two other persons and with intention of causing its breach, or of preventing its performance, persuades, induces or procures the servants of one of those parties, on whose services he relies for the performance of his contract, to break their contracts of employment with him, either by leaving him without notice or by refusing to do what is necessary for the performance of his contract, provided that the breach of contract between the two other persons intended to be brought about by the third party does in fact ensue as a necessary consequence of the third party's wrongful interference with the contracts of employment.

This formulation makes it clear that, where the defendant is alleged to have brought about a breach of the plaintiff's contract *indirectly*, the act from which this result is alleged to have flowed must itself have been illegal.[114] Where the defendant simply persuades the other party to the plaintiff's contract to commit a breach, it is clear, of course, that on that basis alone the defendant incurs liability, but where he interferes by any other means, the means must themselves be illegal.[115] The distinctive feature of "indirect inducing" is that, while the means of causing the breach in the plaintiff's contract must be illegal in themselves, the illegality need not be a wrongful act that would give *the plaintiff* a right of action, had it not resulted in the breach of contract upon which the action is founded. Both Lord Justice Jenkins and Lord Justice Morris give the example of a case in which the defendant takes away the tools with which a third party who has a contract with the plaintiff is to perform his obligations under it. In such a case only the third party has a right of action for the removal of the tools, but the plaintiff will have a right of action for the resulting interference with his contract. In *Thomson* v. *Deakin* itself the alleged illegal inducement of breaches of contracts of service corresponded to the taking away of tools in the example given.[116]

Jenkins L.J. 's statement of the limits of liability for indirect inducement of breach of contract calls for explanation of the phrases "necessary consequence" and "knowledge of a contract", as used by his Lordship. He subsequently defined "necessary consequence" as meaning that,

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[114] *Ibid.*, per Jenkins, L.J., at 696, Morris, L.J., at p. 702 and Lord Evershed, M.R., at p. 678-9.

[115] *Supra*, footnote 73, and accompanying text.

[116] Although it might be thought the the effect of section 3 of The Trade Disputes Act, 1906 would be to render such inducing not "illegal" this was not the view of the court. See *infra*, footnotes 130-132.

> by reason of the withdrawal of the services of the employees concerned, the contract breaker was unable, as a matter of practical possibility, to perform his contract;...[117]

In *Stratford* v. *Lindley* Lord Pearce expressly agreed with this dictum on "necessary consequence" as it applied to cases of *indirect* inducement.[118]

As mentioned above, the facts in *Stratford* v. *Lindley* were treated by Lords Pearce and Donovan as revealing direct inducement and by the other three law lords as showing only indirect inducement.[119] The case arose as follows: Three members of the Watermen's Union were employees of Bowker and King, a barge operating company wholly owned by the owners of J.T. Stratford and Son Ltd. (and treated by the House of Lords as part of the same entity for purposes of this case). Having in previous years refused to recognize any union, Bowker and King came to an agreement in 1963 with the Transport and General Workers Union. As a result of this grant of negotiation rights to a rival union, officials of the Watermen took boycott action against Stratfords; they ordered dockworkers who were members of their union not to work barges hired from Stratfords, and then informed the hirers of the fact. There was some question whether the dockworkers' refusal to work barges hired from Stratfords constituted a breach of employment contracts, and whether implied contracts between the hirers and Stratfords were in fact breached as a result, but the House of Lords held for the plaintiffs on both of these questions.

Lords Reid and Upjohn, and Viscount Radcliffe held that the defendants had indirectly induced breach of the contracts between Stratfords and the hirers by causing the dockworkers to break contracts of employment with the hiring companies. But Lords Pearce and Donovan held that informing the barge hirers of the boycott amounted to a direct inducement of breach of the hiring contracts. There being, in his opinion, such a direct inducement, Lord Pearce held that

> if the defendants intended to procure the breach, and successfully procured it as a reasonable consequence of their acts and their communications to the hirers... it is not, in my opinion, a defence to say that the hirers could have somehow avoided the breaches.[120]

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[117] *Supra*, footnote 106, at p. 697.

[118] *Supra*, footnote 34, at p. 333. Lord Donovan concured with Lord Pearce on this point, at p. 342.

[119] *Supra*, footnote 34, per Lord Pearce and Lord Donovan, at pp. 334 and 342 and per Lords Reid and Upjohn and Viscount Radcliffe, at pp. 323-4, 338 and 328.

[120] *Ibid.*, at p. 333.

His Lordship therefore rejected the argument that it was not established that the hirers' breach was a "necessary consequence", because the plaintiffs might have tried to employ men belonging to other unions. However, Lord Pearce added, by way of dictum:

> In a case where the defendant does not communicate any direct pressure or persuasion to the contract breaker, but merely procures indirectly a situation that causes the breach, I am inclined to agree with the dictum of Jenkins, L.J. that it must be shown "that breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment". But that is not this case.[121]

This statement is especially important in light of the fact that the three Law Lords who did treat the case as one of indirect inducement did not deal with the "necessary consequence" argument.[122] It may be asserted therefore that Jenkins, L.J., in *Thomson* v. *Deakin*, correctly stated the requirement of "necessary consequence" in establishing liability for *indirect inducement* of breach of contract. The inducement of breach of contracts of employment or other illegal act by the defendant which the plaintiff is alleging must "as a matter of practical possibility" render the other party to the plaintiff's contract incapable of performing his obligations.

Stratford v. *Lindley* may have brought about a change of considerable importance in the requirement of "knowledge of the contract", (i.e. the contract the breach of which is indirectly induced). In the Court of Appeal it had been held that there was insufficient knowledge to found the action for indirect inducement. "It must be shown" said Lord Denning, M.R., "that the defendants knew of the relevant terms of the contracts and intended to procure breaches of them." [123] In the House of Lords, on the other hand, Lord Pearce said, "The relevant question is whether they had sufficient knowledge of the terms to know that they were inducing a breach of contract".[124] This would seem to mean, for instance, that where a union leader calls a wholesale grocer's truck driver out on strike in breach of his contract of employment the union leader will be liable to retail merchants who fail to get deliveries. Formerly it had been thought necessary that the union leader know of the specific delivery con-

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[121] *Ibid.*, at p. 333.

[122] Presumably their Lordships made the assumption that the hirers had rightly considered it not a matter of practical possibility to attempt to hire other men to work the barges, in the light, perhaps, of the Watermen's strength on the docks.

[123] *Supra*, footnote 34, at p. 288. Both Salmon, L.J. and Pearson, L.J. agreed that the plaintiff had not made a *prima facie* case that the defendants knew of the contracts in question; at pp. 296 and 301.

[124] *Ibid.*, at p. 332.

tract in question [125] but if Lord Pearce is correct it is sufficient that he knew in a general way that there would be such contracts.[126]

It must be borne in mind, however, that Lord Pearce decided *Stratford* v. *Lindley* on the basis that there was *direct* inducement of the breach of the hiring contracts. This means that his statements with regard to the knowledge required to found an action for *indirect* inducement are reduced to the status of *obiter dicta*. Lords Radcliffe and Reid, who did grant the injunction on the basis of indirect inducement, are somewhat less clear on the knowledge required. Lord Reid, for example, said that it must have been obvious to the defendants that the hiring was by contract, and he said "it is reasonable to infer that they did know [that their interference would involve breaches of these contracts]."[127] Moreover, Lords Upjohn and Donovan, and Viscount Radcliffe really said nothing more than that knowledge of the contracts of hiring had been *prima facie* established.[128] If Lord Pearce is correct, the knowledge "hurdle"[129] which faces the plaintiff is considerably lowered, and indirect inducement takes on added importance for trade unionists in England. But whether or not he is correct must, it is submitted, await further judicial clarification.

Lord Justice Jenkins' formulation in *Thomson* v. *Deakin* of the basis of liability for indirect inducement of breach of contract [130] raises the further question whether, where section 3 of the Trade Disputes Act, 1966 applies, as it would have in *Thomson* v. *Deakin* itself, the "unlawful act" of inducing the employees to break their contracts of service (and thus indirectly procuring the breach of the principal contract) would be rendered not "unlawful" by the effect of that section. Jenkins L. J. does not deal with this question and Morris L. J. expressly declined to decide it,[131] but Lord Evershed said,

> I should, therefore, be prepared to hold that the defendants would not be entitled to resist the plaintiffs' claim merely by saying that their own

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[125] See *Thomson* v. *Deakin*, *supra*, footnote 106 per Jenkins, L.J., at p. 699.

[126] This appears to be the law in Canada. See Carrothers, *Collective Bargaining Law in Canada* (1965) (Butterworths; Toronto), at p. 473, citing *Body* v. *Murdoch*, [1954]O.W.N. 334, at p. 337.

[127] *Stratford* v. *Lindley*, *supra*, footnote 34, at p. 324.

[128] *Ibid.*, at pp. 338, 342 and 328.

[129] Wedderburn, "Note", *supra*, footnote 65, at p. 206. See now *Emerald Construction* v. *Lothian*, [1966] 1 W.L.R. 691 (C.A.), which seems to confirm Lord Pearce's view, but it, too, was a case of *direct* inducement of breach of contract.

[130] *Supra*, footnote 113 and accompanying text.

[131] *Supra*, footnote 106, at p. 703.

> procuration of the workmen's breach of contract was vis-a-vis Bowaters protected by section 3.[132]

Lord Evershed's dictum amounts to this: That English law recognizes as "unlawful", acts which are neither criminal nor actionable. There seems to be little basis in English jurisprudence for such a view, and certainly the contrary view is stressed by the judgment of Salmon L.J. in the Court of Appeal decision in *Stratford* v. *Lindley*.[133] Moreover, it must be considered significant that in the House of Lords judgments in *Stratford* each of the three Law Lords who based his decision on indirect inducement was concerned to establish that there was no trade dispute so that the 1906 Act could not apply and render "not actionable" the inducement of breaches of the dockers employment contracts.[134] Presumably their Lordships thought that if that inducing were rendered "not actionable" it would, by the same token, be no longer unlawful, in which case, as Salmon L.J. had held, the defendants would not be liable for inducing breach of the principal contracts.

In the light of this apparent conflict of authority it is impossible to say with certainty that because a defendant acts in contemplation or futherance of a trade dispute, he will never incur liability for indirect inducement based on the act of inducing breaches of contracts of employment. It is submitted, however, that reason and the preponderance of authority indicate that there should be no liability in such circumstances. It follows that, in a trade dispute situation, a *threat* to induce employees to break their contracts of employment would not consititute the illegal act upon which an action for indirect inducement could be founded, because it is now established in English law that "a threat to do an act which is lawful cannot... create a cause of action..."[135]

What, it may be asked in the light of the foregoing, is the purpose or effect in this connection of the Trades Disputes Act, 1965, which provides in part;

> 1(1) An act done after the passing of this Act by a person in contemplation or furtherance of a trade dispute (within the meaning of the Trade Disputes Act, 1906) shall not be actionable in tort on the ground only that it consists in his threatening

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[132] *Ibid.*, at p. 687.

[133] *Supra*, footnote 34, at p. 303.

[134] *Ibid.*, at pp. 323, 327 and 337.

[135] Per Lord Buckmaster, in *Sorrell* v. *Smith*, [1925] A.C. 700 (H.L.), at p. 747. See also *Rookes* v. *Barnard*, *supra*, footnote 32, per Lord Reid, at p. 1168; and *Camden Exhibition and Display Ltd.* v. *Lynott*, *supra*, footnote 67, per Lord Denning, M.R., at p. 770 (W.L.R.); 33 (All E.R.).

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

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

The Act was passed to restore the law to the state it was in, or was thought to be in, before the decision in *Rookes* v. *Barnard*.[136] Whether or not it achieves that purpose fully, or in the most effective possible way, must be beyond the scope of this paper.[137] It does seem however, that if, contrary to Lord Evershed's dictum in *Thomson* v. *Deakin*, the above submission on the effect of section 3 of the Trade Disputes Act, 1906 is correct, then, the new Act does not affect the law in the indirect inducing situation. If, on the other hand, Lord Evershed *is* correct, it may be that the new Act would afford some protection in such a situation. It would, for example, protect one who, *by threats to induce breaches* of employment contracts, caused a breach in a supply contract or sub-contract. This would be the effect of the Act even though, according to Lord Evershed, one who *actually induced breaches* in the employment contracts, with the same effect, would not be protected by the 1906 Act. Even this result would depend on the court interperting the words "shall not be actionable in tort *on the ground only* that it consists in his threatening", as they appear in the 1965 Act, in a sense favourable to the defendant. It could always be argued for the plaintiff that the breach of the principal contract (e.g. the supply contract or sub-contract) constitutes another "ground" upon which the defendant's act is actionable. If such were the opinion of the court the new Act would be rendered totally ineffective in the context of an action for inducing breach of contract.

In summary, it may be said that, subject to the refinements made by the *Stratford* case in the meaning of the phrases "necessary consequence" and "knowledge of a contract", and in the matter of the illegality, in this context, of inducing breach of contracts of employment in the course of trade disputes, the law relating to inducing breach indirectly is as Jenkins L.J. defined it in *Thomson* v. *Deakin*.[138]

The basis of liability for indirect inducement is clear enough aside from matters of not unimportant detail. It may be, however, that the law relating to indirect inducement is really only an example of a wider head of liability. It is well established that for there to be liability for *indirect inducement* the defendant must do some act

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[136] *Supra*, footnote 32.

[137] For an early criticism see K. W. Wedderburn, *The Worker and the Law* (1965) (London-Penguin), at pp. 291-94; and see now by the same author, *Trade Disputes Act 1965* (1966) 29 M.L.R. 53.

[138] *Supra*, footnote 113, and accompanying text.

illegal in itself, quite apart from the procurement of breach of the principal contract (i.e. the one to which the plaintiff is a party). This requirement makes "indirectly inducing", as a head of liability, look very much like "intimidation", as established by *Rookes* v. *Barnard*.[139] That case established beyond doubt that it is a tort "to coerce a person by *threats* of violence or *other illegal action* into doing or abstaining from doing something that he would otherwise have every right to do".[140] Inducing breach of employment contracts (as in *Stratford*) is such illegal action. In the absence of a trade dispute, if Stratfords' customers had breached the hiring contracts (or given up their proven plans to make new ones) because they were threatened with a boycott involving illegal breaches of employment contracts liability could have been imposed under the tag of "intimidation". Since there can be no liability for threatening an act unless the act itself is illegal [141] it would seem that the same concept of illegality must be said to have governed in the fact situation of the *Stratford* case, where, rather than capitulating, the hirers waited until the dockers actually refused to service the barges. The governing concept — liability to A on the part of B when he strikes at A by an act that is recognized by the law as being illegal in relation to C — controls in both cases.

The provisions of the new Trade Disputes Act (U.K.) are a recognition that previous to that Act a *threat* to *induce* breach of an employment contract, which leads the employer to act to the detriment of a third party plaintiff, might very possibly have been the illelgal act upon which an action for tortious intimidation could be based. If an employer was led by such a threat not only to act in some general way to the plaintiff's detriment but in fact to break a contract with him it would seem to be that the cases would in essence be the same, although the latter would be called "indirect inducement" and the former "intimidation". If the employer had been moved to act to the plaintiff's detriment by inducement of *actual breaches* of contract by his employees the case once again would be the same. Where the illegality lies in the actual breach rather than the threat, the relevant statute is, however, section 3 of the 1906 Act.

In cases of indirect inducement of breach of contract it is the illegality of the initial act, rather than the fact that A's damage arises from breach of contract, that is the basis of liability. This is, of course, quite different from "direct" inducement, where the fact

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[139] *Supra*, footnote 32.

[140] Fleming, *The Law of Torts*, *supra*, footnote 96, at p. 662. Italics added.

[141] See *supra*, footnote 135, and accompanying text.

that there is breach of an actual contract is all-important. It may well be therefore that indirect inducement should not be considered as a branch of the tort of inducing breach of contract at all. Certainly a failure to distinguish the two has caused considerable confusion in the Canadian courts.

(C) The Law In Canada

Until the abolition of appeals to the Judicial Committee of the Privy Council, Canadian case law was not, of course, free to develop along lines different from those taken by its English parent, so it may be that to compare Canadian and English law in an area upon which statute law does not impinge is merely to record instances of judicial courage or misunderstanding, as the case may be. However, there are two Canadian statutory differences that *could have* played an important part in the separate development of the tort of inducing breach of contract in trade disputes. In the first place, as was mentioned above,[142] Canadian labour relations legislation makes collective agreements binding on the parties for some purposes. This could be made the basis for saying that a union is justified in inducing breach of subsequent irreconcilable contracts where it does so to protect its interests under a collective agreement. Secondly, in Canada there may be liability for inducing breaches of contracts of employment in the course of a trade dispute. The second of these differences has been relied upon by the courts; the first has not. Of equal importance to statutory differences is the gradual broadening in Canada of the grounds upon which liability for inducing breach may be based. "Interference with contactual relations" as a basis of liability in Canadian law is wider than the tort of inducing breach of contract known in English law.

These developments, coupled with judicial notice taken by Canadian judges of a trade unionist's predictable refusal to cross a picket line, have helped render it very difficult for injunctions against picketing to be avoided. Each of these points of comparison is examined below in turn, and in conclusion, the requirement that the breach in question be *effectively caused* by the inducement is considered. The Supreme Court decision on this issue in *Newell* v. *Barker and Bruce* [143] is the one bright spot for trade unionists in what, for them, is a bleak Canadian outlook on the law of inducing breach of contract.

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[142] *Supra*, footnote 105.
[143] [1950] S.C.R. 385.

Early decisions

The Canadian courts at first approached the doctrines expounded in *Lumley* v. *Gye* [144] and *Bowen* v. *Hall* [145] with understandable diffidence, only mentioning those cases and gingerly suggesting that they might apply.[146] The action for enticing a servant under contract to his master was, of course, well established.[147]

In the early case of *Hynes* v. *Fisher* [148] the defendant unionists had hustled out of town, apparently against his will, a fellow worker who was under contract to the plaintiffs. In that case no mention was made of either *Lumley* v. *Gye* or *Bowen* v. *Hall*. In fact, in contrast to judicial temper in England, the interim injunction previously granted was dissolved on the motion to continue, partly on the basis that the masters' association could have resolved the conflict by withdrawing a resolution which, it was held, understandably aggravated the unionists.

There is now, however, no doubt of the complete reception into Canadian law of the tort of inducing breach of contract applied to all types of contract.[149]

After *Hynes* v. *Fisher* [150] the judicial attitude evident in trade dispute cases appeared to change. For example, in the *Krug Furniture Company* case [151] an injunction was granted partly on the basis that the defendants had knowingly procured breach of contract by strike-breakers, and it was also mentioned that some of the plaintiff's employees had left their jobs before their day's work or piece-work

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[144] *Supra*, footnote 13.

[145] *Supra*, footnote 16.

[146] *McMillan* v. *Barton* (1890-91-92), 19 O.A.R. 602, per Hagarty, C.J.O., at p. 606, and MacLennan, J.A., at p. 620; *Edison General Electric Co.* v. *Vancouver and New Westminster Tramway Co.* (1885), 4 B.C.R. 460, per McCreight, J., at p. 476.

[147] *Trebilcock* v. *Barton* (1904), 3 O.W.R. 679; See *supra*, footnotes 10-12 and accompanying text.

[148] (1884), 4 O.R. 60 (Ont. Q.B. Div.).

[149] The leading non-trade dispute case may be considered to be *Jasperson* v. *Dominion Tobacco Co.*, [1923] A.C. 709 (P.C.). *Posluns* v. *Toronto Stock Exchange and Gardiner*, *supra*, footnote 28, at pp. 260-333, contains as exhaustive a consideration of the tort of including breach of contract as is to be found anywhere. Gale, J. (as he then was) does not, however, make clear the distinction between direct and indirect inducing, but on the facts he was not called upon to do so.

[150] Militant unionism was spreading across the border from the United States. See Logan, *Trade Unions in Canada* (Toronto) (1948), at p. 77; Jamieson, *Industrial Relations in Canada* (Cornell) (1957) at pp. 37-8.

[151] *Krug Furniture Co.* v. *Berlin Union of Amalgamated Woodworkers* (1903), 5 O.L.R. 463 (H.C.), at p. 469.

contracts were completed.[152] In the years after the *Glamorgan* decision of 1905 [153] the tort of inducing breach of contract was frequently relied upon.

Justification

The Canadian courts did not, of course, question the lead of the English courts in robbing the concept of "justification" of all substance. In *Brauch* v. *Roth*,[154] Teetzel J. of the High Court of Ontario readily adopted the *Glamorgan* case [155] on this issue. Relying mainly on the judgment of Lord James, the learned judge held that "malice" and "wrongfulness", insofar as they were necessary to tortious liability, were proved by showing the intentional procurement of the breach of contract. *Read* v. *Friendly Society of Stonemasons* [156] established, in the opinion of Teetzel J., that the defendant union official was not justified merely because he was enforcing union rules.

In *Klein* v. *Jenoves and Varley*, in 1932, the Ontario Court of Appeal noted that

> It is still the law that "interference directed to bringing about a violation of legal rights is a cause of action, and it is a violation of a legal right to interfere with contractual relations recognized by law, if there is no sufficient legal justification for the interference".[157]

It was pointed out that *Sorrell* v. *Smith*, the House of Lords decision which clarified the wide basis of "justification" for conspiracy to injure, did not change the law. In a "conspiracy" case a judicially approved intent or object rendered the combination not actionable, but it was noted that in *Sorrell* v. *Smith* Viscount Cave specifically excepted the case of inducing breach of contract from his general propositions.[158] Thus it may be said that in the field of labour law,

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[152] In *Le Roi Mining Co. Ltd.* v. *Rossland Miners Union, No. 38 Western Federation of Miners* (1901), 8 B.C.R. 370 an injunction issued to restrain, among other activities, inducing employees to break their contracts.

[153] *Supra*, footnote 35, and see e.g. *Cotter* v. *Osborne* (1909), 18 Man. R. 471 (Man. C.A.); *Cumberland Coal and Railway Co.* v. *McDougall* (1910), 44 N.S.R. 535 (N.S. S.C. en banc).

[154] (1904), 10 O.L.R. 284 (Ont. H.C., C.P. Div.).

[155] *Supra*, footnote 35. Judgment in the Ontario case had been reserved until the decision in the House of Lords was reported.

[156] *Supra*, footnote 30, and see *infra*, footnote 165 and accompanying text.

[157] [1932] 3 D.L.R. 571 (Ont. C.A.), per Riddell, J.A., at p. 575.

[158] [1925] A.C. 700 (H.L.), at p. 713.

since *Brauch* v. *Roth*, there have been no real doubts about the inapplicability of such "justification".[159]

As mentioned above,[160] the one type of justification that English courts have indicated a willingness to recognize as a defence in an action for inducing breach of contract is that based on a prior statutory or contractual right. In his recent decision in *Posluns* v. *Toronto Stock Exchange* Gale J. (as he then was) adopted this view, stating that where a person acts in accordance with a right conferred on him by contract, as distinct from acting in mere protection of his own interests, he may be justified in procuring breach of another's contract.[161] Nevertheless, justification based on prior contractual rights has never played any real part in English labour cases involving inducing breach, probably because the most likely basis for such justification would be a collective agreement, and they are generally considered in England not to be legally binding.

Justification based on a contractual right should be of considerably greater importance in the context of trade disputes in Canada because Canadian labour relations legislation makes collective agreements binding although, perhaps, only for the purposes of the labour relations statutes themselves. For example, the Ontario Labour Relations Act not only specifically makes a collective agreement binding on the parties, its effect is that once a failure to comply with the provisions of a collective agreement is established upon arbitration, the arbitrator's order to comply is enforceable as if it were an order of the Supreme Court.[162] Clearly, therefore, in an

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[159] It has been consistently held in Canadian labour cases that "justification" for inducing breach of contract is not a real issue. Once the breach and the procurement are proven the tort is established. See *Bennett and White* v. *Van Reeder* (1957), 6 D.L.R. (2d) 326 (Alta. S.C., App. Div.), per Johnson, J.A. (Porter, J.A. conc.) at p. 334, citing Viscount Cave in *Sorrell* v. *Smith*, [1925] A.C. 700; per Ford, J.A., at p. 329; *Body* v. *Murdoch*, [1954] O.W.N. 334 (Ont. H.C.), at p. 337, and [1954] O.W.N. 338, at p. 340; *North Fork Timber Co. Ltd.* v. *MacKenzie* (1964), 45 D.L.R. (2d) 79 (Alta. S.C.). In *Gunn* v. *Barr*, [1926] 1 D.L.R. 855 (Alta. S.C., App. Div.) it was held that "justification" had no greater substance in a case where the defendant had induced his brother to breach a contract to marry. However, in *Posluns case, supra*, footnote 28, which also was a non-labour case, Gale, J. (as he then was) noted at pp. 270-1 that while "the defence rarely succeeds" there have been instances in which "the courts have sanctioned interference" where it was "promoted by impersonal or disinterested motives" or "effected in th public intrest".

[160] *Supra*, footnot 101 and accompanying text.

[161] *Supra*, footnote 28, at p. 271. The trial decision was affirmed by The Ontario Court of Appeal without adverse comment on the inducing breach of contract point. See (1966), 53 D.L.R. (2d) 193, especially at pp. 195 and 207.

[162] The Labour Relations Act, R.S.O. 1960, c. 202, s. 34(8) and (9). See also ss. 37 and 38.

inducing breach of contract case as between the defendant and the person induced to breach his contract (or between the defendant and the plaintiff as the case may be) a collective agreement would constitute a binding contractual obligation that would amount to justification.[163]

There are two different types of fact situation in which "contractual justification" might arise. The first is that in which A has a contract with B, and B then makes an inconsistent contract with C. A, in seeking to protect his interests under the first contract, persuades B to breach his contract with C. It seems beyond dispute that, in an action by C for inducing breach of contract, A will have a good defence of justification. Indeed, as has been pointed out from the bench on at least one occasion,[164] in enforcing A's contract the court itself would be causing the breach sued upon in the inducement action. C. would, of course, have a right of action for breach of contract against B.

The 1902 English case of *Read* v. *Friendly Society of Operative Stonemasons* arose out of a fact situation of this first type. In that case Darling J. suggested that a union would be justified in inducing breach of an apprenticeship contract because of the provisions of a collective agreement with the employer.[165] The agreement provided the conditions upon which boys would be allowed to enter the stonemason's trade. The county court judge dismissed the action because in his view the defendants acted *bona fide* in their own interests in persuading the employer to dismiss the plaintiff, whom, they thought, had been hired in breach of the collective agreement.[166] In Divisional Court however, the majority, for whom Darling J. spoke, made it clear that pursuit of legitimate self interest could not amount to justification for inducing breach of contract, but his Lordship sug-

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[163] The Ontario Rights of Labour Act, R.S.O. 1960, c. 354, s. 3(3) provides:

A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of this Act or of *The Labour Relations Act.*

The Saskatchewan Trade Unions Act, R.S.S. 1965, c. 287, s. 27, is identical in all material respects.

Where a defendant relies on a collective agreement, which is made binding on the parties to it by The Labour Relations Act, as justification for having induced a breach in the plaintiff's contract the defendant is clearly not making it "the subject of any action". It is submitted that the Rights of Labour Act has no application in this situation. The section would probably become relevant where the allegedly tortious inducement was to break a collective agreement.

[164] *Smithies* v. *National Association of Operative Plasterers*, per Buckley, L.J., *supra*, footnote 101 and accompanying text.

[165] [1902] 2 K.B. 88 at p. 96; and see *supra*,, footnote 104 and accompanying text.

gested that if the union were protecting its rights under a prior binding agreement with the employer then the case would be different and the inducing would be justified. A new trial was ordered to determine whether the employer had in fact breached a binding agreement with the union. The order for a new trial was appealed and, in the Court of Appeal, it was held that the plaintiff should succeed in the action, the defendant having failed to establish justification.

In the Court of Appeal Stirling J.A.'s judgment turned on the fact that he could find nothing in the rules to which the employer had agreed that entitled the union to get the plaintiff dismissed.[167] This does, however, carry the clear implication that if such were a proper implication or was express on the face, the agreement would amount to justification, as Darling J. had said. Collins M.R., for the majority, held that the agreement between the employer and the union could not amount to justification because it was illegal, as being in restraint of trade. Furthermore, Collins M.R. clearly considered the breach of the apprenticeship contract to have been induced by a threat of strike which in his view was illegal *because it was coercive.*[168]

Canadian courts have not relied on the *Read* case as authority that one who induces breach of a contract may rely for justification on his previous inconsistent contract with the person induced, but have instead quoted at length from the judgment of Collins M.R.[169] His judgment quite clearly does not apply where there is no illegal act, other than the alleged inducement of breach of contract, and where the agreement relied upon as justification is legal and binding. It is submitted, therefore that there is neither reason nor legal authority for saying that inducing breach of contract in this first type of situation cannot be held to be justified.

The second type of fact situation in which "contractual justification" might arise is that in which A has a contract with B, and B then makes an inconsistent contract with C. What distinguishes this situation from the first is that in this case A approaches C (rather than B) and persuades C not to carry out the inconsistent contract, which B on his part would not be able to perform without breaching his contract with A. In an action by B (rather than C,

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[166] *Ibid.*, per Darling, J., at p. 94.

[167] *Supra*, footnote 155, at p. 742.

[168] *Ibid.*, at pp. 737-8.

[169] See for example *Fokuhl* v. *Raymond*, [1949] 4 D.L.R. 145 (Ont. C.A.), per Roach, J.A., at p. 175; *Body* v. *Murdock*, *supra*, footnote 159.

as in the first case) A can show justification, based on his prior contract.

In *Smithies* v. *National Association of Operative Plasterers* it was recognized that in this second type of fact situation there would be "contractual justification" for breach,[170] although the case itself decides that breach of a contract between the plaintiff and the defendant does not justify the defendant in inducing breach of an *entirely independant contract*.[171] The defendant union had attempted to justify inducing the breach of contracts of employment in the course of a strike by showing that the employer had breached his agreement with the union to take disputes to arbitration. The *Smithies* case is distinguishable from the second type of fact situation set out above because the contracts of employment did not bear in any way upon the arbitration agreement, and it was not even suggested that there was an inconsistency between them.

The logic of treating the inducement of breach of contract as justified in this second type of fact situation is supported by the authority of *Posluns* v. *Toronto Stock Exchange*.[172] Posluns was a "customer's man" for a brokerage firm which was a member of the Exchange. His hiring and continued employment depended on approval by the Exchange. On his application for approval Posluns had agreed to submit to the jurisdiction of the Exchange.[173] The Exchange withdrew its approval and Posluns lost his job. In the action that Posluns then brought against the Exchange for inducing breach of his contract of employment the main thrust of the judgment in the High Court is that the Exchange was justified.[174] Thus the *Posluns* case may be regarded as one in which a prior contract between the plaintiff and the defendant was treated as justifying the defendant in inducing a third party (Posluns' employer) to breach his contract with the plaintiff.

It may be argued that *Posluns'* case differs from the second type of fact situation set out above in that Posluns expressly gave the

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[170] *Supra*, footnote 101, per Buckley, L.J., at p. 337, and see *supra*, footnote 102 and accompanying text.

[171] In *Posluns* case, *supra*, footnote 28, at p. 270, the *Smithies* case is cited as authority for the proposition that "justification" will not succeed as a defence "where a person is induced to break a contract because the other party to it has breached his contract with the intervenor". It is respectfully submitted that the statement in the text is more accurate.

[172] *Supra*, footnote 28.

[173] *Ibid.*, at p. 272, (Ont. H.C.) and pp. 200 and 208 (Ont. C.A.); and see the comment on the *Posluns* case by Dean A. W. R. Carrothers in (1965) 43 Can. Bar Rev. 338.

[174] *Ibid.*, at pp. 272-86, and see Dean Carrothers' comment at p. 346.

Exchange authority to intervene as it did should he fail to live up to the Stock Exchange's standard of behaviour. However, in *any* fact situation of the second type it might be said that the defendant's prior contract with the plaintiff had impliedly given the defendant the right to procure the breach of any inconsistent contract that might subsequently be made by the plaintiff. This is only an alternative way of saying that the prior contract justifies inducing breach of the subsequent one. The fact that Gale J. did not have to make such an implication, because of the express agreement in *Posluns'* case, is not a ground of distinction.

In the *Posluns* case the contract breached was not inconsistent with the prior one with the Exchange when made, but became inconsistent when Posluns acted improperly. The effect in law then became the same as if Posluns' employment contract had been inconsistent with the Exchange contract from the start, so *Posluns'* case does lend judicial support to reason in concluding that "contractual justification" is a good defence in the second, as well as in the first, type of fact situation set out above.[175]

The importance of "contractual justification" in trade dispute situations would be one in which an employer who has agreed in the collective agreement not to "contract-out" any work normally performed by members of the bargaining unit breaches that agreement. If union officers then persuaded the outside contractor not to perform they should have a good defence of justification in an action for inducing breach brought by the employer.

Similarly, justification would be a good defence in a case where a non-unionist who had been hired contrary to the provisions of a union security clause in the collective agreement was persuaded by union members to leave the job without due notice. This case is, perhaps, even clearer than the contracting-out example above. It is more obviously similar to *Posluns'* case, because a court could very easily imply that by the collective agreement the employer had authorized the union to dissuade non-unionists from working in the unit. If, in an effort to persuade the non-unionist employee, the union did or threatened any illegal acts against him there could, of course, be no contractual justification.[176]

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[175] Dean Carrothers, *ibid.*, at p. 346, states :

> Where two "rights" of the same class conflict they appear to be reduced to the status of a privilege, which can be exercised with impunity but which will not be protected at law — let the harm lie where it falls. This virtually, is where the judgment in *Posluns* case comes out.

[176] Thus there can never be justification for "indirect inducing", as outlined *infra*, footnotes 106-138 and accompanying text, because an act illegal in itself is always a prerequisite to liability under that head. An exception would be the

An example of the first, or *Read* v. *Friendly Society of Stonemasons* type of fact situation, arises where a union, in pursuance of its rights under a closed shop agreement, induces an employer to fire a non-unionist in breach of his contract of employment. It would, of course, be open to the employer to pay compensation in lieu of notice, but quite aside from that point, the union would seem to be justified in procuring the breach of contract. Another example would be one where a union induced the general contractor on a construction job to breach a sub-contract because the sub-contractor was hiring non-union men contrary to the provisions of the collective agreement between the union and the general contractor.

The facts in the last example are similar to those in *Newell* v. *Barker and Bruce*.[177] The action in the *Newell* case was commenced prior to the passing of the Ontario Labour Relations Act[178] so it could not be argued that there was justification based on a collective agreement rendered binding by statute. Even so, Estey J. expressly accepted the trial judge's finding that the union officials did nothing inconsistent with an endeavour to have the governing collective bargaining agreement lived up to[179] and stated,

> The respondents, as officers of the union and Local 67, were quite within their rights in advising Davis of appellant's employment of non-union men and the difficulties that the employment of non-union men upon the construction of this building would involve.[180]

The *Newell* case turned on the Court's finding that breach of the plaintiff's contract was a matter of free choice by the contractor, and could not be considered to have been *caused* by the union. The judgments do, however, seem to indicate that the 1950 Supreme Court of Canada would readily have accepted the provisions of a legally binding collective agreement as justification for inducing the breach of a subsequent inconsistent contract. It is surprising that since the adoption by every province of collective bargaining legislation there have been no reported cases of inducing breach of contract in which such a defence was advanced.

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case where the "illegal act" which indirectly induced breach of the plaintiff's contract was itself the tortious act of inducing breach of another contract. If the procurement of breach of this second contract (which would probably be a contract of employment) could be justified (probably on the basis of a collective agreement) then there would be no "illegal act" as is required if there is to be liability for the indirectly induced breach of the first contract.

[177] [1950] S.C.R. 385. The *Newell* case is considered in greater detail *infra*, at footnotes 240-242 and accompanying text.

[178] S.O. 1950, c. 34.

[179] *Supra*, footnote 177, at p. 393.

[180] *Ibid.*, at p. 391; and see per Rand, J., at p. 398.

Inducing breaches of contracts of employment

The most important fact to be recognized in comparing the tort of inducing breach of contract as it has been applied in England and Canada is that no Canadian jurisdiction has a statutory equivalent of section 3 of the Trade Disputes Act, 1906,[181] which means that in Canada the tort may be based on the inducement of breaches of contracts of employment. This, of course, has frequently been a basis of trade union liability.[182]

In *Nipissing Hotel* v. *Bartenders Union* [183] the far reaching effects of this difference are made clear. During the course of bargaining the defendants, who were the plaintiff's employees, became dissatisfied with the plaintiff's attitude. Well advised of the illegality of striking at the bargaining stage, contrary to the Labour Relations Act, the defendants continued to work, but when off shift they placarded the plaintiff's hotel. In an action for damages and to make permanent an interim injunction, Spence J. did find breaches of the Labour Relations Act but his judgment against the individual defendant, a union official, was based on inducing breach of contract. The learned judge held that in placarding their employer while still working, the defendant union members had breached their *implied contract* "that they should faithfully serve their master and should take care of and further his interests" and, he held, the defendant union official had induced them to do so.[184] There could be no clearer illustration of the importance of section 3 of the 1906 Act to English trade unionists. The lack of a Canadian equivalent is not to be dismissed lightly.

The law allowing actions for inducing breaches of employment contracts is given added importance by the decision in *Nelsons Laundries Ltd.* v. *Manning*. Dryer J. of the British Columbia Supreme Court held in that case that,

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[181] The equivalent of the Trade Disputes Act, 1906 had been on the statute books of Newfoundland since before Confederation in 1949; but by the decision in *Anglo-Newfoundland Development Company* v. *International Woodworkers of America* (1959), 17 D.L.R. (2d) 766 (Nfld. S.C.) those provisions were held to be only applicable to registered unions. No union had registered in Newfoundland since the passing of the Act, which was repealed by S.N. No. 59 s. 29.

[182] e.g. *Patterson* v. *Canadian Pacific Railway Co.* (1917), 33 D.L.R. 136; (1917), 34 D.L.R. 726; (1918), 38 D.L.R. 183 (Alta. S.C., App. Div.); *Seaboard Owners* v. *Cross*, [1949] 3 D.L.R. 709 (B.C., S.C.); *Bennett and White* v. *Van Reeder*; *Body* v. *Murdock*, *supra*, footnote 159, *Dewar* v. *Dwan* (1958), 11 D.L.R. (2d) 130 (Ont. H.C.); *Belleville Lock Co. Ltd.* v. *Tyner*, [1950] O.W.N. 793 (Ont. H.C.).

[183] *Nipissing Hotel Ltd.* v. *Hotel and Restaurant Employees and Bartenders International Union* (1963), 38 D.L.R. (2d) 675 (Ont. H.C.).

[184] *Ibid.*, at pp. 687-88.

> In the absence of some evidence to indicate a contrary stipulation I must find that the terms of [the contract of service between the plaintiff and the defendant] are those terms of the collective agreement which deal with the rights and obligations which are to subsist between the employer on the one part and the employee on the other.[185]

Thus, entirely aside from the question of whether a collective agreement may, in itself, support an action for inducing breach there will often be derivative tortious liability. Wherever a court finds that a union official has induced a workman to act contrary to a provision of the collective agreement, and finds further that the provision is one dealing with obligations which are to subsist between the employer and his employees, the breach of the collective agreement will amount to a breach of the contract of employment.

Further, it has been held in at least one case that a right of action may arise *directly* from inducing breach of a collective agreement. Under the statutes in force in every province of Canada, (except Saskatchewan) collective bargaining agreements must provide that there shall be no strikes during the currency of the agreement [186] (and provision must be made by the parties for arbitration of disputes over "the interpretation, application, administration or alleged violation of the agreement" [187]). In the *Pacific Western Planning Mills* case,[188] where the defendants picketed a mill the employees of which had voted against striking, Coady J. held that the defendants were both inducing breach of contract of employment — *"per se* an unlawful act, a tortious act" — [189] and inducing an unlawful strike contrary to the British Columbia Labour Relations Act. From this decision the line was, in a trial decision in B.C., then easily crossed to the point where liability for inducing breach of contract was based simply on a breach of the collective agreement.[190]

> There thus inheres in every collective agreement (as in the 'yellow dog' contract), a trigger for liability under the inducing breach doctrine.[191]

In Ontario and Saskatchewan it may be that such a right of action is ousted by statute. The Ontario Rights of Labour Act provides

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185 (1965), 51 D.L.R. (2d) 537, at p. 544.

186 R.S.A. 1955, c. 167, sec. 73(5); R.S.B.C. 1960, c. 205, sec. 22(1)(a); R.S.M. 1954, c. 132, sec. 19; R.S.N.B. 1952, c. 124, sec. 18; R.S.N. 1952, c. 258, sec. 19; R.S.N.S., c. 295, sec. 19; R.S.O. 1960, c. 202, sec. 33; S.P.E.I. 1962, c. 18, sec. 23. Saskatchewan alone has no such provision.

187 R.S.O. 1960, c. 202, sec. 34; in all other provinces this provision is coupled with the "no strike" section, cited *ibid.*

188 *Pacific Western Planing Mills* v. *International Woodworkers of America*, [1955] 1 D.L.R. 652 (B.C.S.C.); followed in *Dawson Wade and Co. Ltd.* v. *Tunnel and Rockworkers Union of Canada* (1956), 5 D.L.R. (2d) 715 (B.C.S.C.).

189 *Pacific Western* v. *Woodworkers, ibid.*, at p. 655.

190 *Comstock Midwestern Ltd.* v. *Scott* (1953), 10 W.W.R. (N.S.) 340 (B.C.S.C.).

that a collective agreement "shall not be made the subject of any action in any court unless it may be the subject of such action irrespective of... *The Labour Relations Act*". The Saskatchewan Trade Unions Act is identical.[192] The generally accepted view is that, aside from federal and provincial labour relations legislation, collective agreements are not legally enforceable, so it may be said to be *on the basis of* the statutes that liability has been imposed for inducing breach of such agreements. To bring an action for inducing breach of a collective agreement is, surely, to make it "the subject of [an] action". It follows that there is no such right of action in Ontario and Saskatchewan, whatever may be the case elsewhere. It does seem however, in any Canadian jurisdiction, that to allow a right of action, based on a collective agreement, against a person who is not a party to the agreement is to go beyond the intention of the legislature. In each statute collective agreements are only made binding "for the purposes of this Act",[193] and enforcement, if any is provided, depends upon the fact that an arbitration decision may be registered as a court order.[194] In some cases the courts have, however, apparently considered rights under a collective agreement to be as worthy of protection from a third party interference as are rights under common law contracts.[195]

Interference with contractual relations

The extension of the basis of liability for inducing breach of contract to include breach of collective bargaining agreements is not at all surprising in view of the willingness with which Canadian courts have accepted other extensions in this form of tortious liability. There has been a failure to insist that the required interference

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[191] H. W. Arthurs, *Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship*, (1960) 38 Can. Bar. Rev. 346, at p. 378.

[192] See *supra*, footnote 163 for the text of the two statutes.

[193] E.g. The Ontario Labour Relations Act, *supra*, footnote 187, ss. 37 and 38(1) and (3).

[194] *Supra*, footuote 162.

[195] *Supra*, footnote 188, and see *G.H. Wheaton Ltd.* v. *Local 1598, United Brotherhood of Carpenters and Joiners of America* (1956), 6 D.L.R. (2d) 500 (B.C.S.C.), in which the plaintiff recovered on this basis. The plaintiff, as a member of the Victoria Building Industries Exchange, was party to a collective agreement with the defendant union. He employed carpenters to work on a pier, although under union rules "work over water" was piledrivers' work. The jurisdictional dispute on this point was not arbitrable under the collective agreement. Nevertheless, the plaintiff was able to recover on tbe grounds that the piledrivers local had impeded the carpenters, and in so doing had induced breach of the provision in the collective agreement that the carpenters local would supply "competent carpenters" where available and required.

take the form of procurement of actual breach of an existing contract. Reliance has been placed on Lord Macnaghten's dictum in *Quinn* v. *Leathem,* where he said that an interference with *contractual relations* committed knowingly gives a cause of action, and other hoary English authorities have been paraded in support of a very wide basis of liability.[196]

The decision of the British Columbia Court of Appeal in *Hammer* v. *Kemmis,*[197] which was reached partly on the basis that the plaintiff's "contractual relations" with his customers were being disrupted, is one example of a labour case in which liability was imposed on some basis, akin to "inducing breach", that apparently does not require actual breach of a contract. In *Poole Construction Company* v. *Horst* [198] the Saskatchewan Court of Appeal uses the same language, although in that case there were existing contracts to which the interference was directed. Even so, it is interesting that, almost contemporaneously with the *Poole* case, Gale J. (as he then was), in his Ontario High Court decision in *Posluns* v. *Toronto Stock Exchange* accepted as correct the strict English definition of the tort of inducing breach of contract.[199]

Certainly, as early as *Allen* v. *Flood,* English law rejected the wide basis of liability for interference with contractual rights,[200] and in *Stratford* v. *Lindley,* the most recent House of Lords decision on the matter, Lord Donovan said;

> [T]he argument that there is a tort consisting of some undefinable interference with business contracts, falling short of inducing breach of contract, I find as novel and surprising as I think the members of this House who decided *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [201] would have done.[202]

In Canada ,however, the argument is not novel. Another example is Laidlaw J.A.'s decision on *Fokuhl* v. *Raymond,*[203] insofar as it is based on "interference with contractual relations." His Lordship did not establish either that there was any "inducement of breach" or that any of the plaintiff's acts were wrongful in themselves.

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[196] See for example, *Steeves Dairy Ltd.* v. *Twin City Co-op,* [1926] 1 D.L.R. 130 (B.C.S.C.).

[197] (1956), 7 D.L.R. (2d) 684 (B.C.C.A.). See also *Belleville Lock Co. Ltd.* v. *Tyner, supra,* footnote 182.

[198] (1964), 47 D.L.R. (2d) 454 (Sask. C.A.), per Brownridge, J.A., at p. 462.

[199] *Supra,* footnote 28, at p. 266.

[200] *Supra,* footnote 22 and accompanying text.

[201] [1942] A.C. 435 H.L.).

[202] [1965] A.C. 269 (H.L.), at p. 340.

[203] [1949] 4 D.L.R. 145 (Ont. C.A.). This case is considered in some detail below; see *infra,* footnotes 211-222 and accompanying text.

It is unclear just what part the contract in question did play in the decision in the *Fokuhl* case, but Laidlaw J.A. made a point of establishing that the plaintiff had a binding contract with the Austin Co., which the defendant's actions forced the plaintiff himself to breach. His Lordship did, at least, recognize that giving the inducee himself a right of action based on inducing breach of contract made this a case that "differs somewhat from *Lumley* v. *Gye*".[204] Other courts have not been so perceptive[205] when ostensibly basing liability, in this reversed situation, on inducing breach of contract rather than on any act otherwise unlawful.

In England there is authority[206] as well as logic to support the view that, contrary to what Laidlaw J.A. held in the *Fokuhl* case, the inducee cannot recover on the basis that he himself has been induced to break a contract. If he has been forced to breach by illegal pressure then an action will lie on the basis of the illegality of the pressure. If no illegal pressure has been brought to bear it seems strange that the contract breaker should have a right of action based on the breach which he has himself committed. Nevertheless, in *Hersees of Woodstock Ltd.* v. *Goldstein*[207] the Ontario Court of Appeal seems to have accepted that such is a proper basis of liability. It must be noted that liability was not imposed directly on the basis of "reversed" inducing breach, but rather it was held that because the plaintiff had been induced to break his own contract the picketing that had taken place was rendered wrongful and not "peaceful" under the Criminal Code.[208] Aylesworth J.A. summarized his conclusions on this branch of the case as follows:

> [A]ppellant had a contract with the Deacon Company; respondents knew of the contract and attempted to induce appellant to break it by picketing his premises; such picketing is a "besetting" of appellant's place of business causing or likely to cause damage to appellant; not being "for the purpose only of obtaining or communicating information" the picketing is unlawful — Criminal Code 1953 — 54 (Can.), c. 51, s. 366 — and it ought to be restrained.[209]

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[204] *Ibid.*, at p. 156.

[205] *Besler* v. *Mathews*, [1939] 1 D.L.R. 499 (Man. C.A.); *Wilson Court Apartments Ltd. and Diamond and Mogil Builders Ltd.* v. *Genovese* (1958), 14 D.L.R. (2d) 758 (Ont. H.C.).

[206] *Boulting* v. *Association of Cinematograph Television and Allied Technicians*, [1963] 1 All E.R. 716 (C.A.), per Upjohn, L.J., at p. 731. See also, *Williams* v. *Hursey* (1959), 103 C.L.R. 30 (Aust. H.C.), per Fullagar, J. (for the majority), at p. 77.

[207] (1963), 38 D.L.R. (2d) 449 (Ont. C.A.). The *Hersees* case is criticized on this point by Dean A. W. R. Carrothers in (1965) 43 Can. Bar Rev. 338, at p. 341.

[208] S.C. 1953-54, c. 51, s. 366(1)(f).

[209] *Supra*, footnote 207, at p. 454. Commented on by H. W. Arthurs in (1963) 41 Can. Bar Rev. 573.

In order to conclude that there was a besetting contrary to the Criminal Code the court had first to find that there was some act which was tortious or criminal apart from the effect of the besetting section itself, and Aylesworth J.A. meets this requirement by saying that commission of the tort of inducing breach of contract can be established. But, finding a tortious inducement in a situation where the plaintiff was himself the party induced amounts to the same thing as imposing liability for "interference with contractual relations". This is a different and far wider basis of liablity than the established tort of inducing breach of contract.

Indirect inducement of breach of contracts: Inapplicable or misunderstood ?

When the Court of Appeal, in 1952, rendered its judgment in *Thomson* v. *Deakin*,[210] many ill-defined extensions to the tort of inducing breach of contract had already been made by the Canadian courts. The Court of Appeal's careful circumscription in that case of the basis of liability for "indirect inducing" came as a clear indication that the Canadian law had grown apart, and if that development had taken place by judicial design it was certainly not an overt design. For instance, *Fokuhl* v. *Raymond*,[211] decided three years before *Thomson* v. *Deakin*, was also a case of indirect inducement, although the Ontario Court of Appeal did not make that distinction.

The *Fokuhl* case arose in the following circumstances : Fokuhl had been an electrical engineer in the employ of Austin Construction Company. In order to satisfy the policy demand of the International Brotherhood of Electrical Workers that members only work for electrical sub-contractors, Austin arranged with Fokuhl that he resign and make a sub-contracting arrangement with the company instead of working for them directly. The sub-contract was legally unimpeachable but in the eyes of the union it was not a genuine arrangement .Raymond, an official of the International Union, used the authority of his position to get the local union to strike,[212] in order to force Austin to work through a genuine sub-contractor. In the result, the arrangement between the Austin Company and Fokuhl had to be abandoned because he was unable to carry out the work.

It appears that it was Fokuhl, the plaintiff, who had himself committed the breach in the sub-contract upon which his action in tort was based. However, even if it is assumed that the Austin Com-

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[210] *Supra*, footnotes 106 ff., and accompanying text.

[211] *Supra*, footnote 203.

[212] *Ibid.*, at p. 156, per Laidlaw, J.A.

pany took the initiative in actually effecting the termination, under the kind of analysis adopted in *Thomson* v. *Deakin* the question would then be whether Raymond caused the breach by acts unlawful in themselves, since direct persuasion was not relied upon. It is hard to conceive that under the circumstances an English court could have found any such unlawful act. The plaintiff did not even contend, for example, that there had been a breach of individual contracts of service, such as allegedly founded the "unlawful acts" in *Thomson* v. *Deakin*. Roach J.A. and Laidlaw J.A. nevertheless both held that Raymond had wrongfully induced breach of contract, or something akin to that. Although Aylesworth J.A. agreed with the decisions and reasons of both, the two judgments proceeded on quite different lines.

Roach J.A. made the assumption that it was Austin which had breached the sub-contract and then found as a fact

> that the defendants coerced the employees of the plaintiff to quit and to refrain from returning to their employment by him, in order to prevent him, if possible, from carrying out his contract with the Austin Company.[213]

The learned judge then went on to discount any justification, but returned, just at the end of his judgment, to the element of wrongfulness. He was, apparently, aware of the neutral legal quality of "coercion"[214] because (in addition to references to the defendant's "yen" to demonstrate power) he said;

> Here, there was a wrongful conspiracy not only between Raymond and his co-defendants, but also between them and the employees of the plaintiff who refrained from going to work... I am thoroughly satisfied that... Raymond... at the least implied threats of union sanctions against those men in order to induce them to remain off the job. The fact that they yielded made them also conspirators...[215]

The element of conspiracy, therefore, apparently provided that element of wrongfulness which Roach J.A., like the Court of Appeal in *Thomson* v. *Deakin*, thought to be necessary where the breach of contract was indirectly induced.

Laidlaw J.A. was content to speak in terms of interference with contractual relations.[216] "The gist of the cause of action", he said,

> is the doing of an unlawful act or the employment of unlawful means for the purpose of causing injury and the cause of action is given by law to

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[213] *Ibid.*, at p. 173.

[214] See Finkelman, *The Law of Picketing in Canada: II* (1937-8) 2 U. of T.L.J. 344, at p. 357.

[215] *Supra*, footnote 203, at pp. 175-76.

[216] *Ibid.*, at p. 158; relying on Lord Macnaghten's statement in *Quinn* v. *Leathem*, *supra*, footnote 26; and see *supra*, footnotes 203-205 and accompanying text.

> the injured party. Thus, intimidation, coercion, obstruction and conspiracy are prohibited and wrongful acts *per se*. They may also be unlawful means to accomplish a wrongful purpose.[217]

Laidlaw J.A. did not greatly elaborate on the nature of the wrongfulness of the coercion and obstruction that took place, beyond expressing the opinion that the employees would not have struck had Raymond not influenced them to do so and had he not relied for his influence, to some extent, on the sanctions which the union rules provided. He said, however, that Raymond "required and demanded" each employee "against his will" to join a combination to compel the plaintiff to give up his contractual relations with Austin.

> A combination for that purpose, if it caused injury to the respondent, would be plainly unlawful and actionable. It would be a conspiracy... Although the respondent did not base his action nor seek relief on that ground, nevertheless he is entitled to treat their conduct as unlawful means...[218]

Thus, although Roach J.A. put his judgment in terms of wrongful inducement of breach of contract and Laidlaw J.A. framed his in terms of injury by a wrongful act, each, in fact, relied for the necessary element of wrongfulness on the conclusion that there was a conspiracy to injure. *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*,[219] the leading case on the law of tortious conspiracy, was mentioned only as establishing that union members and officials could join together in a conspiracy.[220] No mention whatever was made of the fact that the *Crofter* case held that unless there was an act illegal in itself, quite aside from the conspiracy, a combination is not a tortious conspiracy if it is entered into for the purpose of furthering legitimate trade union purposes. The fact that those purposes may run counter to the interests of the employer does not make the combination unlawful. An even more blatant omission, in the light of their Lordships' reliance on conspiracy, was the failure to advert to section 3(1) of the Rights of Labour Act[221] which makes any act committed by trade unionists in furtherance of a trade dispute not actionable simply because it is done in combination[222]

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[217] *Ibid.*, at p. 157, citing Bowen, L.J. in *Mogul Steamship Co.* v. *McGregor, Gow and Co.* (1889), 23 Q.B.D. 598, at p. 614, and Lord Lindley in *Quinn* v. *Leathem, supra*, footnote 26, at p. 535.

[218] *Ibid.*, at p. 156.

[219] *Supra*, footnote 201.

[220] *Supra*, footnote 203, per Roach, J.A., at p. 176.

[221] R.S.O. 1960, c. 354.

[222] The Supreme Court decision in *Newell* v. *Barker and Bruce, supra*, footnote 177, may be usefully considered with *Fokuhl* v. *Raymond* for the contrasting judicial attitudes displayed there. It is not, however, a case of indirect inducement and will be considered in more detail below. Contrast also *Stratford* v. *Lindley, supra*, footnote 202, especially Lord Reid, at p. 323.

Several of the lower court cases on inducing breach of contract in the past decade have, like *Fokuhl* v. *Raymond*, been cases of indirect inducement. In fact, in the two decisions in *Body* v. *Murdoch*[223] and in the interlocutory decision in *Smith Brothers Construction Co.* v. *Jones*,[224] *Fokuhl* v. *Raymond* was expressly followed; but *Thomson* v. *Deakin* has been more commonly quoted.[225] It is not at all clear however, that the Canadian courts have understood the dicta in that case or applied it correctly. Often the distinction between direct and indirect inducement, so important in English law, has not been clearly expressed by Canadian courts.[226] It has been suggested that conditions in England and Canada are so different that distinctions such as this, which are useful in the U.K., are perhaps not acceptable in modern Canadian trade union law based, as it is, on collective bargaining legislation.[227] No such basis for failing to distinguish between direct and indirect inducement has ever been made explicit by Canadian courts.

Picket lines and inducing breach of contract

One of the marked differences between trade union practice in Canada and the U.K. is that there is little use of the picket line in the U.K. On the other hand, in Canada the law of inducing breach of contract is most frequently invoked to support an injunction against pickets, and it is, indeed, in this context that the most important recent Canadian judicial development has taken place, not only in the law itself but in its application.

Smith Brothers Construction Co. v. Jones[228] is of the greatest importance in this area of the law. The plaintiff in that case was a construction company which had several jobs on the Niagara Peninsula. The company employed its own carpenters and sub-contracted other work. The Carpenters Union, of which the defendants were executive members, sought to negotiate with the plaintiffs but was refused because it was not certified as bargaining agent. The union officials then approached the managers of the companies for

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223 *Supra*, footnote 159.

224 [1954] 2 D.L.R. 117 (Ont. H.C.).

225 *Bennett and White* v. *Van Reeder*, *supra*, footnote 159, at p. 333; *Dewar* v. *Dwan*, *supra*, footnote 159, at p. 134; *Island Shipping* v. *Devine* (1964), 41 D.L.R. (2d) 226, at pp. 232-33.

226 *Bennett and White* v. *Van Reeder*, *ibid.*; *Dewar* v. *Dwan*, *ibid.*; *Body* v. *Murdoch*, *supra*, footnote 159. This criticism may be made even of the judgment in *Posluns* case, *supra*, footnote 149, at pp. 266-7.

227 See Carrothers, *The Labour Injunction in British Columbia* (1956) (C.C.H. Canadian Ltd.), at p. 84.

228 [1955] 4 D.L.R. 255 (Ont. H.C.).

which the plaintiff was doing construction work and informed them that unless the plaintiff recognized the Carpenters Union the construction sites would be picketed. The manager of one of these companies, Cyanamid Company Ltd., thereupon told the plaintiff's officials that the plaintiff's men were not to work on the Cyanamid job, and as a result the plaintiff's employees were told not to report to work there. As it had threatened, the union then picketed the other construction sites, with the result that all employees, including those of the sub-contractors, refused to cross the picket line and work came to a standstill.

The action was brought for interference with contractual relations between the plaintiff and his sub-contractors. (In the construction industry, where most workmen are hourly rated employees, the men's own contracts can seldom be shown to have been breached.) At the trial,[229] McLennan, J.A. held that what had occurred was not a strike within the definition in the Labour Relations Act [230] or at common law because sufficient agreement between the workmen who ceased work had not been shown.[231] Nevertheless, His Lordship granted a permanent injunction and damages on the ground that

> what happened at the Cyanamid company clearly falls within the simple case put by Viscount Simon, L.C. in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*... This being so, the plaintiff has established a case of inducing breach of contract or interference with contractual relations against the defendants...[232]

Much more important to Canadian trade unionism, His Lordship also found that there was unlawful interference with contractual relations in the "not so simple case" of the jobs where pickets had been placed. The pickets, in His Lordship's opinion, had been completely peaceful but, he said,

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[229] Picketing had earlier been enjoined on interlocutory application on the grounds that it was in support of an illegal strike and that it constituted an interference with contractual relations and was, therefore, a violation of a legal right; *Smith Bros. Construction Co.* v. *Jones, supra*, footnote 224, at p. 122.

[230] Now R.S.O. 1960 c. 202, s. 1(1)(i).

[231] The plaintiff company had previously been granted a declaration by the Ontario Labour Relations Board that the union's activity constituted a strike and was unlawful under the Labour Relations Act. See R.S.O. 1960 c. 202, s. 67.

[232] *Supra*, footnote 139, at pp. 262-63. In the passage referred to, in [1942] A.C. 435, at p. 442, Viscount Simon, L.C. said :

> If C. has an existing contract with A. and B. is aware of it, and if B. persuades or induces C. to break the contract with resulting damage to A., this is, generally speaking, a tortious act for which B. will be liable to A. for the injury he had done him. In some cases, however, B. may be able to justify his procuring of the breach...

> if the development of the trade union movement has reached the point where workers will not cross a picket-line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be.[233]

McLennan J.A. considered his decision quite consistent with the principles ennunciated in *Thomson* v. *Deakin*.[234] However, the nub of the case is that the sub-contractors were constrained to commit breaches of their contracts with the plaintiff, so the decision in *Smith* v. *Jones* is inconsistent with *Thomson* v. *Deakin* in this respect: the constraint upon the sub-contractor from the universality among unionists of "the rule", of which McLennan J.A. took judicial notice, was not demonstrated to be unlawful. In *Thomson* v. *Deakin* it was made clear that all means of procuring the breach of contract, other than direct inducement, must be unlawful in themselves if the procurement is to be actionable. To be consistent with the principles in *Thomson* v. *Deakin* his Lordship would have had to decide that the workmen were induced by the picket line to breach their contracts of employment, which in turn caused the breach of the sub-contracts. Inducing breach of contracts of employment is clearly an unlawful act in Canada,[235] but McLennan J.A. did not mention that employment contracts were breached, and indeed, it might have been difficult to establish that such was the case where the employees were hourly rated construction workers.

Because picketing is so much a part of almost every North American trade dispute, McLennan J.A.'s decision that "the rule" (that the picket line shall be respected) may operate as "restraint" in cases of inducing breach of contract has great significance for trade unionists.[236] The British Columbia Court of Appeal, however, held in the *Becker Construction* case[237] that, where there was a lock-out, legal under the Labour Relations Act, picketers could not be enjoined on the ground that other trades refused to cross the line. It was considered important in that case that any damage suf-

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[233] *Ibid.*, at p. 264.

[234] See his Lordship's comment at p. 264, *ibid.*

[235] Which is probably not the case in England. See *supra*, footnote 130, and accompanying text.

[236] See now, *Bevaart* v. *Flecher* (1956), 2 D.L.R. (2d) 77 (B.C.S.C.); *Har-a-Mac Construction Co.* v. *Harkness*, [1958] O.W.N. 366 (Ont. H.C.); *North Fork Timber Co. Ltd.* v. *MacKenzie* (1964), 45 D.L.R. (2d) 79 (Alta. S.C.).

[237] *Becker Construction Company Ltd.* v. *United Association of Plumbing and Pipefitting Industry* (1958), 26 W.W.R. 231 (B.C.C.A.). Followed in *Commonwealth Construction Company Ltd.* v. *International Association of Ironworkers* (1959), 30 W.W.R. 624 (B.C.C.A.).

fered was caused not by the picketers but by the tradesmen who were unwilling to ignore the picket line.

Whatever the law may be in British Columbia, the influence of *Smith* v. *Jones* is still great in Ontario. In the 1963 case of *Hersees of Woodstock Ltd.* v. *Goldstein* [238] the Amalgamated Clothing Workers of America picketed the plaintiff's sportswear shop because he dealt in goods manufactured by a company with which the union had a dispute. Aylesworth J.A. upheld the injunction granted by the lower court because in his opinion the picketing interfered with the plaintiff's contractual relations with that company. In the course of his judgment he referred to McLennan J.A.'s judgment, and said,

> In this and in several other cases in Canadian Courts judicial notice has been taken of "the rule" so far as employees are concerned. I am prepared to take judicial notice that the rule affects as well, many other members of the public who are not employees of the employer whose premises are picketed, particularly such other members of the public in a community where, as in the case at bar, there is widespread organization of labour.[239]

The issue of causation

The judicial attitude exhibited in the *Hersees* case toward "the rule" that a trade unionist will refuse to cross another's picket line, could greatly increase the incidence of successful actions for inducing breach of contract in trade dispute situations. However, the question must still be answered in each case, whether the picketing is in fact the effective cause of ensuing breaches of contract. The leading case on this issue of causation in inducing breach of contract cases is *Newell* v. *Barker and Bruce;* [240] the only Supreme Court of Canada decision on inducing breach of contract in a trade dispute situation.

The *Newell case,* like so many other labour cases, arose from a dispute in the construction industry. The Cooper Company, who had the contract to do most of the work on a factory that was being built for Proctor and Gamble Ltd., gave a sub-contract for part of the plumbing work to the plaintiff. Unknown to them the plaintiff had been ousted from membership in the local association of master plumbers and consequently could not get union men to work for him. The defendants, officers of the plumbers union with which the Cooper Company had a closed shop agreement, pointed out to company officials that the plaintiff was employing non-union men and that it was against union policy to work on the same job with them.

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[238] *Supra,* footnote 207.
[239] *Ibid.,* at p. 453.
[240] *Supra,* footnote 177.

As a result the company cancelled its contract with the plainiff. The plaintiff gave the Cooper Company a release from liability but brought an action against the defendants for inducing a breach of the contract.

Estey J., for the majority of the Supreme Court, held that, on the evidence, the defendants had not caused the cancellation of the appellants' contract. The project overseer had

> ...acted upon his own judgment and just as he would have acted had he otherwise learned or discovered that non-union men were being or would be employed on the construction of this building. In these circumstances there was no interference on the part of the respondents with contractual relations within the meaning of the oft-quoted statement of Lord Macnaghten in *Quinn* v. *Leathem*...[241]

It was Mr. Justice Rand who attempted to state the reasons for not holding the defendant unionists liable in terms which related to the realities of modern society, of which organized labour is a legitimate and important part. He thought, as did the majority, that the case resolved itself into a question of causation. He said,

> The market of labour is, therefore, restricted by considerations of competing interests which are now part of the accepted modes of action of individuals and groups...
>
> The action of the respondents was not, therefore, either a procurement or an inducement of the breach which I will assume took place in Newell's contract; but by it the building contractor... facing on one hand the contract and on the other the source of labour not open to him, was put to a choice of the side on which he considered his own interest to lie. It is, I think, the proper view to attribute the cancellation of the contract not to the refusal of labour by the respondents, but to the chosen course of action of the building contractor... If this were not so, by unitedly declining to associate themselves with non-union workers, the respondents and their workmen would involve themselves in illegality brought about by the mere fact that the desire of the building contractor for their labour was stronger than that of observing the contract with Newell.[242]

If such were the attitude of Canadian courts in every case where an action is brought for inducing breach of contract the wide scope of that tort in trade disputes would deserve somewhat less concern from trade unionists. Subsequent decisions have obviously surmounted whatever obstacles to liability *Newell* v. *Barker and Bruce* may present but the case is authority that, in Canada, the issue of whether or not a defendant union has, in fact, *caused* a breach of contract must be dealt with in the light of the union's right to make clear its policy (which may involve a work stoppage) without incurring liability.

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[241] *Ibid.*, at pp. 393-94.
[242] *Ibid.*, at pp. 398-99.

(D) Conclusion

Canadian courts have shown themselves more willing to impose liability for inducing breach of contract in labour dispute cases than are the English courts. Provided that the defendant's activity can be shown to have been the effective cause of the detriment suffered by the plaintiff, Canadian judges have not been careful to ascertain that there has been an actual breach of a contract. Thus it may be said that liability has on occasion been imposed for interference with advantageous trade relationships, rather than only for inducing breach of contract.

If the strict requirement in English law of showing actual breach of a contract, of which the defendant had demonstrated knowledge, is to be relaxed, the defence of justification must become more important in the trade dispute law of Canada. In imposing liability on the grounds of interference with something less than an established contractual right the court takes to itself the function of balancing the societal interests involved. Since there may be legitimate trade union interests at stake in inducing cases, this balancing function cannot be effectively performed unless the law gives real scope to the defence of justification; but however, quite the opposite has been the course of development of Canadian law. Not only have Canadian courts followed English precedent in denying any place to justification based on pursuit of legitimate interests, but, nothing has ever been made of contractual justification, which could in many cases be established on the basis of a collective agreement.

The absence of a Canadian equivalent of section 3 of the English Trade Disputes Act, 1906, which provides that inducing breach of employment contracts in the course of a trade dispute shall not be actionable, also makes the tort of inducing breach of contract of greater importance in Canadian labour law. The variety of terms that may be implied in a contract of employment means that inducement of breach thereof can easily be established. In the *Nipissing Hotel* case,[243] for example, the defendant was held to have induced breach of the plaintiff's employees' implied promise "to care for and further the plaintiff's interests". This is illustrative of the importance of the statutory difference between the laws of England and Canada. Furthermore, it seems clear that many of the terms of the collective agreement in force in any employment situation may also be treated as implied terms of individual contracts of employment. This not only emphasizes once again the importance of the fact that liability may be based on breach of a contract of employment, it

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[243] *Supra*, footnote 183.

also stresses the relevance of the collective agreement as a basis of justification in inducing cases.

Thomson v. Deakin,[244] which has been called the case to which the tort of inducing breach of contract "owes its most exhaustive exposition",[245] makes it clear that, in the law of England, where a breach of contract is induced by means other than direct persuasion, liability results only if the means are illegal in themselves. In similar fact situations Canadian courts have not been diligent in establishing that there has been such illegality quite apart from the inducing. Indeed, the distinction between direct and indirect inducing seems never to have been recognized.

This departure from the requirement of English law that an act illegal in itself must be shown is particularly important in picketing cases. In some picketing cases a failure to recognize the special requirements of indirect inducing has been coupled with judicial notice of the ethic of the labour movement, that no man will cross another's picket line. In brief, Canadian courts now hold a peaceful picket line to be the cause of a breach of contract where the breach results from refusal to cross the picket line, and liability is imposed althought the "ethical" restraint is not in itself illegal. On the analysis put forth in *Thomson* v. *Deakin*, liability would not generally result in such a situation. There would be liability only where the contract upon which the inducing action was based was the employment contract between the plaintiff and the man who had been persuaded not to cross the picket line. The picket could, in that case, be said to have *directly* induced the breach. The more usual case will be one like *Smith Brothers Construction* v. *Jones*[246] where the only inducement alleged is *indirect*. For example, the breach in that case was of a building contract, and followed from a refusal of the workmen to cross the picket line. Such a case is clearly one of indirect inducement in which, according to *Thomson* v. *Deakin*, no liability should be incurred because the restraint on the workmen is not in itself illegal. That however, does not appear to be the law in Canada.

It may be that the complexities of the English law of indirect inducement are out of place in the interlocutory injunction applications upon which such matters usually arise in Canadian courts. But there is no reason to applaud the imposition of liability in such cases, where no act illegal in itself has been shown, unless this extension of the law is offset by protection of legitimate trade union

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[244] *Supra*, footnote 106, and see footnotes 106-113 and accompanying text.

[245] So referred to by Dean Carrothers, *Collective Bargaining Law in Canada* (1965) (Butterworths, Toronto), at p. 471.

[246] *Supra*, footnote 228.

interests in dispute situations. What is needed in the area of picketing is legislation that provides for the issue of injunctions *only* in specific fact situations, and those situations must be clearly delineated in terms that are realistic in the context of North American labour relations. Presumably picketing must be enjoinable where it involves the commission of a crime or a tort other than nuisance. Specified nuisance situations should, no doubt, also give rise to an injunction, but those situations must be further spelled out to leave scope for *effective* peaceful picketing. Picketing in support of a strike contrary to the labour relations legislation of the province probably should be *enjoinable* also, and the wisdom of outlawing secondary picketing must be considered.

The specific provisions of new legislation on picketing are matters of detail beyond the scope of this consideration of the law of inducing breach of contract. The important thing is that, whatever limitations the legislature may see fit to impose on the right to picket, it must be made clear that those are to be the *only* bases upon which injunctions against picketing in the course of trade disputes will issue. Indeed, this proposal for legislation differs from the British Columbia Trade Union Act, 1959,[247] mainly in that the British Columbia Act fails to make it clear that the *statutory* bases for the issue of injunctions are to be exclusive. If it were made clear that the only grounds for injunction were to be those stipulated, the tort of inducing breach of contract would, as a rule, come up for consideration only in trial proceedings, and very seldom in cases arising out of picketing.

Picketing is not, of course, the only type of fact situation in which inducing breach of contract arises, and it may well be that there should be legislation of more general application to free the law from its complexities. Any Canadian legislature would undoubtedly regard contractual rights as worthy of protection, just as the courts have done; but it is more doubtful that they would follow the lead of Canadian courts in extending the tort of inducing breach of contract to protect prospective advantage against interference not otherwise illegal. Certainly a legislative statement would have merits which are lacking in the Canadian cases on the matter; for one thing it would be clear, and for another, it would emanate from a body qualified to decide whether, to what extent, and by what means the law should enter that field of interest balancing. In any case, it should not be beyond the wit of man to devise a more rational means than the tort of inducing breach of contract, as presently understood, for protecting contractual interests from third party interference.

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[247] R.S.B.C. 1960, c. 384.