E. GAGNON AND OTHERS (*Defendants*) ..... APPELLANTS;

AND

FOUNDATION MARITIME LIMITED (*Plaintiff*) ..... RESPONDENT.

1960
*Oct. 17, 18

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Apr. 25

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Labour—Request of unregistered unions for recognition refused—Subsequent picketing resulting in work stoppage—Unlawful strike constituting tortious conspiracy—Labour Relations Act, R.S.N.B. 1952, c. 124, ss. 22(1), 23.

While the plaintiff company was engaged in the construction of a wharf at St. John, New Brunswick, under a contract with the Department of Public Works, certain union organizers, who claimed that they repre-

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

[1] (1911), 21 Que. K.B. 241.

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sented more than fifty per cent of the employees, asked for recognition of their unions. The company refused their request on the ground that the unions had not been certified under the *Labour Relations Act*. The subsequent establishment of a picket line brought the entire operation to a halt, and the work stoppage continued until an interim injunction was obtained to stop the picketing. At the trial, the plaintiff was awarded damages and an injunction restraining all picketing. On appeal, the damages were reduced but the injunction was affirmed. The defendants appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Cartwright and Ritchie JJ.: The submission that the prohibition with respect to striking contained in s. 22(1) of the *Labour Relations Act* only applied to employees on whose behalf an application for certification was pending before the Board was rejected.

The defendants not only formed a common design to obtain recognition for their uncertified unions, which would not of itself have been unlawful, but agreed to achieve this end by organizing a stoppage of work, which constituted a "strike" within the meaning of the Act on the part of a group of employees who were prohibited from striking by the terms of s. 22(1).

It was unnecessary to determine whether or not a breach of s. 22(1) gave rise to a statutory cause of action because when inquiry was "made of the statute law" it disclosed that the means here employed by the defendants were prohibited, and this of itself supplied the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy, the carrying out of which exposed the conspirators to an action for damages if any ensued therefrom. *Therien v. International Brotherhood of Teamsters,* [1960] S.C.R. 265, referred to.

It was not necessary for the plaintiff to prove that actual breaches of contract took place in order to sustain the plea of conspiracy because the evidence supported the allegation that the defendants wrongfully conspired to procure, cause and induce the employees of the plaintiff to abstain from work.

Per Locke J.: The action of the defendants in causing or inducing the employees to cease to work was a tortious act for which they were liable in damages. It was clear that their actions in setting up the picket line were carried on in combination for the purpose of causing injury to the plaintiff by unlawful means.

At the time the picket line was established the plaintiff, by virtue of its contract, was entitled and was required to enter upon the premises of the Crown for the purpose of carrying on the work of construction and to do so, in the circumstances then existing, without interference by the defendants or anyone else with the entry of its employees upon the premises. In these circumstances the conduct of the defendants was a private nuisance and, as damage resulted, actionable. *Lumley v. Gye* (1853), 2 E. & B. 216; *Quinn v. Leathem,* [1901] A.C. 495; *Lyons v. Wilkins,* [1899] 1 Ch. 255, referred to; *Williams v. Aristocratic Restaurants (1947) Ltd.,* [1951] S.C.R. 762, distinguished.

Per Judson J., *dissenting*: The prohibitions of s. 22 of the Act applied only where an application for certification was pending, and the only other prohibition against striking was contained in s. 23 which did not touch this case. Therefore there was no breach of the Act which could turn the conduct here complained of into a tortious conspiracy.

The conspiracy as found by the Court of Appeal was never pleaded. It was not open to that Court to base its judgment, of its own mere motion, on a conspiracy which had never been pleaded and which the defendants had no opportunity to answer.

The defendants in pursuit of the legal object of union recognition employed means which were neither criminal nor tortious in themselves but which, on one reading of the Act, could be held to be prohibited conduct. This did not make them guilty of the tort of conspiracy. In the law of civil conspiracy the unlawful means must be found in nominate torts or crimes.

There was no question of doing something lawful by unlawful means. If the conduct of the defendants was held to be contrary to the legislation, then the conspiracy was to do something forbidden by the Act. They should have been prosecuted for this breach, with leave of the Board, or if the plaintiff wanted damages, its claim was to be founded on a breach of the Act and no more—not on conspiracy.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], varying a judgment of Ritchie J. as to damages but affirming injunction granted. Appeal dismissed, Judson J. dissenting.

I. P. Macklin, for defendants, appellants.

A. B. Gilbert, Q.C., P. M. Laing, Q.C., and *T. L. McGloan,* for the plaintiff, respondent.

The judgment of Kerwin C. J. and of Cartwright and Ritchie JJ. was delivered by

RITCHIE J.:—The evidence in this case discloses that in the early days of July 1958, at a time when the respondent company was employing some 190 workmen without labour difficulty, dispute or complaint of any kind, on the construction of a wharf for the Department of Transport at Saint John, New Brunswick, the three appellants Gagnon, Blackman and Merloni, accompanied by others, called on the superintendent on this job, asking that the company recognize certain unions which they claimed to represent. The superintendent told these men that the matter was one which would have to be decided by other company officials who would be in Saint John during the following week, and, accordingly, on July 15 the same three appellants and some other persons called on the company's construction manager who describes the interview in the following terms:

Mr. Merloni appeared to be the spokesman for the group. He asked if we would be prepared to recognize their union and sign an agreement with them. I asked him if their unions were certified and they were the

[1](1960), 44 M.P.R. 203, 23 D.L.R. (2d) 721.

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> legal bargaining agents and he replied they were not certified under the New Brunswick laws but had more than fifty per cent of the men who had signed cards with their groups and would we recognize them on that basis. I said "No," they should be certified under the law and we would not recognize them or sign an agreement with them on that basis. . . . The discussion I had was with Mr. Merloni. He was the spokesman. When I told him we would not recognize them or sign an agreement with them, the discussion ended and they left. When leaving Mr. Merloni said they were willing at this time to discuss the matter with us but there would come a time when we would have to bargain with them on their terms.

The superintendent, who was also present at the meeting, recounts Merloni's parting words as being, "the time will come when you will recognize us on our basis and there will be no discussion."

On the morning of July 23 (eight days after the meeting) it became apparent that the means which Gagnon, Blackman and Merloni had decided to adopt to achieve recognition without certification under the *Labour Relations Act,* R.S.N.B. 1952, c. 124, was to bring about a cessation of work at the company's premises by persuading the other appellants to parade outside the entrances thereto, carrying placards which read "Engineers, Teamsters & Labourers on strike against Foundation Maritime Limited". Although the picketing itself was, in my opinion, peaceful, it would be totally unrealistic to regard it as an exercise of any right of employees to peacefully inform other persons that they were on strike. There is no evidence that there was anything in the nature of a strike in progress before the placards were paraded and the picket line established. The purpose of the picketing and parading of placards was not to inform other people that a strike existed but rather to create a situation which would result in a cessation of work, constituting a strike within the meaning of the *Labour Relations Act,* s. 1(p), and thus to achieve recognition for unions which were not prepared to comply with the provisions of the statute regarding certification.

The result of these activities was that none of the company's employees (except office workers and supervising staff) crossed the picket line although there were employees who otherwise would have been willing to return to work. Work ceased entirely until July 28th, when, after an interlocutory injunction had been granted to restrain the picketing, some 30 per cent of the men returned to work to be followed by others during the next seven days.

The judgment of the learned trial judge which declared the strike and picketing to have been unlawful, awarded damages in the sum of $22,712.39 and granted an order restraining the appellants from picketing, was based on the grounds that the employees had been intimidated by the pickets, that there had been a tortious interference with the company's contractual relations with its employees and with the Department of Public Works, and that any picketing in furtherance of an illegal strike should be restrained.

In affirming the decision of the learned trial judge, subject to a reduction of the damages to the amount of $12,500, the Appeal Division of the Supreme Court of New Brunswick[1] based its decision on the ground that the appellants had brought about a strike in contravention of the *Labour Relations Act* and had thus employed unlawful means to achieve their object so as to make them parties to an actionable conspiracy and liable for the damages flowing therefrom and subject to restraint by injunction from repetition of any acts in furtherance of such unlawful means.

In resting his decision on this ground, Bridges J.A., speaking on behalf of the Appeal Division, said:

> In an action based on conspiracy we do not think it necessary for the plaintiff to prove that actual breaches of contracts took place. In the case at bar the plaintiff's employees were induced to abstain from work, which, in our view, is sufficient.
>
> In our opinion, Gagnon, Blackman, Merloni and the other defendants who acted as pickets combined in inducing workmen of the plaintiff to refrain from working. Their object was to obtain recognition of the Unions without certification, which, in itself, was not unlawful but the means they used, a strike in violation of the Labour Relations Act, was and they have therefore no defence to the action. Any act done in furtherance of the unlawful means should, in our opinion, be restrained. The plaintiff was therefore entitled to an injunction against picketing in addition to damages.

A conspiracy consists, not merely in the intention of two or more but in the agreement of two or more, to do an unlawful act or to do a lawful act by unlawful means. The essence of the crime of conspiracy lies in the agreement itself which may be punishable, although no action has been taken pursuant to it, but the tort of conspiracy sounds in damages and is concerned only with the effect upon others of steps taken to carry out such an agreement.

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It is apparent from the language used by Merloni, coupled with the stoppage of work for which he, Blackman and Gagnon were primarily responsible, not only that they had formed a common design to obtain recognition for their uncertified unions, which would not of itself have been unlawful, but that they had agreed to achieve this end by organizing and creating a stoppage of work at the respondent's premises. In carying out this design, they enlisted the aid of the other appellants who thus became parties to the agreement. There can be no doubt that the means employed by the appellants resulted in damages to the respondent, but the question which bears further examination is whether or not these means were unlawful in such manner as to taint the whole agreement with the tortious quality necessary to give rise to liability.

Both the learned trial judge and the Appeal Division were satisfied that this stoppage of work constituted a strike which was in contravention of s. 22(1) of the *Labour Relations Act* and therefore unlawful, but as there is a wide difference between the parties to this appeal as to the true meaning to be attached to this subsection, it becomes necessary to analyze its provisions in the framework of the statute as a whole. Section 22 reads as follows:

> 22. (1) No employee in a unit shall strike until a bargaining agent has become entitled on behalf of the unit of employees to require their employer by notice under this Act to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement and the provisions of section 20, or as the case may be, have been complied with.
>
> (2) No employer shall declare or cause a lockout of employees while an application for certification of a bargaining agent to act for such employees is pending before the Board.

The conditions under which a bargaining agent may become entitled to require an employer by notice to commence collective bargaining are prescribed in s. 11 of the Act which reads as follows:

> 11. Where the Board has under this Act certified a trade union as a bargaining agent of employees in a unit and no collective agreement with their employer binding on or entered into on behalf of employees in the unit, is in force,
>
> (*a*) the bargaining agent may, on behalf of the employees in the unit, by notice require their employer to commence collective bargaining; or

(*b*) the employer or an employers' organization representing the employer may, by notice, require the bargaining agent to commence collective bargaining;

with a view to the conclusion of a collective agreement.

That it is an essential prerequisite to certification of a bargaining agent that the Board shall have first determined whether or not the "unit" in respect of which application for certification is made is "appropriate for collective bargaining" appears from the following provisions of s. 8(1):

8. (1) Where a trade union makes application for certification under this Act as bargaining agent for employees in a unit, the Board shall determine whether the unit in respect of which the application is made is appropriate for collective bargaining and the Board may before certification, if it deems it appropriate to do so, include additional employees in, or exclude employees from, the unit, and shall take such steps as it deems appropriate to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf.

Some assistance as to the intent of the legislature can also be derived by reading s. 22(1) in conjunction with s. 20, bearing in mind that the former section provides *inter alia* that "No employee in a unit shall strike until . . . the provisions of section 20, or as the case may be, have been complied with." The latter section reads:

20. Where a trade union on behalf of a unit of employees is entitled by notice under this Act to require their employer to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement, the trade union shall not take a strike vote or authorize or participate in the taking of a strike vote of employees in the unit or declare or authorize a strike of the employees in the unit, and no employee in the unit shall strike, and the employer shall not declare or cause a lockout of the employees in the unit, until

(*a*) the bargaining agent and the employer, or representatives authorized by them in that behalf, have bargained collectively and have failed to conclude a collective agreement; and either

(*b*) a Conciliation Board has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the Conciliation Board was received by the Minister; or

(*c*) either party has requested the Minister in writing to appoint a Conciliation Board to endeavour to bring about agreement between them and fifteen days have elapsed since the Minister received the said request, and

(i) no notice under sub-section (2) of section 27 has been given by the Minister, or

(ii) the Minister has notified the party so requesting that he has decided not to appoint a Conciliation Board.

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The respondent contends that the purpose and effect of s. 22(1) is to prohibit all employees from striking unless and until a bargaining agent has been certified to act on their behalf and until the collective bargaining and conciliation procedures established by the Act have failed.

On the other hand, it is argued on behalf of the appellants that the prohibition is only directed against employees who are members of a group on behalf of which application for certification has been made to the Board and that it is only effective during the time when those employees are waiting for the Board's decision.

In support of this contention it is urged that the words "no employee in a unit shall strike . . ." as used in s. 22(1) should be construed as meaning "no employee in a unit appropriate for collective bargaining shall strike", and that a unit on whose behalf an application for certification has been made is to be regarded as a "unit appropriate for collective bargaining". It is upon this basis that the appellants' counsel contends that the prohibition does not extend to the strike organized by them because at the time of the strike no application for certification had been made on behalf of the employees concerned.

It will accordingly be seen that it is of fundamental importance to determine the meaning which the legislature intended to be attached to the word "unit" as it first appears in s. 22(1), and in so doing it is necessary also to determine the purpose and function of this subsection as a part of the legislative scheme embodied in the statute.

The word "unit" is defined in s. 1(3) of the Act as follows:

> 1. (3) For the purposes of this Act, a "unit" means a group of employees, and "appropriate for collective bargaining" with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit, technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employers.

As the meaning attached to the words "appropriate for collective bargaining" by s. 1(3) is confined to their use "with reference to a unit" and as these words are not used at all in s. 22, it seems to me that the meaning attributed to them in this definition has no relevance in the context of s. 22(1).

As has been seen, the opening words of s. 8(1) indicate that the question of whether or not a group of employees is appropriate for collective bargaining is a matter for the Board and in this regard the provisions of s. 55 appear to me to be significant. That section provides:

> 55. (1) If in any proceeding before the Board a question arises under this Act as to whether
>
> * * *
>
> (*f*) a group of employees is a unit appropriate for collective bargaining;
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> * * *
>
> the Board shall decide the question and its decision shall be final and conclusive for all the purposes of this Act.

It seems to me, therefore, that when an application is made to the Board for certification, the "unit" on whose behalf it is made must be regarded for the purposes of this Act as simply being "a group of employees" until such time as the Board has determined that it is "a unit appropriate for collective bargaining". It is true that when the application is first made, the unit concerned is one which the applicant trade union is claiming to be "appropriate for collective bargaining" (see s. 6), but the whole scheme of the collective bargaining sections of the Act seems to me to contemplate that a "unit" cannot have the status of one which is "appropriate for collective bargaining" until the Board has decided the question.

In view of the above, and with the greatest respect for those who hold a different view, I am of opinion that when the Act is read as a whole its language gives no support to the contention that the legislature intended the word "unit" as first used in s. 22(1) to have the limited meaning of "a unit appropriate for collective bargaining" nor do I think that, for the purposes of this Act, "a group of employees" becomes "a unit appropriate for collective bargaining" simply because a trade union claims that it has that character when making application for certification under s. 6. I cannot, therefore, agree with the submission made on behalf of the appellants that the prohibition contained in s. 22(1) only applies to employees on whose behalf an application for certification is pending before the Board.

Insofar as this Act is designed to secure a greater measure of industrial peace to the public by encouraging collective bargaining and conciliation procedures rather than strikes

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as a method of resolving industrial disputes, the attainment of its purpose would, it seems to me, be gravely hampered if, as appellants' counsel contends, the effect of the language used in s. 22(1) is that in the Province of New Brunswick employees who ignore the Act can strike without offending against its provisions, and that those on whose behalf a bargaining agent has been appointed can strike under the circumstances outlined in s. 20 while those and only those whose application for certification is pending before and being held up by the Board are absolutely prohibited from striking between the time when the application is made and the time when it is granted or refused.

A consideration of s. 23 of the Act also appears to me to weigh heavily against the contention made on behalf of the appellants. This section reads:

> 23. A trade union that is not entitled to bargain collectively under this Act on behalf of a unit of employees shall not declare or authorize a strike of employees in that unit.

If effect were given to the construction sought to be placed on s. 22(1) by the appellants' counsel, it would mean, when read in conjunction with the last-quoted section, that the legislature intended to exercise no control whatever over strikes by employees who are not members of any trade union while prohibiting strikes by trade unions which have not been certified as bargaining agents. That the legislature should have intended this result seems to me to be inherently unlikely, having regard to the recognition accorded to trade unions by the other provisions of the Act.

It is further said, however, on behalf of the appellants that to read s. 22(1) as prohibiting all strikes by employees until a bargaining agent has been certified on their behalf is to attribute to the legislature the intention of creating one standard for the employee and another for the employer because s. 22(2) only prohibits "a lockout" while an application for certification is pending before the Board and the employer is left free to declare or cause a lockout at any earlier time, although, of course, after certification this right is restricted by ss. 20 and 21.

This objection must be viewed in light of the fact that the Act provides an elaborate and workable procedure whereby employees may compel their employer to bargain collectively with them with a view to concluding a collective agreement as to terms and conditions of employment, whereas no such right and no such procedure is provided for the employer unless and until a bargaining agent has been certified at the instigation of his employees.

It must be emphasized that the only statute in question in this appeal is the *Labour Relations Act* of New Brunswick, and that this Court is not here concerned with the statutes existing in other provinces concerning labour relations which, in many cases, are differently framed and worded.

The regulation of a system whereby collective bargaining and conciliation procedures are to be exhausted before resorting to strikes appears to me to be one of the chief functions which this *Labour Relations Act* purports to accomplish, and I am unable to agree that by using the phrase "No employee in a unit shall strike . . ." instead of "No employee shall strike . . .", the legislature intended s. 22(1) to have the effect of relieving employees who disregard the Act from any obligation to make use of those procedures for which such elaborate provision is made elsewhere.

Adopting this view, I have concluded that the appellants organized, directed and participated in a cessation of work constituting a "strike" within the meaning of the Act on the part of a group of employees who were prohibited from striking by the terms of s. 22(1). The appellants Gagnon, Blackman and Merloni designedly and deliberately adopted this unlawful means of achieving their object, and for the reasons hereinafter specified I am of opinion that they, together with those who were persuaded to join their enterprise, must bear responsibility for any damage which ensued to the respondent.

Section 40 of the Act provides a penalty for breach of s. 22(1), and although it is true that "No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Board" (s. 44(1)) this does not, in my view, alter the fact that s. 22(1) constitutes a

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mandatory prohibition enforceable by penalty if the Board deems it appropriate to consent to such method of enforcement.

In the case of *Therien v. International Brotherhood of Teamsters*[1], Mr. Justice Sheppard of the British Columbia Court of Appeal had occasion to consider whether breaches of the *Labour Relation Act* of that province by the defendant constituted "illegal means" whereby the company there in question was induced to cease doing business with the plaintiff. In the course of his decision, Mr. Justice Sheppard said at p. 680:

> In relying upon ss. 4 and 6 of the statute the plaintiff is not to be taken as asserting a statutory cause of action. The plaintiff is here founding upon a common law cause of action within *Hodges v. Webb* [1920] 2 Ch. 70 which requires as one of the elements that an illegal means be used or threatened. To ascertain whether the means was illegal enquiry may be made both at common law and at statute law.

When the *Therien case*[2], reached this Court, Mr. Justice Locke, speaking on behalf of the majority of the Court, said at p. 280:

> I agree with Sheppard J.A. that in relying upon these sections of the Act the respondent is asserting, not a statutory cause of action, but a common law cause of action, and that to ascertain whether the means employed were illegal inquiry may be made both at common law and of the statute law.

In light of these observations, it becomes unnecessary to embark upon the difficult exercise of determining whether or not a breach of s. 22(1) of the *Labour Relations Act* gives rise to a statutory cause of action because when inquiry is "made of the statute law" in the present case it discloses, as has been said, that the means here employed by the appellants were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy, the carrying out of which exposes the conspirators to an action for damages if any ensue therefrom.

[1] (1959), 16 D.L.R. (2d) 646, 27 W.W.R. 49.
[2] [1960] S.C.R. 265, 22 D.L.R. (2d) 1.

The only plea of conspiracy in this case is contained in para. 10 of the statement of claim which reads as follows:

> 10. In the alternative the Defendants wrongfully and maliciously conspired and combined amongst themselves to procure, cause and induce the employees of the Plaintiff to break their contracts of employment with the Plaintiff and to leave its service and to abstain from continuing therein.

I agree with Bridges J.A. that it is not necessary for the respondent to prove that actual breaches of contract took place in order to sustain the plea of conspiracy because the evidence supports the allegation that the appellants wrongfully conspired to procure, cause and induce the employees of the respondent to abstain from work. Although the wrongful means are not specifically alleged in the paragraph pleading conspiracy, all the ingredients of an unlawful strike are elsewhere alleged and the pleadings are sufficiently explicit to have made the appellants aware of the fact that the legality of the means which they employed to obtain recognition was being placed in issue.

Thomas Onno never entered an appearance, although his name appears in the notice of appeal to the Appeal Division as one of the appellants. However, as against him the damages awarded by the Appeal Division should be substituted for the amount fixed by the judge of first instance.

Onno and Roy Carr did not appeal to this Court, although named as parties appellant. There should, therefore, be no costs of this appeal as against them. Save for varying the amount of damages as against Onno, the appeal should be dismissed with costs.

LOCKE J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick[1] which, with a variation as to the damages to be awarded, affirmed the judgment of Ritchie J. at the trial. The respondent company was on July 15, 1958, engaged in the construction of a wharf for the Department of Transport in the Harbour of St. John, employing on the work some 190 men engaged as labourers, timbermen, carpenters, operating engineers, riggers and a number of office workers.

Some days previous, one Capone and the appellants Merloni, Blackman, Gagnon, and two men name Kaiser and Evans, called upon the superintendent of construction of

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the work, Gerald H. Lilly, asking that the company recognize certain unions which, they said, they represented. The names of the unions were not stated at that time. Lilly told them that he had no authority to deal with the matter but told them that other company officials would be in town on the following week when they could discuss the matter.

On July 15 these men came again to the company's office, together with one Murray Stanton and some other official of the carpenters' union, and presented the same request to Lilly and J. A. Marshall, the construction manager of the company. They asked Marshall if the company would recognize their unions and, according to Lilly, when asked if they were certified by the Labour Relations Board, they said they were not but that they would produce cards of fifty per cent of the men if the company "would recognize them on that basis." According to Marshall, he informed them that they should be certified under the law and that the company would not recognize them or sign an agreement with them until that was done. Merloni said that the time would come when the company would have to recognize them "on our basis and there will be no discussion", which terminated the interview.

While there was no issue of any kind between the respondent and any of its employees as to wages, hours or any similar matters and nothing to indicate that the employees were not satisfied with the conditions as they were, on July 23 a picket line was established outside the site of the work organized and under the direction apparently of the defendants Gagnon, Blackman and Merloni, exhibiting placards on some of which there appeared the words "Operators, engineers and labourers on strike against Foundation Maritime Ltd." These placards were carried from time to time by the defendants Roach, O'Neill, Morrison, Blackman, Merloni, Michaelson, Onno, Hachey, Armstrong, Lundman and Grant. When the various employees other than the office staff came to work they were faced with this picket line and, in the result, did not enter the premises and the entire operation was brought to a halt, the work stoppage continuing for five days when an injunction in the present action was effective to stop further picketing and work was resumed.

There is no evidence that there was any violence employed by the pickets Blackman and Merloni who were, apparently, in charge on the morning of July 23. When Cecil Bellefontaine, a workman employed on a hydraulic jack, was stopped, he was told by them that " there was a strike on and we could not go in to work." Bellefontaine said that he did not go through the picket line saying that "they erupt sometimes." He went back the following morning in a further attempt to go to work and was again stopped and said as to this that he was afraid to go through the picket line.

Arthur Neilson, who was working as a mechanic, endeavoured to go to work on July 23 and was stopped by three pickets who told him that "the company was on strike." He asked Gagnon what the strike was about and he said that they were on strike for recognition. Neilson told him there was no necessity of striking because if they went through the proper channels they would get recognition. He did not go through the picket line and explained this by saying:

> Judging from the way that the pickets spoke if a man went through he would be in trouble.

He tried to go to work on the following morning and was again stopped.

By an order made on July 25, 1958, by Ritchie J. certain of the defendants who were engaged in the picketing and some persons who are not now defendants in the action were enjoined from watching, besetting or picketing the premises until July 30. A second order was made by Ritchie J. on July 30 naming the present appellants and continued the injunction until the trial.

It was shown by the evidence of the witness Lilly that on July 23 Gagnon and Blackman represented themselves as officers of the Operating Engineers' union and the International Teamsters' union, respectively. The identity of the union represented by Merloni is not shown.

That the respondent suffered substantial damage from the work stoppage is not and cannot on the evidence be disputed. The argument for the appellants, however, is that the evidence does not disclose a cause of action against the defendants or any of them.

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The *Labour Relations Act* of New Brunswick, R.S.N.B. 1952, c. 124, provides the means whereby a trade union may be certified as a bargaining agent on behalf of employees such as those with whom this case is concerned and, on their behalf, negotiate with the employer and enter into a collective agreement. It was shown at the trial that none of the unions claimed to have been represented by Capone, Merloni, Blackman and Gagnon had been certified as bargaining agents for any of the employees concerned. Whether any of such employees were members of these unions on July 23, 1958, was not shown, the defendants electing not to give any evidence at the trial.

The word "strike" is defined by s. 1 of the Act to include:

> a cessation of work or refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding.

and the expression "to strike" is defined to include:

> to cease work, or to refuse to work or to continue to work, in combination or in concert or in accordance with a common understanding.

Section 1(3) reads in part:

> For the purposes of this Act, a "unit" means a group of employees.

Section 22(1) reads:

> No employee in a unit shall strike until a bargaining agent has become entitled on behalf of the unit of employees to require their employer by notice under this Act to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement and the provisions of section 20 (which provides for the appointment of a conciliation board), or as the case may be, have been complied with.

Section 23 reads:

> A trade union that is not entitled to bargain collectively under this Act on behalf of a unit of employees shall not declare or authorize a strike of employees in that unit.

Section 39 provides, *inter alia,* that every trade union that declares or authorizes a strike contrary to the Act is guilty of an offence and liable to a penalty, and s. 40 provides, *inter alia,* that every person who does anything prohibited by the Act is liable to a fine.

The purpose of this statute and others of the same nature in Canada is the prevention of strikes and lockouts and the maintenance of industrial peace. As none of the unions said to be represented had been certified or, so far as the

evidence in this case goes, authorized in any manner to act on behalf of any of the employees, the attitude taken by the officers of the respondent on July 15 was correct.

It is apparent that Merloni, Gagnon and Blackman had decided to ignore the provisions of the Act and to endeavour to compel the respondent to negotiate with their unions by bringing about a stoppage of work. The remaining defendants were apparently duped by these three into taking part in bringing about that stoppage.

Ritchie J. was of the opinion that the cessation of work was a strike and was unlawful as being contrary to the provisions of s. 22(1) of the Act; that to induce and persuade the employees not to report for work was a tortious interference with the contractual relations existing between the plaintiff and its employees; that there was evidence that the employees Neilson and Bellefontaine were intimidated by the picket line and thus prevented from reporting for work, and that the picketing itself in support of an illegal strike was unlawful. He awarded damages in the sum of $22,712.39.

Bridges J.A., who delivered the judgment of the Appeal Division, agreed that there was a strike within the meaning of the Act. He was of the opinion that the evidence did not support the charge of intimidation but considered that there was evidence that the defendants had conspired together to injure the respondent in its trade or business and, further, that as the strike itself was unlawful the picketing was unlawful. He, however, considered that the damages awarded were excessive and they were reduced to $12,500.

There was at the time in question no statute in New Brunswick such as the *Trade-unions Act*, R.S.B.C. 1948, c. 342, which was considered in the decision of this Court in *Williams v. Aristocratic Restaurants (1947) Ltd.*[1] In that case the trade union had been certified as the bargaining authority for the employees of one of the respondent's five restaurants, but did not represent any of the employees of the other restaurants which were operated in Vancouver. The conduct complained of was to have men walk back and forth on the sidewalk in front of each of the five restaurants,

[1] [1951] S.C.R. 762, 3 D.L.R. 769, 101 C.C.C. 273.

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bearing a placard to the effect that the employees did not have an agreement with the union. It was held in this Court, reversing the judgment of the Court of Appeal, that this conduct was permissible under the provisions of ss. 3 and 4 of the *Trade-unions Act*.

In the present case the statement exhibited in the placards carried by Merloni *et al.* on the morning of July 23 that there was a strike was untrue, to the knowledge of all of the defendants who took part in the picketing. So far as the evidence goes, at the time the picketing commenced no single employee of the respondent company was a member of any of the unions. There was no dispute between the company and any of its employees of the kind commonly known as a trade dispute, nor any difference between them on any ground that might become the subject of such a dispute. The defendants Merloni, Gagnon and Blackman, who claimed to represent certain trade unions, were well aware of this fact, and such of the other defendants as were employees at least knew that in their own case they had no dispute with their employer and that no one had been authorized to represent them and that no strike had been called.

While, by paragraph 10 of the statement of claim, the respondent alleged that the defendants had wrongfully and maliciously conspired and combined among themselves to induce its employees to break their contracts of employment and to leave its service and to abstain from continuing therein, no evidence was given as to any contract of employment other than that of Lilly who said that the men were required to fill in a standard form used by their company when they went to work, but he was unable to give any further details. The evidence, therefore, is insufficient to show whether or not the failure of the men to report for work on the morning of July 23 was a breach of contract on their part. The respondent's right to recover, however, does not turn upon this, in my opinion. It is, however, clear that the respondent expected them to return to their work on the morning of July 23 and that they intended to do so.

In my opinion, the presence of the picket line did not excuse the actions of the employees in failing to continue to work on the morning of July 23 and on the succeeding

days and I consider that the learned trial judge was justified, in view of the fact that none of them other than the office workers did pass the picket line, in drawing the inference that the cessation of work was done by them in concert or in accordance with a common understanding, within the meaning of s. 1(p) and (q), and was unlawful under the terms of s. 22(1). All of these employees must have known when they reported for work on that day that the statement that there was a strike on was false and that Merloni *et al.* did not represent the employees. I agree with the learned trial judge and with Bridges J.A. that the action of the defendants in causing or inducing them to cease to work was a tortious act for which they are liable in damages. It is clear from the evidence that the purpose of setting up the picket line was to inflict injury upon the respondent by halting the work for the purpose of compelling it to contract with the unions which, so far as the evidence goes, represented no one.

By the statement of claim the respondent alleged, *inter alia,* that the defendants wrongfully and maliciously conspired and combined amongst themselves to procure and induce the employees of the plaintiff to abstain from continuing in its employment. That the actions of Merloni, Gagnon and Blackman were carried on in combination for the purpose of causing injury to the respondent by unlawful means is made clear by the evidence. Neither the learned trial judge nor Bridges J.A. found that these actions were malicious but this was not essential. While in *Lumley v. Gye*[1], the head note to the report says that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, Lord Macnaghten in *Quinn v. Leathem*[2], said that the real basis of the finding in that case was not on the ground of malicious intention but on the ground that a violation of a legal right committed knowingly is a cause of action. Lord Lindley, speaking of *Lumley v. Gye,* said at p. 535:

> Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.

[1] (1853), 2 E. & B. 216, 22 L.J.Q.B. 463.
[2] [1901] A.C. 495 at 510, 70 L.J.P.C. 76.

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And at p. 538 he said:

A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a different thing, and is *prima facie* unlawful.

On July 23, 1958, the respondent, by virtue of its contract, was entitled and was required to enter upon the premises of the Crown for the purpose of carrying on the work of construction and to do so, in the circumstances then existing, without interference by the defendants or anyone else with the entry of its employees upon the premises.

In these circumstances, it is my opinion that the conduct of the defendants was a private nuisance and, as damage resulted, actionable.

In Clerk & Lindsell on Torts, 11th ed. at p. 560, nuisance is defined as:

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

The respondent, by virtue of its contractual relationship with the Crown, had an easement in the nature of a right-of-way across the property of the Crown, in order to carry on its work, and that right was interfered with.

In *Lyons v. Wilkins*[1], the head note reads:

Per Lindley M.R. and Chitty L.J.: To watch or beset a man's house, with the view to compel him to do or not to do that which it is lawful for him not to do or to do, is, unless some reasonable justification for it is consistent with the evidence, a wrongful act: (1) because it is an offence within s. 7 of the Conspiracy and Protection of Property Act, 1875; and (2) because it is a nuisance at common law for which an action on the case would lie; for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset.

Section 7 of the Act referred to is to the same effect as s. 366 of the *Criminal Code*. There was in s. 7 an exception from the penal provisions dealing with watching or besetting which read:

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

[1] [1899] 1 Ch. 255.

To the same effect is the exception in s. 366 of the Code. In *Lyons'* case it was held upon the facts that the conduct of the defendants did not fall within the exception.

In *Quinn's* case at p. 541 Lord Lindley said that:

> there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance, and if damage results in an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7).

In the *Aristocratic Restaurant* case the claim that the conduct above mentioned was a private nuisance was rejected by the majority of the court by reason of the provisions of s. 3 of the *Trade-unions Act,* which provided, *inter alia,* that no officer, agent or servant of a trade union or any other person should be liable in damages for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation or other unlawful acts, any person to refuse to become the employee or customer of any employer. As there is no such statutory provision in New Brunswick, the case does not affect the present matter.

While named as parties appellant, the defendants Onno and Carr did not appeal to this Court and there should, accordingly, be no costs of this appeal awarded against them. I would direct that as against Onno the amount of damages awarded by the Appeal Division should be substituted for the amount fixed by the trial judge.

With the exception above mentioned, I would dismiss this appeal with costs.

JUDSON J. (*dissenting*):—The first three named appellants are trade union organizers and the others were employees of the respondent on July 23, 1958. The respondent sued them all for damages and an injunction against picketing because of a strike which they began on July 23, 1958, and which lasted for a few days. At the trial, the respondent obtained judgment for $22,712 in damages and the injunction. On appeal[1], the damages were reduced to $12,500 but the injunction was affirmed as having been

[1] (1960), 44 M.P.R. 203, 23 D.L.R. (2d) 721.

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rightly granted, although the need for it had disappeared. The appellants appeal both against the award of damages and the injunction.

In the summer of 1958 Foundation Maritime Limited was building a wharf in the city of Saint John under a contract with the Department of Public Works of Canada. On July 13 the three union organizers met an official of the company and asked for recognition of their unions, claiming that they represented more than 50 per cent of the employees. A week later they made the same request to a higher official of the company. The company refused their request on the ground that the unions had not been certified as representing the men under the *Labour Relations Act*, R.S.N.B. 1952, c. 124. Pickets appeared on July 23 outside both jobs on which the company was engaged. These pickets carried notices stating "Engineers, Teamsters and Labourers on strike against Foundation Maritime Limited". The company obtained an interim injunction against all picketing on July 25, and on July 30 this order was continued until the trial. For 5 days the stoppage of work appears to have been complete and for an additional 7 days, while the men were drifting back to work, the company claims that the efficiency of its operation was reduced. This was the main basis of its claim for damages.

The injunction against picketing was completely prohibitory and it was based upon the threefold conclusion of the learned trial judge that there had been intimidation of employees reporting for work, a tortious interference with contractual relations between the company and its employees and also between the company and the Department of Public Works, and picketing in furtherance of a strike which was prohibited by the *Labour Relations Act*. The Court of Appeal, after a full review of the evidence, found that the picketing was peaceful and that there was no basis for a finding of intimidation. The Court of Appeal also found that there was no plea of interference with contractual relations with the Department of Public Works and no evidence that by stopping work the employees broke their contracts of employment or that they were

under any legal obligation to work during the days of the strike. The findings of the Court of Appeal raise three issues in this Court:

(a) Was this strike prohibited by the *Labour Relations Act*;

(b) Was the conspiracy as found by the Court of Appeal the one which was sued on and pleaded;

(c) Was this strike for union recognition a tortious conspiracy from the mere fact that there was no compliance with the certification provisions of the *Labour Relations Act*, and was picketing in pursuance of such a strike properly enjoinable even though it was peaceful and was carried on without violence, intimidation or obstruction?

These are the issues raised in the *ratio decidendi* of the Court of Appeal which is contained in the following paragraphs:

> In an action based on conspiracy we do not think it necessary for the plaintiff to prove that actual breaches of contracts took place. In the case at bar the plaintiff's employees were induced to abstain from work, which in our view, is sufficient.
>
> In our opinion, Gagnon, Blackman, Merloni and the other defendants who acted as pickets combined in inducing workmen of the plaintiff to refrain from working. Their object was to obtain recognition of the unions without certification, which, in itself, was not unlawful but the means they used, a strike in violation of the Labour Relations Act, was and they have therefore no defence to the action. Any act done in furtherance of the unlawful means should, in our opinion, be restrained. The plaintiff was therefore entitled to an injunction against picketing in addition to damages.

The appellants question the judgment on all three grounds. On the first, they submit that since there was no collective agreement in existence, their conduct in this case was not in breach of the Act. This submission requires an examination of all the sections of the Act relating to strikes and lockouts and the reading of s. 22(1), which has been taken to be the applicable section, in the context of the other sections.

Section 20 provides that where a trade union has been certified there shall be no strike vote, no strike and no lockout until there has been failure to conclude a collective agreement and conciliation proceedings have been taken. This section does not apply because no union had been certified in this case.

Section 21 deals with the case where there is a collective agreement in force whether entered into before or after the commencement of the Act. In this situation there are to

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be no strikes or lockouts until certain procedures have been exhausted. This section does not apply because there was no collective agreement of any kind in force.

Section 22 I now set out in full:

22(1) No employee in a unit shall strike until a bargaining agent has become entitled on behalf of the unit of employees to require their employer by notice under this Act to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement and the provisions of section 20, or as the case may be, have been complied with.

(2) No employer shall declare or cause a lockout of employees while an application for certification of a bargaining agent to act for such employees is pending before the Board.

I take this section to be applicable as a whole to the case where there is an application for certification pending before the Board. The second subsection says so expressly in dealing with the right of lockout. The employer's right is limited only during this period. Outside this period, unless the case is one within ss. 20 and 21, there is no restriction on the right of lockout. Under the same conditions, that is outside the stated period, unless the case is one to which ss. 20 and 21 apply, is the employee's position made inferior by the first subsection to that of the employer? The company submits that it is and that s. 22 treats employee and employer on a different basis. It requires very plain language to reach such an anomalous conclusion. Far from cogently pointing to this conclusion, it is my opinion that subsection (1) does equate the positions of employee and employer and that the whole section applies only when the certification proceedings are pending. The language of subsection (1) is "No employee in a unit shall strike" not "No employee shall strike". The company says that there is no difference between these two expressions and that unit merely means a group of employees—any group of employees—but the definition (s. 1(3)) continues:

and "appropriate for collective bargaining" with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit, technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employers.

When does a unit become appropriate for collective bargaining? Only when the claim is made in an application for certification of the bargaining agent under s. 6, or the

Board has made a determination under s. 8 that the unit in respect of which the application is made is appropriate for collective bargaining.

I therefore conclude that the prohibitions of s. 22 apply only where an application for certification is pending and that both employer and employee are treated by this Act on a footing of equality and that there is nothing in s. 22(1) or anywhere else in the Act to prohibit an employee who may be a member of an uncertified union withholding his labour in concert with others and engaging in peaceful picketing in a case where there is no collective agreement in effect. If the legislature had intended to prohibit this conduct, there is a simple way to do it by imposing the prohibition in all cases, whether or not there is a collective agreement in force and whether or not the collective agreement was made before or after the coming into force of the Act. This is not what this legislation has attempted to do.

The only other prohibition against striking imposed by the Act is contained in s. 23, which reads:

> 23. A trade union that is not entitled to bargain collectively under this Act on behalf of a unit of employees shall not declare or authorize a strike of employees in that unit.

This prohibition is imposed on the trade union. It does not touch the individual who may be a member of the union. The action in this case is taken entirely against three individual union organizers and individual employees. The penalty provisions of the Act against the trade union are in s. 39(3) and (4). The trade union is liable to a fine of $150 for each day that the strike exists and the officer or representative of the union to a fine not exceeding $300. The individual employee is dealt with only by s. 40, which imposes a penalty not exceeding $100 on every person who does anything prohibited by the Act. All these penalties are subject to the condition that there is to be no prosecution under the Act except with the consent in writing of the Board. My conclusion is that s. 23 does not touch this case.

The reasoning of the Court of Appeal, in my respectful opinion, therefore fails in the first place on an interpretation of the Act. There was no breach of the Act which could turn the conduct complained of in this case into a tortious conspiracy.

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In the second place, the conspiracy as found by the Court of Appeal was never pleaded. Paragraphs 7, 8 and 9 of the statement of claim complain with some repetition of threats of violence, coercion, procuring breach of contract between the company and its employees, misleading placards and the establishment, wrongfully and illegally, of a picket line whereby workmen were intimidated and prevented from working. Up to this point there is no plea of conspiracy. This is contained in para. 10 of the statement of claim, which reads:

> 10. In the alternative the Defendants wrongfully and maliciously conspired and combined amongst themselves to procure, cause and induce the employees of the Plaintiff to break their contracts of employment with the Plaintiff and to leave its service and to abstain from continuing therein.

This is the plea of conspiracy in a very bare framework without any particulars and its basis has been expressly denied by the finding of the Court of Appeal. There is no other plea of a combination to do any other act or acts causing damage against which the defendants might have pleaded that their predominant purpose was to advance their own lawful interests. There was no plea of the use of unlawful means which might bring liability in a conspiracy case. The defendants successfully met the only conspiracy charged against them. If they were to be expected to meet others, they are reasonable in their assertion that they should know in the pleading what they have to meet. A finding of a conspiracy based upon a breach of the Act appeared for the first time in the reasons of the Court of Appeal. Counsel for the appellants stated without contradiction that the point had never up to that time been argued. In my respectful opinion, it was not open to the Court of Appeal to base its judgment, of is own mere motion, on a conspiracy which had never been pleaded and which the defendants had no opportunity to answer.

The judgment under appeal has wide implications and involves, in my respectful opinion, an erroneous extension of the law of civil conspiracy. After the decision in *Crofter Hand Woven Harris Tweed Company Limited v. Veitch*[1], there could, on the facts of this case, be no liability

[1] [1942] A.C. 435, 111 L.J.P.C. 17.

in tort at common law. If this was a strike, its predominant purpose was for the legitimate promotion of the interests of the persons who were acting in concert. The *Crofter* case holds that if the means employed are neither criminal nor tortious in themselves, the combination is not unlawful. This judgment makes a strike, which was formerly not actionable, actionable in conspiracy, solely on the ground of violation of the *Labour Relations Act,* when there is no conduct on the part of the participants which can be labelled as criminal or tortious.

This extension of liability appears to me to be based on a very insecure foundation. It is not to be found in *Williams v. Aristocratic Restaurants (1947) Ltd.*[1] At the trial of that action there was, among others, a plea of conspiracy based solely upon a breach of the statute and it failed. The breach alleged was failure to take a strike vote. On appeal to the Court of Appeal, liability was imposed on this as well as other grounds. But on appeal to this Court no attempt was made to support the judgment on the ground of conspiracy in breach of the statute. The ratio of the judgment in this Court which restored the judgment at trial was that the picketing did not amount to a criminal offence or to a common law nuisance.

The case of *International Brotherhood of Teamsters v. Therien*[2], does not carry the matter any further. It was not a conspiracy case. A business agent of a union attempted to compel Therien who was an independent trucker and an employer of labour, to join the union. Therien had a business relationship with a construction company and the union agent, for the purpose of compelling Therien to do his bidding, threatened to picket the job, with the result that Therien lost his business relationship and the construction company ceased to do business with him. The case was therefore one where a union organizer intentionally inflicted harm upon Therien without justification. His attempt to justify his conduct on the ground of advancing union interests could not stand because of the prohibition in the statute against harassing an employer or independent con-

[1] [1951] S.C.R. 762, 3 D.L.R. 769, 101 C.C.C. 273.
[2] [1960] S.C.R. 265, 22 D.L.R. (2d) 1.

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tractor into union membership. The case is not authority for the establishment of a statutory breach or a threat to compel a statutory breach as an independent basis of unlawful means in the law of civil conspiracy. It is no more than *Allen v. Flood*[1] over again with the added element of a statute which prevented a justification of the conduct complained of.

Further, these union agents made no threat to the Foundation Company to compel it to do something in violation of the Act. On any reading of the Act it was open to the company to negotiate a collective agreement without resort to prior certification proceedings. It is, of course, equally clear that the company had the right to refuse to do this. These defendants, then, in pursuit of the legal object of union recognition employed means which were neither criminal nor tortious in themselves but which, on one reading of the Act, could be held to be prohibited conduct. I do not think that this makes them guilty of the tort of conspiracy. I prefer the view that in the law of civil conspiracy the unlawful means must be found in nominate torts or crimes. On this point, I adopt the statement in Salmond on Torts, 12th ed., 678, to the following effect:

> It is submitted that when the object of the combination is legitimate the unlawful means which will give a good ground of action against persons acting in concert are the same as the unlawful means which will give a good ground of action against a defendant acting alone.

Could it be said here that the plaintiff has a good cause of action against any of these defendants as individuals? According to the Court of Appeal they did not commit any tort apart from conspiracy founded upon a statutory breach. If there is to be any liability in this case it must be on the grounds pleaded, namely, the commission of nominate torts or conspiracy with nominate torts as the unlawful means.

If this is not so any strike in violation of the Act which by definition means "a cessation of work or refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding" would be actionable as a conspiracy even in the extreme case where hourly paid employees did nothing more than

[1] [1898] A.C. 1, 67 L.J.Q.B. 119.

stay at home. If there is to be liability in damages for the tort of conspiracy founded solely upon a breach of the *Labour Relations Act,* it should, in my respectful opinion, be imposed by the legislature and not by what I regard as an unwarranted extension of the case law.

So far I have accepted the distinction drawn in the reasons of the Court of Appeal between the end and the means in the consideration of the acts of these defendants. What did these individuals do? Acting under the leadership of the three union organizers, they withdrew their labour, established a picket line and carried placards. Following this no employees except supervisory and office staff went to work for some days. If there was a combination it was to do these acts. If the doing of these acts is held to be contrary to the legislation, then the conspiracy is to do something forbidden by the Act. There is no question of doing something lawful by unlawful means. A more accurate way of stating the problem is whether an agreement to strike, which is carried out, in the face of a statutory prohibition is actionable as a conspiracy.

At this point it is reasonable to ask what need there is for the tort of conspiracy. On the assumptions made there has been a breach of the Act by people acting in concert. Does it add anything to the liability, if there is any, by calling the conduct by the name of conspiracy? To give rise to tortious liability for conspiracy, there must be more than the mere fact of agreement. There must be some carrying out of the agreement, causing damage. The agreement in itself does not cause the damage. If the agreement is to commit a tort and it is carried out or if the agreement is to do something lawful, but its carrying out involves the commission of a tort, what need is there in either case for the tort of conspiracy? The defendants in each of these two situations could always be sued as joint tortfeasors under some other special heading of tortious liability.

What we have in this case then, if every assumption is made against the defendants is an agreement to breach the Act which was carried out. Does this involve any more than a breach of the Act? If this is the basis of liability the defendants should have been prosecuted for this breach, with leave of the Board, or if the plaintiff wants damages,

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its claim must be founded on a breach of the Act and no more—not on conspiracy. Whether such a claim is maintainable in this action, it is unnecessary to decide. It was not pleaded and not argued. This is a picketing case in its simplest elements. According to the finding of the Court of Appeal, threats, coercion, intimidation and procuring breach of contract are all absent. The problem is therefore reduced to one of breach of statutory duty.

I would allow the appeal with costs both here and in the Court of Appeal. The injunction should be dissolved and judgment entered dismissing the action with costs.

Appeal dismissed with costs, Judson J. dissenting.

Solicitor for the defendants, appellants: Ian P. Mackin, St. John.

Solicitors for the plaintiff, respondent: Gilbert, McGloan & Gillis, St. John.