1990 S. H. No. 74471

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

THE ROYAL BANK OF CANADA, a body corporate

PLAINTIFF

- and -

UNITED STEELWORKERS OF AMERICA, LOCAL 9271, Sydney, Nova Scotia (representing striking Bank workers) and ANDY GILLIS (Business Representative) and KEN DEMONT, GLENN MILLER, and DON SIMM

DEFENDANTS

HEARD: at Halifax, Nova Scotia (in Chambers), before the Honourable Mr. Justice David W. Gruchy, Trial Division, on October 1st, 1990

DECISION: October 1st, 1990 (orally at conclusion of hearing)

COUNSEL: Donald H. McDougall, Q.C. and Cathy Gaulton, for the plaintiff

Raymond F. Larkin and Leanne MacMillan, for the defendant, United Steelworkers of America, Local 9271

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GRUCHY, J.: (Orally)

First of all, I would like to express my thanks to counsel. That is frequently done by the courts and I am very sincere, in that, you gentlemen have done quite a bit of work, and that work is particularly helpful.

I want to say before I get into the body of the decision, as well, my sole source of information is from the affidavit evidence. If I appear to state any matters as fact, such statements reflect only the allegations in the affidavits, and do not represent findings of fact

in the usual sense, that is, I have not been able to assess such matters or credibility of witnesses.

Eleven employees of the Royal Bank of Canada on Union Street in Glace Bay, Nova Scotia are represented by the United Steel Workers of America, Local 9271, a trade union certified for collective bargaining purposes. Since August 27th, 1990 that union has been in a legal strike against that branch of the bank.

According to the affidavits filed, as a result of activities on the picket line outside the branch on various dates in the latter part of September, 1990, other non-unionized employees of the bank were prevented from entering the bank. Consequently, the bank could not be opened or operated on various occasions, for a total of nine days.

The non-striking employees were physically prevented from entering the bank by "about thirty" people standing in, and blocking, the main entrance to the bank. The blocking was physical and was accompanied by verbal abuse and threats directed toward the non-strikers. The Glace Bay Police Department was unable to gain peaceful entry for the non-striking employees; or alternatively, could have gained the entry, but warned the employees that they might not be able to get them out of the bank later

in safety. The police advised the bank manager "to obtain an injunction".

On September 17th, the bank had been opened and operated by non-striking replacement employees. The employees were prevented from leaving the bank by "about twenty-five picketers", some of whom blocked the door and prevented its opening. Physical assaultive action against the employees is, again, alleged to have occurred.

The picketers outside the bank have consistently included a considerable number of non-bank employees. Two of the defendants, Ken Demont and Glenn Miller, have been active in such picket line, and neither of them is a bank employee. As a result of perceived threats from the people on the picket line, the bank was not opened on Friday, August 31st. Those same people were involved in preventing non-striking employees from leaving the bank's parking lot. At that time, as well, there were perceived threats made by the defendants, Ken Demont and Glenn Miller. Some of the picketers, who are not bank employees, are related in various ways to the striking employees.

From time to time, certain of the non-bank picketers have taken actions which are best described as "besetting". Access to the bank's night depository has been prevented from time to time. Striking employees have

sat in lawn chairs placed in such a manner as to obstruct, or partly obstruct, the main door of the branch.

On September 12th, the Glace Bay Police Department found it necessary, or advisable, to block off Union Street because of "a very large, unruly crowd in front of the bank". On that day, as on other days, on the advice of the police, the replacement employees were not taken to the bank, and the bank did not open for business.

The Chief of the Glace Bay Police Department, Michael MacLean, has filed an affidavit in this matter. He has outlined the types of complaints received by the police from the various Royal Bank employees.

Mr. MacLean has been concerned about the situation at the bank, and, in particular, is concerned that the police may not be able to prevent harassment of the bank employees. He has discussed the police involvement in the matter and their attempts to keep the situation under control. At p. 3 of his affidavit, he stated:

> "10. **THAT** the picketers at the Royal Bank, which also include various and numerous men who are not employees of the Royal Bank, have been regularly and continuously attending in front of the Royal Bank and have been picketing the Royal Bank and causing significant difficulties for the replacement staff by obstructing their ability to enter and exit, and by using various intimidating comments and gestures toward the Royal Bank replacement

> staff when they are either entering or leaving the Royal Bank premises and surrounding area;"

The Chief was, on various occasions during the relevant time period, concerned about violence, and for the safety of bank employees. His police force had to be involved on several occasions to escort replacement employees into, or out of, the bank when the picketers were physically obstructing the entrance to the bank. The picketers obviously ignored the requests of the police. The Chief stated at p. 6 of his affidavit:

> "26. **THAT** I am very concerned that if the picket lines are able to continue in the numbers and manner that they have to date, that our Police Force will not be able to ensure the safety of the Royal Bank replacement staff as they enter and leave the Bank premises;"

He refers to the "ever-increasing size in the number of picketers ... and their increasingly aggressive attitude". He has requested "that the number of pickets at the Royal Bank should be reduced in numbers to about 5". [see p. 6, paras. 26 and 27 of his affidavit]

Other affidavits filed by various bank employees outlined the assaultive or tortious actions taken by the picketers, including the throwing of a rock at a window of the bank and a clear threat of further physical violence.

The action herein was commenced by an originating notice (action) and statement of claim dated

September 25th, 1990. By interlocutory notice dated September 25th, 1990 the Royal Bank of Canada has requested injunctive relief. Notice of that application was given to the various defendants, and an affidavit of service is on file herein.

The court is naturally reluctant to take any action which may appear to be an interference in labour relations, and which might limit a perfectly legal activity. It is necessary to determine if it would be just and equitable to grant the relief sought.

The tests to be applied were set forth clearly by Beetz, J. of the Supreme Court of Canada in **Manitoba (A.G.) v. Metropolitan Stores Ltd.**, [1987] 1 S.C.R. 110 at p. 127 as follows:

> " The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.
>
> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a **prima facie** case. The injunction will be refused unless he can: **Chesapeake and Ohio Railway Co. v. Ball**, [1953] O.R. 843, per McRuer C.J.H.C., at pp. 854-55. The House of Lords has somewhat relaxed this first test in **American Cyanamid Co. v. Ethicon**

> **Ltd.**, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J. speaking for himself and five other members of the Court in a unanimous judgment referred to but did not comment upon this difference in **Aetna Financial Services Ltd. v. Feigelman**, [1985] 1 S.C.R. 2, at pp. 9-10.
>
> **American Cyanamid** has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia...
>
> ...
>
> The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.
>
> The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."

This case was referred to by Adams, J. in the Supreme Court of Newfoundland in **Easteel Industries Ltd. v. I.A.M., Lodge 950** 67 Nfld. and P.E.I.R. 319; 206 A.P.R. In that case, the learned trial judge reviewed

the decision of Beetz, J. and the review of it by Goodridge, J. (as he then was) in **Labatt Brewing Co. v. Carling O'Keefe Breweries Canada Ltd.** (1985), 53 Nfld. & P.E.I.R. 66; 156 A.P.R. 66, is both instructive and helpful. In each of these cases **American Cyanamid, supra**, was reviewed.

In our own court, Davison, J. reviewed some of the issues involved herein in his oral decision in **Brett Pontiac Buick GMC Ltd. v. N.A.B.E.T., Local 920 et al.** 90 N.S.R. (2d); 230 A.P.R. 342. That case involved secondary picketing, but many considerations are common to both the questions in that case and the questions involved here. He said at p. 347:

> "**[22]** In this proceeding it is incumbent on the applicant to establish a prima facie case for the relief it seeks, proof that any harm which may befall it is irreparable and not compensable in damage, and a finding that the balance of convenience favours the granting of the injunction.
>
> **[23]** The **Judicature Act** stipulates that the court has the discretion to issue an injunction when it is just and convenient, but that provision is only an overriding principle by which a court must be guided in exercising its discretion. Before resort can be had to that discretion the applicant must meet the burden of proof to which I have made reference; and in this case the applicant must establish it has a substantive right or cause of action and establish a prima facie case that the right has or will be infringed and that irreparable harm will flow therefrom."

And later, in the same case, Davison, J. said:

"[33] The solicitor for the Union in the proceeding before me takes comfort in the **Dolphin Delivery** case, and states that it stands for the proposition that before the court should restrain a party from exercising the fundamental right of freedom of expression it must be shown that the Union is liable in tort. In my opinion there is nothing startling about this proposition. The applicant would have had to establish a cause of action before obtaining relief even if principles emanating from the **Charter** were not involved, and that cause of action in labour disputes would probably be founded in tort. In **Sherritt Gordon Mines Ltd. and TIW Industries Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Locals 179 and 264,** [1988] 1. W.W.R. 289; 59 Sask. R. 104, Cameron, J.A., of the Saskatchewan Court of Appeal stated at page 320:

> 'This court recently settled this standard. We held in **Potash Corp. of Sask. Mining Ltd. v. Todd,** [1987] 2 W.W.R. 481, that an applicant for interlocutory injunctive relief in cases of this nature must do more than show he has a fair question to be tried; he must establish a strong prima facie case. This is so for two reasons: first, in cases of this kind an order granting an injunction is most often in the nature of a final order; second, the competing interests at stake, and their nature, make it necessary to start with a balanced scale, not one weighted at the outset in favour of the plaintiff.
>
> It is, therefore, necessary on these applications for the judge to carefully weigh the relative strengths of the parties' cases and satisfy himself, to the extent required by the standard, that the plaintiff has a good cause of action: (i) that the plaintiff has a legal right and (ii) that the

defendant is interfering with that right. Each of the constituent elements of the cause of action must be made out with sufficient certainty, in light of the governing standard, to warrant the sought-after relief.

With that, I turn to the foundation of principle upon which the companies' case rested. I begin with the same general observations I made in **Potash Corp. v. Todd:**

> "These actions are, of course, rooted in the law of tort. And since picketing per se is not actionable when carried on during lawful strikes, it is not subject to restraint in civil actions unless it involves the commission of a tort of concern to the plaintiff, one that inferferes, for example, with the ownership or enjoyment of his land (as in trespass or nuisance), or with his person or reputation (defamation), or with his economic relations (as in procuring or inducing breach of contract or intimidation). So to the extent picketing may be accompanied by an independent tort such as trespass, intimidation, defamation and so on or may form an essential ingredient of another such as inducing breach of contract, or may itself constitute a tort such as that of nuisance, then that picketing may - so far as the plaintiff's legal rights are being interfered with - be restrained. Otherwise it may not. And such restraint as may be put upon the defendant should not in general extend beyond the tortious conduct complained of and established

by the plaintiff.

> So the determination of an application for injunctive relief in a civil action arising out of a trade dispute begins, just as it does in any other action, with the pleadings. The statement of claim constitutes the foundation upon which the plaintiff will have built his case for the interlocutory relief he seeks. It is necessary, therefore, to go first to the statement of claim and to identify which of the potentially applicable torts the plaintiff is relying upon. Having done that, it is then necessary to recall in detail the nature of the tort or torts in issue so as to be able to construe the framework of principle by which the lawfulness of the picketing falls to be determined."'"

In the present context, it is necessary to examine the statement of claim herein to determine just what it is that is being claimed to make certain that the relief sought is appropriate. I have examined the statement of claim herein. There are allegations of tortious conduct and resulting damages found in paras. 6, 7 and 8 of that document, which read as follows:

> "6. On various occasions since the commencement of the strike, the Defendants and Striking Bank Workers have been picketing the Plaintiff's premises in such a way that:
>
> (a) The Defendants and/or Striking Bank Workers have illegally trespassed on the private property of the Plaintiff including

specifically the setting up and taking part in picketing at the side door, in the parking lot and in the driveway of the Plaintiff's Glace Bay branch, all of which is the private property of the Plaintiff;

(b) The Defendants and/or Striking Bank Workers have from time to time set up obstructions to the driveway entrance, the doorway and the night depository areas, directly in front of the Plaintiff's Glace Bay branch. These obstructions have included vehicles being placed in whole or in part across the entrance to the driveway, the setting up of lawn chairs, including lawn chairs occupied by the Defendants and Striking Bank Workers in front of the driveway, doorway and/or night depository of the Plaintiff's branch, and physically restraining entrance and exit by the front doorway.

(c) The Defendants and/or Striking Bank Workers have authorized, consented to and/or taken part in picketing of the Plaintiff's Glace Bay branch with excessive numbers of pickets;

(d) The Defendants Andy Gillis has made defamatory comments to one of the Bank's staff in public in front of the Plaintiff's Glace Bay branch and in the presence of a number of other persons including other staff of the Plaintiff;

(f) The Defendants and/or Striking Bank Workers have physically and verbally harassed staff of the Plaintiff who have been working at the Plaintiff's Glace Bay branch since the commencement of the strike;

(g) The Defendants and/or Striking Bank Workers have verbally and physically harassed customers and suppliers of the Plaintiff as they have sought to enter and/or depart from the Plaintiff's Glace Bay branch;

> (h) The Defendants and/or the Striking Bank Workers have threatened and intimidated staff of the Plaintiff who have worked at the Glace Bay branch during the strike, which threatening and intimidation has included the blocking and preventing of staff of the Plaintiff as they seek to exit from the Glace Bay branch and exit from parking areas close to the Glace Bay Branch;
>
> 7. The actions of the Defendants and the Striking Bank Workers set out in Paragraph 6 have continued notwithstanding verbal and written requests by representatives of the Plaintiff to the Defendant Steelworkers Union and Defendant Gillis that such actions stop immediately.
>
> 8. By reason of the action of the Defendants, and others, the Plaintiff has suffered damage and is suffering irreparable harm."

On the basis of affidavits and argument before me, I have reached the following conclusions:

(1) The plaintiff has established, not only that there is a substantial issue to be tried, but it has established, as well, a strong **prima facie** case. While I conclude that the test in **American Cyanamid, supra**, is the applicable test in Nova Scotia, it is my finding that even the more stringent test of a **prima facie** case has been met.

(2) I conclude, on the basis of the affidavit evidence before me, that unless the injunction sought herein (or an injunction with similar provisions) is granted, the plaintiff (or even parties not involved herein) will,

in all probability, suffer irreparable harm; that is, "harm not susceptible or difficult to be compensated in damages". The affidavit evidence has convinced me that unless some definitive action is taken, there will be further obstruction to the entry to, and the exit from, the bank. I accept the opinion (subject to what I say below) of the Chief of Police; and I, accordingly, conclude that further assaultive and tortious activity is probable. I adopt herein the words of Doherty, J. in **Photo Engravers and Electrotypers Ltd. v. Fell et al.**, 90 C.L.L.C. 12,005 (Ont. S.C.), when he said:

> "...It does not rest well with me that the court should tell members of the community who are acting in a law abiding manner that they should run the risk of being assaulted or of having their property deliberately damaged because at some future point a court may order the person who assaulted them or caused the damage to pay them some money. In cases like this damages provide an inadequate and indeed an inappropriate remedy. Substantial injury which cannot be adequately or appropriately compensated in damages constitutes irreparable harm..."

(3) On the question of the balance of convenience, I find that this balance certainly favours the plaintiff. It is not intended by this order that the legal right to picket, and to strike, will be limited. It is only intended that the picketing will be done in a lawfully acceptable manner. It is intended only that excesses which are unlawful will be prohibited.

I might say, as you might have already noted, that I had some reservations about the form of the order [illegible] defendant union and the defendant, Gillis. I will not presume to tinker with that form of order.

I have some concerns about this case which I must express. The action was commenced in Halifax, but the site of the activity complained of is in Cape Breton County. There is no reason why the matter should not have been commenced and heard in Sydney. The subject matter involves residents of Cape Breton, who ought to be able to attend the court hearings, and to see and to hear, at first hand, the court proceedings which directly concern them.

I also express a concern which has been expressed many times by our courts, in particular, within the last six weeks in Nova Scotia there have been four independent expressions of concern about the court's role in labour disputes. It has been the experience of the courts that frequently injunctions are granted, and then ignored or disobeyed. On some occasions, contempt orders

are granted. Then, however, the parties reach agreement on the main subject matter of the dispute, and agree to approach the court to withdraw the contempt proceedings. The effect, however, is that the court has been brought into disrepute by the failure to proceed with the contempt proceedings. That effect must be avoided.

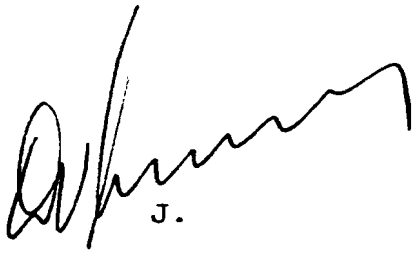
Recently, Glube, C.J.T.D. said in an oral decision **Cape Breton Development Corp. v. United Mine Workers District No. 26 et al.** (S.H. 73931 unreported) at p. 2:

> " On August 17, after an application for an injunction, Mr. Justice Davison granted an interim injunction which was to last until August 22. The Order which was granted, in essence, restrained the Defendants and all members of the Union or persons acting under their instructions from interfering or attempting to interfere with persons or vehicles entering on the plaintiff's premises by any force or threat of force, intimidation, coercion, or other unlawful means. In essence, it prevented the Union from causing a nuisance adjacent to or in the vicinity of the premises and from conspiring to have any other members commit any of these acts. Finally, the order indicated that lawful and peaceful picketing solely for the purposes of disseminating information was not prohibited. On August 18 the Canadian Labour Relations Board issued a declaration which among other things required the Union members to return to work and this did not happen.
>
> On August 23, a further injunction was granted by Mr. Justice Gruchy containing the same terms as the earlier injunction which was granted to the Corporation. This new injunction was to be in effect until after the trial or further Order of the court. The court action, as I see it, was commenced on August 23."

I am not saying that these concerns are justified in this case. I am comforted by the fact that the parties have experienced and knowledgeable counsel, and that they have shown here, on behalf of their clients, a willingness to work together to solve the problems that the parties are facing.

I hope that the cooperation that you gentlemen have displayed before the court can somehow or other be imparted to the parties who ought to be at the bargaining table working out their difficulties.

An order, in the amended form sought this morning, will be granted.



J.

Halifax, Nova Scotia
October 1st, 1990