THE LABOUR INJUNCTION IN CANADA

Introduction

Operating a business during a lawful strike is difficult. Even if management is able to operate the business with a sufficient number of trained employees, the union uses picketing to restrict the movement of employees, product and customers. The union's picketing tactics can create significant and immediate economic harm to the extent that an employer's right to continue operations during a strike or lockout becomes illusory.

These challenges are often magnified for the employer's human resources and legal staff because they may experience picketing only rarely, and may therefore be unfamiliar with the employer's legal rights and the processes for enforcing them

The purpose of this paper is to describe the law on picketing in labour disputes in Ontario, British Columbia and Atlantic Canada with a particular focus on three questions: (1) What is the Company's right to control picketing; (2) What is the process to obtain an injunction to restrain illegal picketing? and; (3) How can the Company best prepare itself now to increase its chances to obtain an injunction?

The key point to remember is that the courts throughout Canada are very reluctant to interfere in labour disputes. An employer must be patient before asking the Court to restrain illegal picketing. The Court will look to see whether the employer has identified through direct evidence the individual defendants who are involved in illegal conduct on the picket line and, in Ontario, whether the employer has used reasonable efforts to seek police assistance to control the wrongdoing. Of special concern to the Court will be whether the wrongdoing is causing irreparable harm to the employer. Only if these three conditions are met - direct evidence of illegal conduct, police assistance has failed, and the illegal picketing is causing irreparable harm- will the Court issue an injunction. British Columbia employers may also be entitled to relief against picketing from the BC Labour Relations Board.

PICKETING IN LABOUR DISPUTES IN ONTARIO

by Stephen Gleave, Partner, Hicks Morley Hamilton Stewart Storie LLP

An Employer's Rights to Control Picketing in a Labour Dispute

Section 102 of the *Courts of Justice Act* regulates the circumstances in which the Court in Ontario has jurisdiction to issue an injunction in a labour dispute.

The Courts hold that an employer must satisfy three conditions before granting an injunction:

a. the picketing involves an illegal act;

b. the employer has used reasonable efforts to obtain police assistance to prevent or control the illegal picketing;

c. irreparable harm would result to the employer if the injunction was not granted.

A. Illegal Picketing

Courts view an injunction as a remedy that must be used sparingly in labour disputes because of the importance of picketing to those employees on strike. As Mr. Justice Riopelle stated in *Falconbridge Limited v. C.A.W. et al.* (released on October 14, 2005):

> The right to picket is one which is constitutionally protected under the *Charter of Rights and Freedoms* in Canada. It is a right to the freedom of expression and therefore should not merely be tolerated but actively preserved and protected. The right to picket is generally seen to have four positive aspects to it. One of them is to persuade people of the righteousness of your cause. Another is to show solidarity: when large numbers congregate together there is some moral support in having someone elbow-to-elbow or shoulder-to-shoulder with you. The third reason is that picketing is also an outlet for that overabundance of energy that many strikers seem to have in the supercharged atmosphere of a strike. That last reason is that picketing is a way that the workers can inflict some economic consequences against an employer; customers, suppliers and many other people do not feel comfortable crossing picket lines and for that reason picket lines historically have been very effective.

Picketing, however, cannot be used to breach the law. As the Supreme Court of Canada held in *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U. Local 558* (2002), 208 D.L.R. (4th) 385, all picketing is legal, even if the picketing is secondary in nature (directed against someone other than the employer). The point at which picketing becomes illegal is when the conduct becomes criminal or tortuous (at page 461):

> Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation, will be impermissible, regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract.

Section 102(3) of the *Courts of Justice Act* also protects an employer from this type of illegal picketing (emphasis added):

> In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful.

The Courts in Ontario have relied on the *Pepsi-Cola* case and section 102(3) of the *Courts of Justice Act* to hold that the following type of conduct on the picket line is illegal and capable of being restrained:

1. picketers blocking company required vehicles (company trucks, suppliers' vehicles, contractors' vehicles, employee cars or buses) from entering or exiting the property;

2. picketers delaying these vehicles from entering and existing the property for significant time periods (anywhere from 5 to 15 minutes seen as excessive);

3. picketers causing traffic jams or congestion on public roads;

4. violence, assaults, property damage, defamation, harassment on the picket line or at staging areas to pick up or drop off managers or replacement workers.

It must be emphasized that picketers do not have the right to picket the homes of employees or managers. This is considered to be intimidation and a restriction on the free access to one's private property.

B. Police Assistance

As section 102(3) of the *Courts of Justice Act* states, an employer who is faced with illegal picketing must use reasonable efforts to obtain police assistance to control the illegal conduct. If the employer fails to prove this fact, the injunction will not be granted.

The Courts in Ontario take into account two factors in assessing whether the employer has used reasonable efforts to obtain police assistance. First, the Courts consider the police's policy on their involvement in labour disputes. Most police services in Ontario have adopted a policy of neutrality. They will intervene to control criminal acts and to keep the peace, but they will not prevent picketers from blocking or delaying ingress and egress from an employer's premises. If an employer shows the police in the jurisdiction have a policy of neutrality, this helps establish the police will not control the illegal conduct of blocking or delaying access to and from the employer's premises.

In addition, the Courts look at the number of times the employer contacts the police and asks for assistance. For example, in the *Falconbridge Limited v. C.A.W.* case, supra, Justice Riopelle took into account that during the first

thirteen days of the strike, the company called the police over three dozen times to report the blockades and delays on the picket line and, despite these requests, the problem persisted. Justice Riopelle concluded that the police could not effectively control the illegal conduct.

In some cases, the police have been successful in resolving blockades or other illegal conduct, however, after they depart, the illegal conduct continues. The Courts are also clear that in cases where police have temporary success, if the overall pattern of illegal conduct continues, the police cannot successfully control the illegal conduct and, therefore, the requirement in section 102(3) has been met by the employer: see *Industrial Hardwood Products (1996) Ltd. v. I.W.A. Canada, Local 2693 et al.* (2001), 196 D.L.R. (4th) 320 (C.A.).

C. Irreparable Harm

Even if there is illegal conduct, and the police cannot control it, an employer must still demonstrate irreparable harm for an injunction to be issued.

The concept of irreparable harm has been described by Justice Sharpe in his book *Injunctions and Specific Performance* as:

> It has been held that the courts should avoid taking a narrow view of irreparable harm. The concept is not to be restricted to market loss or damage to business reputation and may include harm in the form of administration disruption and inconvenience caused by dismantling scheme of school administration…The important point is that irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.

The problem is that our Courts recognize that picketing will create inconveniences and delays for an employer. It is common for the Courts to hold that employers should expect picketers to cause some disruption in their business. The issue in every case is: when does inconvenience become irreparable harm?

Irreparable harm is found to exist when an employer can demonstrate that money is not an adequate remedy. To satisfy this definition, an employer must clearly show the illegal conduct is causing harm to the employer or its employees, contractors, suppliers, or members of the public such that money cannot adequately cover.

Many cases now support the view that if there is a denial of basic civil liberties (such as access to private property, security of the person, liberty of the person, the right to travel on public roads), then no other type of harm must be proved. The Courts state that damages are not an adequate remedy for the flouting of these basic civil liberties: *Falconbridge Limited v. Sudbury Mine, Mill & Smelter Workers Union, Local 598 et al.* (Justice Hennessy, October 31, 2002).

The Courts have found the following types of harm to be irreparable and to form the basis for granting an injunction:

1. blockades of an employer's premises;
2. significant delays to entering and exiting an employer's premises;
3. violence, assaults, other criminal acts;
4. congestion or unsafe conditions on public roads;
5. loss of business or contracts (clients leaving);
6. loss of reputation or position in the marketplace;
7. significant loss of revenues which cannot be collected from the individual defendants;
8. lost production which cannot be made up in the future.

The Process for Obtaining an Injunction in a Labour Dispute

Timing is of critical importance in seeking to obtain an injunction in a labour dispute. The Courts expect the employer to tolerate some inconvenience and disruption. This may be a matter of hours or days in some strikes, or a week or a month in other strikes. But at some point the employer may conclude that its operations will be harmed without the assistance of the Courts to regulate the illegal picketing.

The key in every case is to ensure that the employer knows when it needs an injunction in place. This allows for the necessary planning and preparation by lawyers to complete the process for obtaining an injunction in time to protect the employer's business interests.

The employer's legal team must first find a judge in the jurisdiction to provide time to hear the motion. These motions typically last one day. Once a judge is available, the employer must identify the union and individual defendants involved in wrongdoing. Once they are identified, then the appropriate notice can be given to them. Notice can be given by letter, telephone or notice of motion, and personal service should be given. Without proper notice, even if the judge is available, the motion cannot proceed. Therefore, it cannot be emphasized enough how important it is for the employer to plan when the injunction must be in place. After that decision is made, the legal team can arrange the hearing date and then serve notice on the union and individual defendants.

It also is important to recognize the amount of effort that must be devoted to the preparation of affidavits. Affidavits are documents that set out the direct observations and knowledge of the deponent (the person who signs the affidavit). Judges rely on the affidavits and they must be accurate and contain no misrepresentations. These affidavits can take hours to prepare and sign off on. The employer must commit the resources to having the deponents ready to give the affidavits to the legal team, who in turn will have the deponents review and sign off on the affidavits. If there is delay in serving the affidavits on the union, this can be grounds for an adjournment of the motion.

Section 102 of the *Courts of Justice Act* allows an employer in extraordinary circumstances to be in Court with less than one day's notice to the union and other individual defendants. The norm, however, is that an employer is expected to give either two or four clear business days' notice. Clear days means you do not count the day on which notice is given, but you count the day on which the hearing is held (i.e., four clear days notice is service on Monday and hearing on Friday).

The following three processes are available to an employer under section 102:

1. An employer can file a notice of motion for an injunction with <u>four</u> clear business days notice to the union and named individual defendants on the picket line. Affidavits must be provided with the notice of motion. These affidavits set out the facts relied on for the injunction, and must contain direct observations of the deponent. These deponents can be cross examined by the union at the hearing. If four clear business days notice has been given, the employer can obtain an injunction to trial (in practical terms, for the rest of the strike);

2. An employer can telephone, or give a letter or notice of motion to, the union or individual defendants. If <u>two</u> clear days notice has been given, the employer can file affidavits setting out the facts relied on for the injunction, all of which has to be direct evidence of the deponents. The deponents can be cross examined at the hearing, if the union gives proper notice and pays their conduct money. The injunction, however, can last for no more than four days;

3. An employer can <u>move immediately</u> to Court, by giving notice by telephone or letter to the union or individual defendants. All evidence must proceed by oral evidence, that is, the employer calls its witnesses to give evidence in Court. The witnesses are cross-examined in Court. The employer has some latitude in putting in an affidavit on irreparable harm. This affidavit can be used to convince the Court that if the employer had to wait two days to bring the motion, the

damage to the employer in waiting for those two extra days would be irreparable. The injunction, however, lasts for only four days.

Best Practices for Preparation for an Injunction in a Labour Dispute

Preparation for an injunction begins well before a strike occurs. Once the employer determines the appropriate level and procedures of business operations during a strike, it can focus on the hour by hour, day by day, week by week needs of the business in terms of vehicular traffic, employees or contractors who need to report to work, and finished product to ship to customers. The employer has working knowledge of the type of blockades or obstructions or delays by the union and picketers that will cause harm to the business. With the development of a "critical time path", management can have a working definition of when an injunction will need to be in place.

The employer can develop a picket line protocol for its staff. Its primary purpose is to set out the requirements of the employer during the strike and how the employer expects employees and others to behave on the picket line. If the employer wants to demonstrate good faith, it can ask the union to sign off on the protocol. It is unlikely, however, that the union will sign off on a protocol that does not create significant harm for the employer. Nevertheless, when the employer proceeds to Court for an injunction, it can show the judge that it sought to negotiate a protocol.

The protocol can contain the following terms:

- there will be no picketing on the employer's property and there shall be no strike related equipment on the employer's property or blockade gates on the employer's property;

- there shall be immediate and non-obstructed ingress and egress of all company required vehicles, including contractors, suppliers, employees, management, members of the public, and clients. Pedestrians will be given the same right;

- employees are required to attend work; however, they are not to force their way through a picket line. If they are threatened or interfered with, ask them to note the name of the wrongdoer and report the incident to management;

- special arrangements for environmental or safety personnel to guarantee their immediate and non-obstructed ingress and egress to the employer's premises;

- picketers have the right to communicate their views, carry signs, speak to people entering the property about their concerns;

- the union will provide names, locations and telephone numbers of picket captains;

In addition to this protocol, the employer can develop a procedure for informing key management and security about the process to follow to obtain an injunction. The important terms of the procedure are:

- picketers have the right to express their views. This is an important right that must be respected;

- once the picketing becomes unlawful, the employer has the right to apply for an injunction to restrain the illegal picketing. Clarify the wrongdoing: the obstruction and interference with lawful entry to and exit from the employer's premises, acts of violence, property damage, nuisance or intimidation;

- inform the picket captain of the unlawful picketing on each shift. Record the response;

- maintain a daily log of number of picketers, location, whether exchange of information or simply blockades, messages on signs;

- security is to take pictures or videos of disruptive or unlawful conduct on the picket line;

- police assistance must be sought. A key member of management should have discussions with the labour liaison officer of the police services to identify the policy of the police, discuss police responses, and to identify the employer's protocol for picketing. It is critical to keep notes of these conversations and to obtain a copy of any police policy;

- a reminder that the police must be called for each incident of wrongdoing, for each significant delay or obstruction, or any other threats or harassment or violent or dangerous act. The police cannot be called too often. The employer has the right to police protection, and if the police will not act, it helps establish the case for an injunction;

- a summary of each act of wrongdoing must be kept and signed off by the eyewitness. For example, if an employee is assaulted, or there is a threat to management, have the eyewitness sign the affidavit;

- To keep the number of affidavits within reason, the employer should consider assigning a duty manager for each shift who would be responsible for observing and reporting on wrongdoing which is related to

obstructions and delays. The duty manager also would be familiar with the names of the wrongdoers and be able to identify those who are participating in the wrongdoing. Prompt the wrongdoers. Ask to cross the line or stop delays. Record their responses to show they are involved in an obstruction rather than peaceful picketing;

- It is critical to refrain from relying on photo identification (whether video or still photo) to identify wrongdoers. This type of evidence is frowned on by the Courts. Have the duty manager approach the wrongdoer and if the wrongdoer is not known by his features, ask the wrongdoer to identify himself. Sometimes we can get lucky that way;

- minimize the use of security to sign affidavits, if the security officers are not our employees. They simply do not know who the wrongdoers are;

- have the duty manager prepare a summary of each shift setting out the total number of vehicles delayed or obstructed, the types of vehicles, their reason for entry or exit, the number of employees or others delayed, and how these delays or obstructions affected production.

- it is important to inform the judge what the normal operations looks like (we need 50 trucks in per day), and how the illegal conduct is hurting the company (we are getting in 10 trucks and our raw materials are at 20% of our need). Also demonstrate how the illegal picketing is hurting shipment of processed materials (we need 10 trucks per day to get product out, we have only 2 getting out). Specify loss in revenue and clients and business caused by the illegal picketing. Indicate whether we will ever be able to make up lost production;

- the duty manager or security must documents every shift the number of calls to the police, reason for the calls, who was called, what was the response, if any;

- to demonstrate irreparable harm, pretend the judge knows nothing about your business. Start with a simple description of your production process, what you need to produce, what you need to get the product out, and how the picket line has created a “bottleneck” to meeting those needs. Educate the judge about your business and how the picket line is hurting you!

- be clear about harm that may affect the public (unsafe roads, environmental issues, safety concerns at the plant).

PICKETING IN LABOUR DISPUTES IN BRITISH COLUMBIA

by Matthew Cooperwilliams, Partner, Harris & Company LLP

> "The labour movement in British Columbia has succeeded in developing among trade unionists respect for picket lines to an extent which is unsurpassed in North America."
>
> BC Federation of Labour Picketing Policy

Given the cooperation and coordination amongst trade unions in British Columbia, picketing activity can have an immediate and serious impact on both unionized and non-unionized employers.

Unlike Ontario and Atlantic Canada, which rely on the Courts to regulate picketing activity, picketing of provincially regulated employers in British Columbia is addressed directly by the *Labour Relations Code* R.S.B.C. 1996, C 244 (the "Code"). This unique legal regime requires employers to understand how picketing is regulated in order to know when to deal with illegal picketing at the British Columbia Labour Relations Board (the "Board") and when to seek relief from the Supreme Court of British Columbia (the "Court").

This section of the paper addresses three questions: How is picketing regulated in B.C.? Who has jurisdiction to control illegal picketing in B.C.? What are the processes for obtaining injunctions to restrain illegal picketing from the Board and from the Court? Finally, we deal with a few additional practical points to help employers prepare for illegal picketing.

How is Picketing Regulated in B.C.?

Part 5 of the Code deals with strikes, lockouts and picketing for provincially regulated employers. Within Part 5, sections 65 to 67 deal with lawful picketing and the role of the Board in regulating picketing. Employers must understand what amounts to lawful picketing and how it is regulated in order to know when it crosses the line and becomes illegal picketing, as well as to know whether to seek injunctive relief from the Board or the Court.

Section 1 of the Code defines "picketing", but this definition has been struck down as overbroad and unconstitutional by the Supreme Court of Canada[1]. The actions which amount to picketing in B.C. are therefore determined by reference to the common law.

---

[1] *UFCW, Local 1518 v. KMart Canada Ltd.* [1999] 2 SCR 1083

When Can Picketing Occur?

Sections 65 and 67 of the Code have the collective effect of prohibiting picketing against provincially regulated employers unless there is a lawful strike or lockout. Section 57 of the Code prohibits strikes against, and lockouts by, provincially regulated employers during the term of a collective agreement. Thus, any picketing of a provincially regulated employer in B.C. during the term of a collective agreement breaches the Code and is unlawful.

Where Can Picketing Occur?

Primary Picketing

Under section 65(3) of the Code, members of a union have a right to picket at any location where a member of the striking or locked out bargaining unit performs work under the control or direction of the employer. Under section 65(4)(a), the Union may also apply to the Board to picket at another site or place that the employer is using to perform work, supply goods or furnish services that, except for the strike or lockout, would be performed at the site where picketing is permitted. Thus, if an employer attempts to continue providing services at a new location, that location may lawfully be picketed during the strike or lockout.

Secondary Picketing and Leafleting

B.C. is the only Canadian jurisdiction with legislation which appears to have the effect of prohibiting most secondary picketing, because it prohibits picketing against provincially regulated employers that is not in accordance with the Code and it allows picketing at sites other than the location of the struck work in only limited circumstances (under section 65(4)(b) of the Code, a union can apply to the Board for an order permitting it to picket at the place where an "ally" performs work for the benefit of the employer). However, as explained earlier in this paper, the Supreme Court of Canada held in *Pepsi* that secondary picketing is a Charter protected activity, and that some level of legislative intervention is warranted to balance the rights of picketers to free expression, the preservation of third party interests, and the prevention of the spread of labour strife. The Court held that the legislatures are required to respect Charter values and that the government bears the onus of justifying any such limitations.[2] *Pepsi* established, therefore, inconsistency between the common law and the Code regarding secondary picketing and this area of the law remains unsettled in B.C.

[2] *R.W.D.S.U., Local 558 v. Pepsi Cola Canada Beverages (West) Ltd.,* 2002 SCC 8, at para 107

In *U.F.C.W., Local 1518 v. KMart Canada Ltd.,* [1999] 2 S.C.R. 1083 ("KMart") the Supreme Court of Canada considered whether consumer leafleting amounted to picketing. Striking workers were distributing information to shoppers at neutral KMart locations but were acting peacefully and were not impeding people from shopping. The Court struck down the Code's definition of "picketing" and held that behavior meeting the following conditions constituted lawful consumer leafleting protected by the Charter:

- the message conveyed on the leaflet was accurate, not defamatory or otherwise unlawful, and did not entice people to commit tortious or unlawful acts;
- although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only;
- the manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful;
- the activity did not involve a large number of people such as to create an atmosphere of intimidation;
- the activity did not unduly impede access to or egress from the leafleted premises;
- the activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to the neutral sites.

Leafleting which complies with these conditions does not amount to picketing and cannot be enjoined.

Who has Jurisdiction to Control Picketing in B.C.?

If employee action amounts to picketing, it may be illegal, and may warrant legal relief, if it is picketing against a provincially regulated employer which violates the Code (which may entitle the employer to relief from the Board) or picketing against any employer which involves tortious or criminal acts, like nuisance, trespass or obstructing access to premises (which may entitle the employer to relief from the Court). Practically, the Board has jurisdiction over the time and place of picketing against provincially regulated employers, while the Court has jurisdiction over the time and place of picketing against federally regulated employers and the manner of picketing against all employers.

Sections 136 and 137 of the Code deal with the jurisdiction of the Board and the jurisdiction of the Court respectively. Section 136 provides, *inter alia,* that the Board has exclusive jurisdiction regarding regulation, restraint or prohibition of an individual or group from picketing against a provincially regulated employer.

Section 137 states that the Court retains the right to entertain a proceeding and make an order within its proper jurisdiction.

The Board has exclusive jurisdiction to regulate picketing of provincially regulated employers in the context of a labour dispute, or picketing which violates the Code, the regulations, or the governing collective agreement. "Dispute" is defined in section 1(1) of the Code as follows:

> "dispute" means a difference or apprehended difference between an employer or group of employers, and one or more of his or her or their employees or a trade union, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done.

Some interesting results flow from this definition. First, a labour dispute does not require a union, or a collective agreement. According to this definition, a single non-unionized employee picketing his employer over the terms and conditions of his employment would come within the Board's jurisdiction. Picketing by union members as part of a political campaign (as distinct from a labour dispute), on the other hand, has been found to fall outside the Board's jurisdiction.[3]

It is more difficult to be confident of the jurisdiction of the Board when illegal activities occur during otherwise legal picketing against a provincially regulated employer. In these situations, depending on the nature of the illegal activity, the employer will either bring its complaint to the Board or the Court. In *Better Value Furniture (CHWK) Ltd. v. General Truck Drivers and Helpers Union, Local 31* (1981), 26, B.C.L.R. 273 (C.A.), the Court, at para. 278, said:

> …there is jurisdiction in the Court to consider any matter that does not involve contraventions of the Labour Code, a collective agreement or the regulations.

In *Auto Haulaway Inc. v. Emcon Services Inc.* (1994), 93 B.C.L.R. (2d) 161 (S.C.) the Court found that jurisdiction should be declined by the Court where there is tortious conduct but the conduct was essentially a labour problem. If the conduct was criminal in nature, breached a provincial statute or violated laws applicable to all citizens of B.C., however, the Court would accept jurisdiction. Practically, in order for the Court to have jurisdiction regarding conduct, the tort itself must have arisen independently of any violation of the Code.[4]

---

[3] *Compass Group Canada v. Hospital Employees' Union,* 2004 BCSC 51

[4] See *Westminster Credit Union v. United Brotherhood of Carpenters and Joiners of America* (1984), 55 B.C.L.R. 369 (S.C.); *Maz Tutor Inns Ltd. v. Canadian Association of Smelter and Allied Workers* (1985), 68 B.C.L.R. 396 (C.A.); *Superior Propane Ltd. v. International Brotherhood of Teamsters, Chauffers, Warehouseman, and Helpers of America , Local 213*, [1983] B.C.J. No. 1685 (QL) (S.C.);

While tortious activity during picketing is normally illegal, section 66 of the Code provides a defence to the following torts when they arise out of lawful picketing against a provincially regulated employer:

- petty trespass to land normally accessible to the public,
- interference with contractual relations, and
- interference with a person's employment, trade or business which results in impairment of a business opportunity or economic loss.

In addition to the jurisdiction to deal with independent acts, criminal acts, breaches of provincial statute and violations of laws applicable to all citizens of B.C., the Courts retain inherent jurisdiction to grant interim relief to a provincially regulated employer where no adequate remedy exists under the Code or the collective agreement. The Court also retains jurisdiction, under section 137(2) of the Code, to restrain or enjoin picketing if there is immediate risk to individuals or property.[5]

Finally, the Court has exclusive jurisdiction with respect to picketing against federally regulated employers, because the *Canada Labour Code* does not regulate picketing. As a result, federally regulated employers in B.C. may only obtain injunctive relief against picketing if it meets the *Pepsi* test.

Obtaining Injunctions from the Board and from the Court to Restrain Picketing

Application to the Board

An application to the Board for a declaration that an activity constitutes unlawful picketing is called a Part 5 application. Before filing a Part 5 application, the party seeking relief should phone the Board's Registry to advise of the application and its nature, and to arrange the date, time and location of the hearing.

A Part 5 application must be filed directly with the Board and must specify the section(s) of the Code alleged to have been breached, the evidence on which the applicant will rely, and the remedy sought. The application must state the applicant's requested location, date and time for the hearing. At the same time that the application is filed with the Board it must also be served on all respondents. A hearing is usually set for at least 24 hours after the

[5] See, for example, *Vancouver (City) v. Vancouver Municipal and Regional Employees' Union* (1994), 118 D.L.R. (4th) 417 (B.C.S.C.)

respondent is served with a copy of the application. The Board may require the respondent to file a written reply to the Part 5 application, but in practice this is rare.

If the applicant requests the hearing within 24 hours after service, the application must set out the circumstances that require the urgent hearing as well as the nature of the anticipated or resulting harm. The Board may unilaterally fix dates and times of meetings and hearings without regard to when counsel for each side is available, and adjournments are unlikely to be granted in the absence of the consent of both parties or an emergency.

Normally, both parties and an officer of the Board will initially attend an informal, without prejudice, mediation in an attempt to resolve the situation. The majority of Part 5 applications are resolved through this process. If the matter is not resolved informally, an oral hearing will proceed with *viva voce* evidence from witnesses.

If the matter goes to a hearing the Board may grant interim relief pending the outcome.

Application to the Court

When picketing is, itself, lawful and an employer seeks relief against unlawful acts associated with it, the Court will be measured in its consideration of an injunction application and will intervene as little as possible. Generally,

(1) The Court should determine whether there is a lengthy history of trouble on the picket line.

(2) The injunction should bind no more persons than are necessary.

(3) The injunction should not enjoin behaviour in broad general terms that would prohibit the union from engaging in ordinary picketing activity.

(4) The injunction should be limited in time.

(5) The degree of scrutiny to be given such applications is greater than for other kinds of applications for interlocutory injunctions and requires some examination of the merits.[6]

In order to obtain an injunction in Court, the employer must demonstrate (i) a strong *prima facie* case, and (ii) that the balance of convenience favors granting the injunction.

[6] R.J. Kaardal, *Injunctions – British Columbia Law and Practice, 2nd, Chapter 5: Labour and Employment Disputes*, 2d Ed (Vancouver: Continuing Legal Education Society of British Columbia)

The British Columbia Court of Appeal held in *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333,* 2002 BCCA 641 at paras. 27 to 30 that because of the importance of expressive action and the fact that a picketing injunction effectively provides the whole of the relief sought, the usual evidentiary threshold for an injunction (that is, "a fair question to be tried") is insufficient and "a strong *prima facie* case" must be established instead.

When considering the balance of convenience, the Court will normally consider whether irreparable harm will result if the order is not made. Irreparable harm refers to the nature of the harm suffered rather than its magnitude.

Irreparable harm need not be proven when the conduct complained of is criminal in nature.[7] Other factors which the Court will consider when assessing the balance of convenience include:

- the likelihood that damages will be paid if recovered;
- the preservation of contested property;
- the preservation of the status quo;
- the strength of the applicant's case;
- public interest considerations; and
- any other factors affecting the balance of convenience.[8]

In practical terms, the Court's consideration of the balance of convenience amounts to an assessment of whether the injunction <u>should</u> be granted.

Injunctions may be sought on a without notice basis if (i) the application is of an urgent nature, (ii) it is not feasible to give notice because of logistical reasons (for example, the picketers can not be identified or they are in a remote location), or (iii) it is impossible to give notice without defeating the purpose of the order. On a without notice application, the applicant must be candid with the Court about the facts of the case and must offer all information which may have a bearing on the case. Further, the applicant must apply for leave to dispense with the requirement of notice.

[7] *U.A.W. v. Pacific Western Airlines Ltd.,* [1986] A.J. No. 119

[8] *Attorney General v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.)

Absent an emergency, the employer can apply for short leave to expedite the hearing of an injunction application in Court with notice. This is done by attending Chambers, providing materials (affidavits, Notice of Application, Notice of Civil Claim, and Short Leave Requisition) and speaking to the short leave application. If a short leave order is granted, the Court stipulates when the employer must serve the Defendants with its injunction application materials, when the Defendants must deliver their reply materials, and when the application will be heard. An urgent injunction application can normally be heard on 24 to 48 hours' notice.

The hearing of an injunction application is based on the parties' affidavit evidence and submissions.

After an injunction is obtained, if picketers fail to obey its terms the employer may return to Court and obtain an enforcement order, which allows law enforcement officers to arrest non-compliant picketers. An application for an enforcement order requires additional affidavit evidence, a Notice of Application and a new hearing.

How Employers Can Best Prepare to Obtain a Picketing Injunction

Aside from the practice tips already provided, we emphasize that because of the difficulty of obtaining picketing injunctions in B.C., it is extremely important to obtain accurate and detailed evidence about the picketing activities in issue. The pleadings for a Part 5 application to the Board or an injunction application to the Court should normally include:

- Identities of all of the parties involved.
- Descriptions of where the picketing took place, what time it began, who observed it, the number of picketers, any placards worn, and general conduct.
- Detailed descriptions of attempts to cross the picket line and what occurred. It is not sufficient to simply say that a truck approached the premises and was blocked. A good description, for example, would be: truck approaches at 8:00 am, is blocked by 10 picketers (identified if possible) standing in front of the truck, driver honks, waits for 5 minutes, backs up, waits another 10 minutes, attempts access again by driving into premises, is again blocked by 10 picketers (again, identified if possible), cannot obtain access after waiting another 10 minutes, honks again with no effect. Descriptions of the activities of the picketers as they blocked access, for example whether profanities were used and/or objects thrown, are also useful.
- Copies of letters written to the Union asking that the conduct cease.

- Description of communications with the picketers.
- Description of communications with law enforcement officers.
- Evidence of the impact of the blockade on the business and the morale of non-union employees.
- Details of property damage.

OBTAINING AN INJUNCTION IN ATLANTIC CANADA

By G. Grant Machum, Partner, Stewart McKelvey

Introduction

In Canada, as a general rule, picketing is permissible as long as it does not involve criminal or tortious conduct. This rule was enunciated by the Supreme Court of Canada in *Pepsi-Cola Canada Beverages (West) Limited v. R.W.D.S.U., Local 558*, 2002 SCC 8 ("*Pepsi-Cola*"). In Atlantic Canada, as in other provincial jurisdictions, the courts are reluctant to interfere in labour disputes unless there is some evidence of criminal or tortious conduct and that conduct is causing irreparable harm.

Issue 1: An Employer's Right to Control Picketing in a Labour Dispute

Various rules of Court in Atlantic Canada regulate the circumstances in which the Court has jurisdiction and discretion to issue an injunction in a dispute. For example, Newfoundland and Labrador has a process for obtaining an injunction that is included in its *Labour Relations Act*. Nova Scotia and Prince Edward Island's *Judicature Act* specifically provides that, in matters involving a "labour-management dispute", a motion for injunction cannot proceed on an *ex parte* basis unless the court is satisfied that it should proceed as such and "a breach of peace, an interruption of essential public service, injury to persons or severe damage to property has occurred or is about to occur; and, reasonable attempts have been made to notify the persons or the trade union affected." Unique to Atlantic Canada, Prince Edward Island must show by way of affidavit that reasonable efforts to obtain police assistance have been made. The particular procedural nuances for obtaining an injunction in each Atlantic jurisdiction are set forth below.

In all cases, courts hold that an employer must satisfy three conditions before an injunction will be granted:

a. the picketing involves an illegal act;

b. the employer has used reasonable efforts to prevent or control the illegal picketing;

c. irreparable harm would result to the employer if the injunction was not granted.

A. Illegal Picketing

As in other jurisdictions, courts carefully weigh the interests in injunction proceedings with a view to balancing freedom of expression on the one hand (picketers informing the public about their dispute) and protection of property and health and safety on the other. The courts have recognized that picketing cannot be used to breach the law. The point at which picketing becomes illegal is when the conduct becomes criminal or tortious and was discussed in *Pepsi-Cola* as follows:

> *103 At this point we may usefully review what is caught by the rule that all picketing is legal absent tortious or criminal conduct. The answer is, a great deal. Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible, regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract.*

Examples of tortious conduct include nuisance, trespass, interference with economic relations, defamation, intimidation, misrepresentation and rights arising out of contracts or business relationships through the tort of inducing breach of contract. Examples of criminal conduct include trespass, vandalism (or other offences against property), assault or threats of harm (or other offences against the person).

For example, in *Canada Post Corp. v. Public Service Alliance of Canada, Union of Postal Communications Employees, Local 60100*, 2009 NBQB 38, the Court ruled that the right to picket did not include the right to obstruct and create a safety hazard on a busy interchange. This case is a good example of conduct that courts will restrain.

Examples of other conduct attracting injunctive relief in Atlantic Canada over the last few years includes the following:

- Smashing a window on the driver's side of a van and then punching the driver of the van in the chest. A report that picketers used a wooden butt end of a picket to strike sections of the van, including the grill, causing the van to become immobilized (*Toromont Cat v. International Union of Operating Engineers, Local 904*, 2007 NLTD 212 (CanLII)).
- A strong *prima facie* case of intimidation – intentional intimidation of an individual by making derogatory racial or ethnic taunts (*Dexel Developments Ltd. v. Nova Scotia and Prince Edward Island Regional Council of Carpenters Millrights & Allied Workers, Local 83*, 2007 NSSC 335 (CanLII)).
- Property damage (*Atcon Plywood Inc. v. IWA Canada, Local 1-306*, 2004 NBQB 190 (CanLII)).

When picketing activities become unlawful, the employer should act quickly to get an injunction. Since interlocutory injunctions are sought before the parties are heard on the merits of the case, such a remedy will not be granted before the applicant establishes that it has met the stringent requirements established through previous jurisprudence.

An interlocutory injunction that is granted in an industrial dispute is particularly significant in that it essentially disposes of the matter. Because of this, the applicant has a heavy burden of proof in order to satisfy the court that injunctive relief should be granted.

B. Police Assistance

Nova Scotia, New Brunswick and Newfoundland and Labrador do not expressly address the issue of police assistance in rules regulating picketing. Prince Edward Island rules provide that an applicant must show, by way of affidavit, that reasonable efforts have been made to obtain police assistance:

> *...reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question, or a breach of the peace have been unsuccessful.*

C. Irreparable Harm

Where illegal or tortious conduct occurs, the court must still determine whether the applicant would suffer irreparable harm if the interlocutory injunction is not granted. "Irreparable" refers to the nature of the harm suffered, rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

<u>What is irreparable harm?</u>

In Nova Scotia, Davison, J., addressed this question in *J.W. Bird & Co. Ltd.* (1988), 82 N.S.R. (2d) 435 at p.437:

> *It is alleged by Mr. Bird in his affidavit that solicitations by Mr. Levesque to the suppliers and the customers "may well have caused damage" to the plaintiff but that "it is too early to know that with any certainty". It is also alleged that if the defendants are permitted to continue to solicit the suppliers and customers of the plaintiff, the solicitations will result in irreparable harm through lost business.*

In Atlantic Canada irreparable harm is not based on unsupported allegations. Courts recognize that picketing will create inconveniences and delays for an employer and, generally, courts hold that employers should expect picketers to cause 'some' disruption to their business. The issue in every case is "when does inconvenience cross the line to become irreparable harm?"

As noted by Stephen F. Gleave under the Ontario section of this paper, Courts have found the following type of harm amounts to irreparable harm and to injunctive relief:

- Blockades of an employer's premises;
- Significant delays to entering and exiting an employer's premises;
- Violence, assaults, other criminal acts;
- Congestion or unsafe conditions on public roads;
- Loss of business or contracts;
- Loss of reputation or position in the marketplace;
- Significant loss of revenues that cannot be collected from individual defendants;
- Lost production that cannot be recovered in the future.

Issue 2: The Process for Obtaining an Injunction in a Labour Dispute

Before soliciting an interlocutory injunction, the applicant should ensure that the circumstances justify an injunction.

The process usually starts with the commencement of an action. The action will be the underlying reason for the injunction, for example an action in trespass, nuisance, etc. As mentioned earlier, in the context of picketing, granting an interlocutory injunction often disposes of the matter and the parties never end up at trial. However, for procedural reasons, the applicant will always have to commence an action.

If the picketers' behaviour is criminal, the employer may also seek to press criminal charges.

Although there are significant similarities, each province has its own procedural and legislative requirements that must be adhered to when seeking an injunction.

(1) Nova Scotia

Section 43(9) of the *Judicature Act* and the Nova Scotia *Civil Procedure Rules* provide the court with jurisdiction over interim and interlocutory injunction applications.

There is a process in Nova Scotia to obtain an injunction through an emergency motion to the Court. In order to bring an emergency motion (or for that matter any motion), the applicant must first initiate a claim by filing a Notice of Action and Statement of Claim (short standard form and may be subject to amendment at a later date, if pursued). Immediately after filing a claim a motion would be brought.

Whether an emergency motion for an injunction will be heard will depend on the particular situation. Obtaining an emergency motion may prove difficult, but again will depend on the circumstances and whether the applicant can convince the Court it is truly an emergency. A judge hearing an emergency motion may provide directions on having the matter heard in the usual "non-emergency" fashion. Thus, while the emergency motion may be denied, it can be used to bring the matter before the court quickly and then have the matter scheduled for a hearing soon thereafter.

The emergency motion provisions allow for an *ex parte* hearing. However, Nova Scotia's *Judicature Act* specifically provides that in matters involving a "labour-management dispute" a motion for injunction cannot proceed on an *ex parte* basis unless the court is satisfied that it should proceed as such and "a breach of peace, an interruption of essential public service, injury to persons or severe damage to property has occurred or is about to occur; and, reasonable attempts have been made to notify the persons or the trade union affected."

Aside from proceeding on an emergency basis, an applicant could bring a "regular" motion. An *ex parte* motion (subject to the qualifications set forth above for "labour-management disputes") can be brought on two clear days' notice; a motion on notice may be brought on five clear days' notice. The Court may allow a "regular" motion to be brought with an abridged timeline for service, etc.

Evidence on any motion is generally by way of affidavit.

In either emergency or regular procedure, the employer must provide an undertaking to:

- Indemnify the union for losses if the injunction is ultimately found not to be justified,
- Move without delay for an interlocutory injunction,
- Bring the action to final determination without delay.

In either emergency or regular matters, the motion should be filed along with Affidavit evidence immediately after filing Notice of Action.

(a) Steps to obtain an interlocutory injunction in Nova Scotia

1. <u>Choose between emergency motion or regular motion, with notice or *ex-parte*</u>

(a) Required Documents and Rule Information

(i) Emergency motion pursuant to R 28:

(A) Direct the request for emergency motion through the Prothonotary, who will ensure a judge is available to hear the motion. The judge must be convinced there is a true emergency that requires a speedy hearing. While such a motion can proceed *ex parte* if there are "circumstances of sufficient gravity", the motion can also proceed with notice and in practice, notice is generally given to the union and courts are reluctant to proceed unless the notice would lead to harm to a child, violence or destruction of evidence. The letter to the Prothonotary should include:

(I) Description of the parties;

(II) Request for a specific time to be heard;

(III) Description of anticipated evidence;

(IV) Description of Civil Procedure Rules relied upon;

(V) Notice that the employer will be filing an application;

(VI) Reasons why the motion should be heard on an emergency basis;

(VII) Notice as to when the employer will file motion materials; and

(VIII) Anticipated length of the hearing.

(ii) *Ex parte* motion for interim injunction pursuant to R 41.05(1):

(A) Allows the motion to proceed without notice to the union. Can be brought on two days' notice to the court (R 23.11(2)). Can only be brought where the Court is satisfied that there are "circumstances of sufficient gravity" (R 41.05(1)), defined in the labour relations context as "a breach of peace, an interruption of essential public service, injury to persons or severe damage to property has occurred or is about to occur; and, reasonable attempts have been made to notify the persons or trade union affected" [*Judicature Act*, s.44(3)(a)]. A party affected by an *ex parte* order may request a rehearing on notice pursuant to R 22.06.

(iii) "Regular" motion for interlocutory injunction pursuant to R 41.03:

(A) On five days' notice (R.23.11(1)). Notice of the motion must be served on the union. It may be possible to bring this motion on an abridged timeline for notice, service, etc. upon request to the court.

2. <u>Proceed or Withdraw the action</u>

(a) R 41.06 requires the moving party to undertake to bring the claim to final determination without delay.

(b) The action may be withdrawn once a strike has ended or other settlement has been reached.

(2) New Brunswick

Sections 33 and 34 of the *Judicature Act*, R.S.N.B. 1973, c. G-2 and Rule 40 of the *Rules of Court* provide the court with jurisdiction over interlocutory injunction applications.

There are two ways to seek an interlocutory injunction in New Brunswick (Rule 40.01):

1. **Preliminary Motion** (Before commencement of proceedings);

(a) File a Notice of Preliminary Motion (Form 37B).

(b) The request for an interlocutory injunction sought by way of preliminary motion will usually be granted only on terms providing that proceedings will be commenced without delay.

2. **Motion** (After commencement of proceedings);

(a) File a Notice of Action with Statement of Claim Attached (Form 16A) and a Notice of Motion (Form 37A).

Emergencies

When there is a situation of emergency, there are two measures that can be sought in order to speed up the process to obtain an interlocutory injunction: an abridgement of time for service and/or an *ex parte* motion.

1. Abridgement of time for service

(a) *What is the general rule regarding time for service?*

A Notice of Motion or Preliminary Motion usually has to be served at least 10 days before the date of the hearing (Rule 37.04(5)).

(b) *What are the other options?*

A Court has the power to abridge that delay "on such terms as may be just" (Rule 3.02). In order to obtain an abridgement of time for service, the moving party must substantiate the need for the abridgement, show that the opposing party would not be unduly prejudiced if the abridgement is granted, and demonstrate that it is in the interest of justice for the Court to order the abridgement.

2. *Ex parte* motion

(a) *What is the general rule regarding notification?*

The Notice of Motion or Preliminary Motion and affidavits in support usually have to be served on all parties to the proceedings and on any persons who would be affected by the order sought (Rule 37.04(1)).

(b) *What are the other options?*

Where the nature of the motion or the circumstances of the case render service of the Notice impractical or unnecessary, or where the delay necessary to effect such service might entail serious consequences, the court may make an order without notice (Rule 37.04(2)).

Where a case of extreme emergency exists, a motion and an order may be made without notice before the commencement of a proceeding upon the undertaking of the applicant to commence the proceeding forthwith (Rule 37.04(3)).

(c) *What is particular about ex parte injunctions in the case of industrial disputes?*

In the case of industrial disputes, an *ex parte* injunction shall not be for a period longer than four days (s. 34 of the *Judicature Act)*.

Furthermore, motion for injunction in the case of an industrial dispute cannot proceed on an *ex parte* basis unless the court is satisfied that "a breach of peace, injury to the person or damage to property has occurred and is likely to be continued" and reasonable attempts have been made to notify the persons or the trade union affected (s. 34 of the *Judicature Act)*.

Notice of Motion or Preliminary Motion

A Notice of Motion or Preliminary Motion should (Rule 37.03):

(a) state the precise order sought;

(b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) list the documentary evidence to be used at the hearing of a motion.

It is common practice to enclose the injunction order sought as Schedule "A" to the Notice of Motion or Preliminary Motion.

Evidence on any motion would generally be by way of affidavit. Pursuant to s. 34(5) of the *Judicature Act*, an affidavit used in support of a motion for an *ex parte* injunction must be confined to facts within the personal knowledge of the deponent and the court may require *viva voce* evidence in addition to the affidavits.

Where an *ex parte* injunction is granted, a party cannot rely solely on the evidence from that injunction to obtain a subsequent *ex parte* injunction (s. 34(4) of the *Judicature Act*).

At least 48 hours before the hearing of the motion, the moving party has to file a record for the use of the court consisting of:

(a) an index,

(b) a copy of the Notice of Motion or Notice of Preliminary Motion, and;

(c) a copy of all affidavits, including those of each adverse party, or other material to be used on the hearing (Rule 37.05).

Although it is not mandatory to submit a brief for a motion, it is common practice to do so when an interlocutory injunction is sought.

It should be noted that if an interlocutory injunction is granted, the moving party undertakes to indemnify the opposing party if the interlocutory injunction is ultimately found not to be justified (Rule 40.04).

Proceed or withdraw the Action

After the granting of an interlocutory injunction, the moving party will have to either:

(a) take the necessary steps to bring the action to a final determination without delay; or

(b) obtain the consent of all parties to discontinue the action, file with the clerk a Notice of Discontinuance (Form 25A) and serve a copy of the Notice on all parties who have been served with the Statement of Claim.

(3) Prince Edward Island

The court's jurisdiction to grant injunctions is found in s. 42 of the *Judicature Act*. Section 44 enables the court to grant an interlocutory injunction where it is "just and convenient" to do so. Section 45 applies specifically to "labour disputes". Rule 40 of the *Rules of Civil Procedure* provides the procedural mechanism for seeking an injunction.

With regard to the first branch of the *R.J.R. MacDonald* test – a serious issue to be tried – Prince Edward Island courts have not adopted the stricter Nova Scotia threshold of "a strong *prima facie* case". So long as the issue is not frivolous or vexatious, this branch will be satisfied.

Unlike other jurisdictions, a moving party is not necessarily required to initiate an action before making a motion to obtain an injunction. Rule 40.01 permits a moving party to obtain an interlocutory injunction for a "pending or intended proceeding". Notably, unless the court orders otherwise, Rule 40.03 requires the party seeking the injunction to provide an undertaking to abide by any order of the court concerning damages.

Labour disputes are explicitly excluded from the provisions in the *Rules of Civil Procedure* permitting a motion without notice. The *Judicature Act* provides that in matters involving a "labour dispute" – broadly defined at s. 45(1) – a moving party is under a general obligation to provide the responding party with two days' notice of the motion. However, s. 45(8) dispenses of this requirement where the moving party can prove not less than four things: an interim injunction would otherwise be granted; the delay necessary to provide notice would "result in irreparable damage or injury, a breach of the peace, or an interruption of an essential service"; reasonable notice has been provided (or could not have been given) to the affected person(s) or the labour organization; and, oral evidence establishes all of these conditions.

Rule 40.04 provides that where an injunction is obtained without notice, an "opposing party" may apply for the dissolution or modification of the injunction on two days' notice; or on such shorter notice as the court may prescribe.

Aside from proceeding without notice, a moving party involved in a labour dispute may bring a motion for an injunction where it provides the responding party with the necessary two days' notice, either by way of personal service on an officer or director (in the case of a labour organization) or by posting the notice in a conspicuous place at the location of the activity sought to be restrained (for all others).

Regardless of whether the moving party is proceeding with or without notice for an injunction in connection to a labour dispute, it must satisfy the court that:

> *reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question, or a breach of the peace have been unsuccessful.*

Evidence on any motion is to be given by way of affidavit.

Steps to Obtaining an Injunction

1. Ensure the circumstances justify an injunction;

2. Determine whether the activity sought to be restrained is connected to a "labour dispute";

(a) If **NO**,

(i) the motion may be brought without notice pursuant to Rule 40.02 of the *Rules of Civil Procedure*;

(ii) An injunction may be granted for a period not exceeding ten days;

(iii) Absent exceptional circumstances, notice must be provided for a motion to extend the notice for a further period not exceeding ten days;

(b) If **YES**,

(i) Take sufficient measures to satisfy a court that reasonable efforts have been made to obtain police assistance with respect to the illegal activity sought to be restrained;

(ii) Provide two days' notice to the responding party pursuant to s. 45 of the *Judicature Act* **UNLESS**;

(iii) It can be established that the criteria found in s. 45(8) will be satisfied;

3. Prepare and serve a factum consisting of facts and law as provided for in Rule 40.05.

<u>Rule Information</u>

- A motion for an interlocutory injunction under ss. 44 and 45 of the *Judicature Act* may be brought by a party to a pending or intended proceeding (Rule 40.01).
- The *Rules of Civil Procedure* do not allow a motion to be brought without notice where the activity sought to be restrained is connected to a "labour dispute", as defined in s. 45 of the *Judicature Act* (Rule 40.02(4)). However, the motion may be brought under the authority of the *Judicature Act*, where certain conditions are fulfilled (s. 45(8)).
- Regardless of whether the moving party is proceeding with or without notice, it must undertake to abide by any order concerning damages the court may make, if ultimately it appears that the granting of the order has caused damage to responding party and the moving party ought to provide compensation (Rule 40.03).

- Rule 40.05 governs a party's obligations to serve the opposing party with a factum setting out its argument, including the applicable facts and law:
  - A party making a motion under Rule 40.01 must serve every other party at least four days before the hearing (Rule 40.05(2));
  - The Responding party must serve the moving party two days before the hearing (Rule 40.05(3));
  - Each party's factum and proof of service must be filed with the court at least two days before the hearing (Rule 40.05(4)).

(4) Newfoundland and Labrador

General Guidelines

In Newfoundland and Labrador an injunction may be granted via s.105 of the province's *Judicature Act, 1990*. This provision allows the Court to grant an injunction at its own discretion, provided that such an order is just or convenient.

Rule 22 of the *Rules of the Supreme Court, 1986* states the regulatory stipulations for creating an application for interlocutory, interim and *ex parte* injunctions. In short, an application for an interlocutory injunction shall be "made upon notice" except where "urgency" exists and shall be granted at any time after an action is commenced on "terms that are just".

An interim injunction is permissible under the *Rules*, prior to the commencement of a proceeding by Statement of Claim. However, interlocutory injunctions are the most commonly sought in labour matters.

Injunctions in Labour Matters

The *Labour Relations Act* (the *"Act"*) governs labour relations, collective bargaining, and workplace disputes. Lawful striking practices are outlined in s. 128 of the *Act*, as is the process for applying for an injunction during a lawful strike, when tortious or unlawful behaviour takes place, and particularly where the statute is breached, as stated in s. 134.

To establish that the circumstances of a labour dispute justify an injunction, the Newfoundland judiciary system relies upon a three-step test:

> *1) The plaintiff must establish a prima facie case for the relief which is being sought;*

> *2) Irreparable harm need not be proven in cases where the breach of a statute is established through the activities of a party to be enjoined; and*
>
> *3) The criterion for balance of convenience, including that of irreparable harm, need not be established where, because of the facts and circumstances of a case, the matter will in all likelihood continue in dispute to trial if the injunction is issued.*

Establishing a *prima facie* case for an injunction in labour disputes is a higher threshold test than in other situations where an injunction is sought. For labour related matters, the applicant must establish that there is a serious issue to be tried. Unlawful or violent behaviour of picketers during a labour strike can meet this threshold, if the behaviour is severe.

Peaceful picketing has been recognized judicially as a freedom of expression and informational in character, and therefore not a violation of the *Act*. Picketing employees involved in a lawful strike are able to participate in a range of actions under s. 128 of the *Act*: peacefully persuading or trying to persuade anyone not to enter an employer's place of business, operations or employment; to do business with the employer; or to deal in or handle the products of the employer are specifically listed as acceptable under the statute. This provision also outlines the penalty for exceeding allowable strike activity, including a fine and the possibility of imprisonment for a term not exceeding three months.

The right to picket becomes a breach of s. 128 of the *Act* when picketers demonstrate in a violent manner. An injunction may be granted to cease striking employees who are engaging in tortuous activities such as assault, trespassing, intimidation, and nuisance, or those who are otherwise in violation of s. 128. An injunction is a potential remedy for employers seeking to quash violent or unmanageable picketing behaviour in an expedient manner. When picketing demonstrators show severe and violent behaviour, criminal charges may be laid; arrests are laid frequently when picketing behaviour leads to property damage or physical injuries.

Ex Parte Injunctions

Rule 29.04 sets out the general conditions for an *ex parte* injunction application; one such condition includes the Court being "satisfied that the delay caused by giving notice would or might entail serious mischief...". An *ex parte* injunction in a labour dispute will only be granted where there are exceptional circumstances requiring urgency.

According to Chief Justice Derek Green, the general rule is that an injunction will not be granted without notice to the other side, absent exceptional cases of urgency. An *ex parte* application will not be successful unless two conditions are satisfied:

1) The threat of irreparable harm is so immediate and serious that even abbreviated notice (i.e. less than that stipulated by the rules of the court) or informal notice (such as by telephone, facsimile or e-mail either to the affected person to known counsel) would not be appropriate; and,

2) in the case of a labour dispute, at least 24 hours' notice is not required by virtue of the application of s. 134 of the Labour Relations Act.

Section 134 of the *Act*, which applies notwithstanding the usual *Rules* dispensing with the need for notice, stipulates that an injunction may not be granted unless the parties to a dispute have been "given notice of the application and have been given an opportunity to appear". By express provision of s. 134 of the *Act*, 24 hours' notice to the affected parties is required. The requirement for 24 hours' notice is not easily circumvented by characterizing the injunction as an *ex parte* motion.

Steps to Obtaining an Injunction in Labour Disputes

1. Ensure circumstances justify an injunction.

1. Note the above statutory and common law criterion, tests for establishing an injunction.

2. File a Statement of Claim per Rule 5.01.

2. Every proceeding requires the issuance of an originating application or a statement of claim. An applicant's Statement of Claim in a labour dispute context should state the cause of action, including the underlying facts; describe the circumstances surrounding the claim; whether the behaviour of picketers was tortious and/or in breach of s. 128 of the *Act*; whether the circumstances cause damages, and what relief is being sought (including the injunction).

3. File an interlocutory application per Rule 22.01(1).

EITHER:

3. **WITH NOTICE**, per Rules 22.01(2), 22.01(2). An application for an injunction shall be made by a party to a proceeding at any time after the commencement of the proceeding, whether or not the claim for the injunction was included in the party's statement of claim. An application for an injunction shall be made upon notice;

OR:

4. ***EX PARTE***, per Rules 22.01(2), 29.04. In usual circumstances, an application for an *ex parte* injunction is the exception to Rule 22.01(2), whereby application may be made without

notice to other affected parties. However, the Court has noted that s. 134 still applies in the context of a labour dispute, and the general rule is that an injunction will not be granted without notice to other parties.

The application for an *ex parte* injunction must include:

- A statement as to whether s. 134 of the *Labour Relations Act* applies, and the reasons for that belief;
- Information as to the steps, if any, taken by the applicant to bring the application to the attention of affected persons;
- A description of the circumstances that make it infeasible to serve, or give abbreviated and informal notice of, the application;
- A statement as to whether the applicant is offering an undertaking or security (more on this below), and the manner in which the same will proceed.

4. **File evidence, usually in the form of sworn affidavits**. The injunction application, whether *inter partes* or *ex parte*, must be grounded by an affidavit. By s. 134(1)(b) of the *Act*, the information provided in an affidavit submitted alongside an injunction application must be based on firsthand, factual knowledge of an event, and not hearsay. An affidavit in the labour dispute context must be given by an observer or a participant in the said labour dispute. It should reference the facts relevant to whatever circumstances lead to the injunction being sought.

5. **The applicant must undertake to pay damages.** As per the three-part test that establishes a labour injunction, the threshold on a labour dispute injunction application does not require that 'irreparable harm' be caused by the objectionable picketing activity, if breach of the *Act* is established (usually s. 128). The applicant must undertake to pay damages adequate to compensate the affected party in the event that loss is sustained from the granting of the injunction.

6. **The applicant must give an undertaking for contempt**. The contempt powers of the Court are set out in Rule 53.05. However, the court also retains an inherent power to enforce its orders. When an injunction is granted to an employer, the employer agrees to prosecute any subsequent injunction violations. This helps to maintain the balance of bargaining power between employer and union. A promise to duly prosecute violation of the injunction ensures that the employer is not able to use waiver of that breach as leverage to coerce the union to sign a collective agreement. There is also a public interest in promoting compliance with court orders generally.

7. **Submit a memorandum of authorities.** This establishes the applicant's legal arguments and states the relevant case law to be submitted alongside its injunction application. In practice, this often takes the form of a list

of authorities, as the requirement to submit a brief several days before the hearing may be too time-consuming for parties who are seeking a quick remedy.

8. **Proceed or withdraw the action**: Rules 19.01 and 19.02 allow for the discontinuance of a proceeding or the withdrawal of any cause of action both before and after a proceeding is entered for trial. Applicants may therefore withdraw a statement of claim for its injunction application at any time by filing a notice of discontinuance or withdrawal. Certain costs may then be owed to the withdrawing party, as outlined in Rule 19.03.

A notice of discontinuance will contain the reasons why a party is withdrawing its cause of action. It is common to withdraw a cause of action for an injunction at the resolution of a strike when a collective agreement has been reached. Once the notice of withdrawal is approved, the cause of action is closed and will not receive further intervention from the Court.