CASE AND COMMENT

UNION NATIONALE DES EMPLOYES DE VICKERS v. CANADIAN VICKERS LTD.

LABOR UNION — NON-STRIKING EMPLOYEES PREVENTED FROM WORKING BY ILLEGAL ACTIVITIES OF PICKETING EMPLOYEES — DAMAGES TO EMPLOYER — CRIMINAL CODE ART. 336 — ARTICLES 1053, 1054 C.C.

Articles 1053 and 1054 C.C. have again reared their controversial heads in the recent case of *Union Nationale des Employes de Vickers* v. *Canadian Vickers Ltd.*[1]; moreover, as in most labour cases dealing with picketing by striking unionists, section 366, sub-section 2, of the Criminal Code has been invoked. Although these three articles have given rise to voluminous jurisprudence and an abundance of opinion concerning their legal implications and effects, the issues in the present case are primarily of factual rather than legal nature. Nevertheless, the casting of these facts into the legal framework drawn by the three articles is an interesting one and bears some consideration.

The question to be decided by the Court of Appeal was whether or not the picketing organized by the appelant Union was legal in accordance with section 366, sub-section 2 of the Criminal Code; and, as a result, whether or not the respondent was entitled to damages allegedly resulting from this picketing in virtue of articles 1053 and 1054 C.C.

During the period in which the facts occurred (August, 1952), Canadian Vickers Ltd., a ship-building company, employed three shifts working twenty-four hours daily. Only a segment of the workers belonged to the appellant Union. The rest, with the exception of certain categories, were affiliated with the American Federation of Labour. Trouble between the Union and the company arose over the signing of a collective agreement. Arbitration failed, and Union officials called a strike early on the morning of the 19th of August. At 5:30 A.M. workers began gathering outside the plant, and by 7:30 a crowd numbering between one and two thousand had massed outside the company property, as well as inside the yard and also between the plant and a near-by plate shop belonging to the company. The crowd was made up both of striking and non-striking workers and a sprinkling of onlookers and policemen. Because of the large milling mob, many non-striking employees were prevented from entering the plant, and consequently were not able to work that day. The company, claiming the picketing to be illegal and directly responsible for preventing non-striking employers from working, subsequently took action against the Union for damages incurred through the loss of work of these non-striking workers.

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[1][1958] Q.B. 470. Appeal from the judgment of the Superior Court maintaining the action. Appeal dismissed, Mr. Justice Bissonnette dissenting.

In defense to the company's allegations, the Union maintained that, although admittedly it ordered the picketing, never did it intend it to be illegal; and that, in fact, it never was illegal and could not be pointed to as the direct cause for the stoppage of work.

The trial judge upheld the action and awarded the company $2000 in damages. The picketing was held to be illegal as it prevented the non-striking employees from passing through the picket lines. It thus constituted "un fait fautif de leur part ayant pour objet et pour effet de violer le droit d'autrui."[2] Moreover, it had been established by the evidence that this picketing was ordered by the Union officers who should have been aware of the possible consequences of such action.

> Aussi bien, la défenderesse doit être tenue responsable, tant en vertu de l'art. 1053 C.C. pour avoir elle-même organisé ce piquetage dans les circonstances susdites, qu'en vertu de l'article 1054 C.C. comme commettante de ses officiers.[3]

The issues, then, before the Court of Appeal were both of fact and of law. In the view of the majority, the issue of fact proves to be the really contentious point of the case, and thus the decision is made primiarily on the basis of each judge's appreciation of the factual evidence. The issue of fact is threefold:

a) was the picketing carried out in an illegal manner?

b) were such illegalities ordered or sanctioned by the Union?

c) did the plaintiff company suffer damages from the illegalities beyond what it would have suffered from legal picketing?

The legal issue crystalizes itself in the question whether, under article 1053 C.C., the Union could be held liable for damages; and, in failure of this, whether it could be held responsible for damages incurred by persons under its control in virtue of article 1054 C.C.

In discussing the first issue of fact — the legality of the picketing — it is necessary to consider section 366, sub-section 2 of the Criminal Code which provides for peaceful picketing:

> A person who attends at or near or approaches a dwelling house or place, for the purpose only of obtaining or communicating information, does not watch, or beset within the meaning of this section.

This is construed as an exception to the offense of intimidation by "watching or besetting" a building as outlined in sub-section 1, paragraph (f) of the same section. In other words, the picketing to be legal must not result in forceful, physical, or threatening acts which will tend to force others to act against their will.

Mr. Justice Montgomery found that although the picketing was peaceful (as testified by a police inspector), access to the entrance of the plant, and

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[2][1958] Q.B. 470 at 478.

[3]At p. 478.

especially to the plate shop was impossible because of the large crowds milling about, and hence the picketing was of an illegal nature. "This certainly went beyond what was necessary for obtaining or conveying information, and I am of the opinion that numerous illegal acts were committed."[4]

In regard to the second question of whether such illegalities were ordered or sanctioned by the Union, Montgomery J. pointed out that although the contention by the Union that the illegal acts were simply those of individuals acting on their own accord was largely justified, nevertheless the Union "appears to have made a concerted effort to see that no hourly-paid employees, whether legally on strike or not, entered the plant that day."[5]

He underlined specifically two facts to demonstrate this argument. In the first place, the plate shop, being a small and detached building, was extremely well picketed; yet many of the people who work in this shop belouged to other unions and consequently were not on strike. Secondly, it was shown by the evidence that all hourly-paid workers, both striking and non-striking, were prevented from working. Passes were issued only to salaried workers.

On the third point of fact, Montgomery J. agreed in principle with the trial judge that the company did incur damages resulting from the illegal picketing. He reduced these, however, from $2000 to $500 on the ground that even if the picketing had been wholly legal, not very much work would have been accomplished that day.

It is interesting to note that the majority judgment barely touches on the legal issues involved in the case. One wonders whether this is due to lack of emphasis by counsel, or whether the judges simply preferred to avoid the knotty problems stirred up by articles 1053 and 1054 C.C. At any rate, very little mention is made of these two vital articles. Under Quebec law a union is a corporate body — a fictitious person — and hence can be sued in the same capacity as an ordinary person. Thus both article 1053 C.C. and 1054 C.C. can be applied to it:

1053 C.C.:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054 C.C. (in part):

> He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things he has under his care.

Montgomery J. completely fails to mention these articles. Mr. Justice Hyde, however, makes some reference to them. He concurs with Montgomery J. on

[4]At p. 472.
[5]At p. 473.

the issues of fact, but he does not appear to be as certain as the latter that the picketing was directly responsible for the stoppage of work. He does not say so explicitely but one may suppose that there is some doubt in his mind as to the direct fault of the Union. Perhaps this is why he seems to rely more on article 1054 than 1053. He directly adopts the view of the trial judge: "whether the act was deliberate or not on the part of the Union is not established, but that it was done by persons under its control was the view of the trial judge with which I am not prepared to differ."[6]

In its formal judgment the Court does not even consider the issue and simply rejects the appeal of the Union on the ground that the work in the plaintiff's plant was prevented "by the illegal activity of persons who were picketing the respondent's plant, and that the picketing was organized and directed by representatives of the defendant."[7]

The dissenting judgment given by Mr. Justice Bissonnette is a very interesting one. Not only does his appreciation of the facts differ from the rest of the Court, but he seems to be the only one who makes a genuine effort to view these facts in the light of the legal issues involved.

He admits to nearly all the facts held material by the majority, and says, in fact, that it is undeniable that members of the Union committed illegal acts thus submitting themselves to the sanction of section 366 of the Criminal Code. But it is in the appreciation and in the conclusion which he draws from these facts that Bissounette J. comes much closer to the true solution of the case than do the other judges.

According to him, it is irrelevant that certain illegal acts were committed by individuals, some of whom undoubtedly belonged to the appellant Union. The action was not brought against these individual members, but against the Union as a corporate body. To prove the fault of the Union, it would be necessary to prove that the Union made a concerted effort to promote the illegal picketing, or that it possessed the power to prevent this from happening. To put it in more practical terms, it would have to be shown that officers of the Union, *acting in their capacity as officers,* encouraged or sanctioned these illegal acts. Any acts these officers may have committed as private individuals have no bearing on the responsibility of the corporate body of the Union. While it is true that the picketing was organized by the Union, the Union also organized a committee to prevent violence. Moreover, according to the testimony of the police inspector, order was maintained throughout, and an atmosphere of a picnic prevailed. Thus Bissonnette J. concludes, that the Union could not be held responsible under article 1053 C.C.

As for article 1054 C.C., Bissonnette J. puts his finger directly on the core of the problem when he states what for him is the real issue involved in the case: "si le piquetage, en tant qu'il pourrait être tenu pour illégal, a

[6]At p. 475.
[7]At p. 471.

été la cause directe et immédiate de l'arrêt de travail."[8] In other words, this is a pure and simple question of causality. The pickets, the persons under the control of the Union, were undoubtedly present outside the plaintiff's plant, but so were hundred of other people. These contributed just as much, if not more, to obstructing the entrances to the plant. Moreover, he insists that it would be false to say that it was because of the picketing that the crowd gathered. Not the picketing, but the occurrence of the strike itself was the real cause for the large crowd and the resulting obstruction. At 7:30 A.M. the shifts were changing and everybody simply stayed to see what consequences would result from the Union's decision to strike. Very few people were even aware of the picketing. In fact, organized picketing as such did not take place until late that afternoon. Bissonnette J. admits that the Union is responsible for its members when these act in their capacity as members, but he maintains that it was because of the *huge milling mob*, and not because of the picketing by Union members, that work was stopped.

Bissounette J. thus absolves the Union of any responsibility for the stoppage of work because of the picketing. He can find no conclusive proof that any illegal picketing was condoned by the Union, and consequently he holds that the appeal of the Union be maintained and the action by the company rejected.

Appreciation of facts is, in the final analysis, a matter of subjective judgment. But it is not in this aspect that the dissenting judgment appears to be more convincing than that of the majority. In reality, the issue is not which facts ought to prevail, but rather what conclusion ought one to draw from these facts, and how must one weigh these conclusions in the light of legal principles. It is in this respect that the dissenting judgment seems the more tenable.

There is ample jurisprudence to support the majority holding that a Union is liable for illegal acts resulting from picketing.[9] But in all these it is clearly shown that the Union was directly responsible for the illegal acts. Thus in *Acton Vale Silk Mills Ltd.* v. *Leveille,* the Court found that "les têtes dirigéantes de ladite grève, par leur conduite et leur agissement ont non seulement autorisé et ratifié les dits actes de violence et d'intimidation de la part de ces ouvriers, mais ils y ont même participé, et ils sont en loi solidairement résponsables du préjudice qui en résulte."[10]

On the other hand it was held in *Peerless Laundry* v. *Laundry & Dry Cleaning Workers Union*[11] that illegalities where picketing is concerned do not create a presumption of fault on part of the union: "There is authority for the view that it is not the mere commission of the offense under section

[8]At p. 479.

[9]*Acton Vale Silk Mills Ltd.* v. *Leveille* (1939), 78 S.C. 19; *Shane* v. *Lupovich* [1942] K.B. 523; *Army and Navy Dept. Store Ltd.* v. *Retail, Wholesale, and Department Store Union* [1950] 2 W.W.R. 999.

[10]At p. 19.

[11][1952] 6 W.W.R. 443.

501 of the Criminal Code (corresponding to section 366 in 1952 R.S.C.) which vests a civil right of action in a plaintiff. The conduct complained of should be otherwise tortious."[12]

In conclusion, it is this point brought forth in the *Peerless* decision which is probably the most disturbing aspect of the majority decision in the present case. One tends to feel that the Court impliedly adopted the notion that illegal acts committed by members of the Union presume the fault of the latter. The two points mentioned above on which Montgomery J. bases his conclusion that the Union made a "concerted effort" to prevent non-striking workers from entering the plant, both beg the issue. The fact that the plate shop was extremely well picketed and the fact that some hourly-paid workers were obstructed, simply point out that certain illegal acts were committed, something which not even the Union denied. But what proof was there that the Union sanctioned these illegalities? Large mobs have been known to commit impulsive and illegal acts in the past. It is this implied presumption of fault, then, which causes one to question the soundness of the judgment of the court. It is a presumption which, if carried too far, could lead to dangerous consequences.

GEORGE A. ROSENBERG*

CITÉ DE MONTRÉAL v. CHAPLEAU

MUNICIPAL LAW — FALL ON AN ICEY SIDE-WALK — CLIMACTIC CONDITIONS — RULES WHICH GUIDE THE COURTS WITH RESPECT TO THE RESPONSIBILITY OF MUNICIPAL CORPORATIONS — DAMAGES — CHARTER OF THE CITY OF MONTREAL ART. 536 — CITIES AND TOWNS ACT s. 622(7)

A recent decision by the Quebec Court of Queen's Bench (Appeal Side)[1], illustrates the extent of an individnal's claim against a municipality for damages resulting from a fall on a slippery sidewalk within that city's jurisdiction during inclement weather. The issues, reviewed by Mr. Justice Bissonnette, although not of a controversial nature do summarize in a lucid manner certain basic principles developed over the years by numerous "sidewalk damage" cases. The facts were simple: on 18 December, 1953 at about 8.30 P.M., the respondent Chapleau while walking along Roy St. near the

[12]At p. 447.

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[1]*Cité de Montréal* v.*Chapleau,* [1958] Q.B. 445, affirming the Superior Court decision (unreported).

south-west corner of St. Denis St. in Montreal, slipped and fell, thereby fracturing a leg. The accident was subsequently attributed to the dangerous condition of the city's sidewalk. Three witnesses were produced by the plaintiff and their testimony, considered in relation to the official weather report, seemed to suggest to the court "que le trottoir pouvait être sinon en glace, du moins glissant."[2]

Proceeding from these facts the court was concerned with three basic issues:

1. What is the liability of a city in regard to the maintenance of sidewalks within its jurisdiction during the winter months?[3]
2. What in essence must be included in the prior notice required by the City of Montreal's Charter when instituting an action for damages or for compensation against the city?
3. What basis of calculation should be used in determining the measure of damages?

I.

Section 622(7) of the Cities and Towns Act[4] states:

> Notwithstanding any general law or special act, no municipal corporation may be held liable for damages resulting from an accident, of which any person is the victim, on the sidewalks, streets, or roads, by reason of the snow or ice, unless the claimant establishes that the said accident was caused by the negligence or fault of the said corporation, the court having to take into account the weather conditions.

Previous to the passage of this statute the courts tended to consider city municipalities as insurers of the security of pedestrians; the presumption of fact was, in a sense, against the city. The present context of the 1936 amendment leaves no room for doubt: the claimant must in all cases establish two factors:[5] fiirst, the slippery or dangerous condition of the sidewalks; second, he must clearly reveal the city's negligence in failing to properly maintain the sidewalk at the time of the accident. Further, it may be noted that Quebec courts currently tend to the view that the defendent municipality need no longer refute the allegations of the plaintiff by establishing the contrary of that which was alleged, it being sufficient to merely justify the condition of the sidewalk.[6]

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[2]Ibid. at p. 448.

[3]Although this discussion shall only involve the city's liability with regard to sidewalks in a dangerous state due to the winter conditions, it follows that many of the principles examined are applicable to litigation which involves pedestrians' safety and related municipal negligence. For instance, see *Desormeaux* v. *City of Verdun*, [1958] S.C.R. 342.

[4]R.S.Q. (1941), c. 233, s.662(7).

[5]Bissonnette J. excludes the widely used Art. 1054 C.C. in his judgment, relying instead on the basis of the contravention of a statute.

[6]See for instance *Naginska* v. *City of Outremont*, [1945] K.B. 495; *Cité de Québec* v. *Barbeau*, [1948] K.B. 307; *Cité de Sherbrooke* v. *Dawson*, [1945] K.B. 486.

That the court in the present case satisfied itself as to the discharge of the plaintiff's burden is evident by the following words of Bissonnette J.:

> Si donc nous tenons pour vrai que le trottoir constituer un état de danger, il reste à se demander si la défenderesse a été diligente à parer à cette condition du trottoir. Il est reconnu de tous qu'aucune précaution n'a été prise pendant toute cette journée . . .[7]

The jurisprudence is well settled in that the City of Montreal is under a legal obligation to keep its sidewalks in such a state as would not constitute a danger to any pedestrian who may make use of them.[8] A careful distinction, however, must be drawn: the fact that a sidewalk is slippery does not necessarily constitute a fault. The court must also appreciate the surrounding circumstances: was the weather such as to make any attempts at maintenance temporarily impossible; what the lapse of time was from the end of a storm to that of the incident itself; the last time the sidewalk had been sanded, grated, or salted. Furthermore, as previously mentioned, the city is not an insurer of persons using its sidewalks, and consequently there is no liability upon a mnnicipality from the mere fact that a person has fallen because of ice or snow on a sidewalk. Whatever confusion has arisen in the past was caused by the varied judicial interpretation of what constitutes "proper" care and what was a "reasonable" length of time under climatic conditions.[9]

> La règle qui doit nous guider c'est de rechercher, non pas si cette corporation municipale a réussi à faire disparaitre l'état glissant de tout trot·'ir, mais si elle a pris des précautions suffisantes et si elle s'est mise diligemme·t à la tâche pour parer aux dangers et, par là, s'affranchir de toute négligence, de toutes faute . . . si elle a pris les moyens raisonnables pour lutter contre les éléments de la nature.[10]

Again,

> La cité n'est pas tenue d'assurer que ses rues ou trottoirs ne seront jamais glissants; elle est seulement obligée de prendre les précautions qu prendrait un homme diligent pour atteindre ce but. D'où il suit que la cité ne sera pas nécessairement responsable chaque fois qu'une personne fera une chute sur un trottoir glissant, mais que sa résponsabilité sera engagée seulement lorsque l'état du trottoir, s'il a été la cause du dommage, aura été le résultat d'une faute.[11]

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[7]At p. 448.

[8]The jurisprudence only follows what is in fact obvious from a perusal of the City of Montreal charter. See especially, Arts. 300 par. 2, 375 par. 4, 379(e). Also note *Calascione* v. *City of Montreal,* [1943] R.L. 260; *Labonté* v. *City of Montreal,* [1943] S.C. 284; *Cité de Montréal* v. *Tremblay* (1926), 40 K.B. 222; *Léger* v. *Cité de Montréal* (1928), 34 R.L. 28.

[9]*Westmount* v. *Peters* (1940), 69 K.B. 269; *Proulx* v. *City of Hull,* [1947] K.B. 135; *City of Sherbrooke* v. *Lefebvre,* [1950] R.L. 433.

[10]Remarks of Bissonnette J. in *Cité de Sherbrooke* v. *Dawson,* supra., as cited by the then Chief Justice, Hon. T. Rinfret.

[11]See the remarks of Pratte J. in *Cité de Québec* v. *Barbeau,* supra., at p. 315. Also, *Fee* v. *City of Montréal* (1917), 52 S.C. 336; *Naginska* v. *City of Outremont,* supra., at p. 500; *Cité de Québec* v. *Dame Dupont,* [1941] K.B. 510.

Hence, as Mr. Justice Bissonnette suggests in summarizing the present extent of a city's responsibility:

> . . . l'obligation imposée à la cité n'est pas une obligation de résultat, mais une obligation de moyen.[12]

II.

A second question considered in the *Chapleau* case involved the procedural issue of what is sufficient notice as required by the City of Montreal Charter, Article 536,[13] which outlines the steps necessary in the institution of any action in damages or compensation against the city. The text of the article appears to be quite clear; in effect, it states that notwithstanding any law to the contrary, no right of action shall exist against the city for damages resulting from bodily injury, caused by a fall on the sidewalk or roadway, unless within ten days from the date of such accident, a written notice has been received by the city containing the particulars. An exception is provided in that an injured person shall not be deprived of his right of action because of a failure to give the notice if he shows a reasonable excuse which is acceptable to the court.

In this instance the notice filed with the city on behalf of the claimant was somewhat vague as to its charges. The notice did attribute responsibility to the city, but it was insufficient with regard to the description of the injuries sustained. There was no mention of fault but Mr. Justice Bissonnette stated that:

> Or, j'estime que qui dit responsabilité dit faute.[14]

A strange statement indeed when it is recalled that while a city may be legally responsible for damages, it may not be at fault. This apparent inconsistency is partially explained by the honourable judge when he says that as long as the intention of the parties is obvious the court should appreciate the circumstances and not demand the required formality. This liberal interpretation of the meaning of the procedural clause closely follows a view expressed in an earlier case by the same judge.[15] However, a later appellate decision voiced a contrary opinion, holding that a notice not adhering to the strict formalities of section 536 was insufficient and consequently not acceptable.[16]

Although a considerable amount of jurisprudence may be found in support of both views, it must be acknowledged that the more liberal view is usually invoked, especially once the negligence of the city has been established.[17]

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[12]At p. 450

[13]Corresponding to s.622 of the Cities and Towns Act, R.S.Q. (1941), c.233.

[14]At p. 451.

[15]*Ville St. Laurent* v. *St. Aubin*, [1941] K.B. 342 at 345.

[16]*Patenaude* v. *Cité de Montréal*, [1946] K.B. 554.

[17]Those cases advocating a strict interpretation, see: *Fortune* v. *City of Montreal*, [1950] C.S. 111; *Kemp* v. *Ste. Thérèse*, [1950] P.R. 404; *Samson* v. *Quebec*,

III.

A third issue, considered by Montgomery J., involved the measure of compensatory damages to be awarded the claimant. As the term implies, compensatory damages are awarded, in conformity with the principles underlying damages generally to make good or replace the loss caused by the wrong or injury. Damages in such an accident as that under consideration involve certain distinct criteria, such as hospital and medical expenses, physical suffering, loss of earnings and impairment of earning capacity, and present and future or permanent disability. The court must first establish that all the injuries for which the plaintiff claims damages are properly attributable, in a medical sense, to the accident; then it is a matter of determining the veracity of the claimant's total demands. Hospital and medical expenses are, of course, easily ascertained. Similarly, loss of earnings may be fixed with reasonable certainty. Of interest in Mr. Justice Montgomery's award is the fact that consideration was made of payments to the plaintiff's family by the Welfare Department of the City. It was reasonable to treat these payments as mitigating the damages suffered by the plaintiff.[18]

Calculations of pain and suffering are not as easily ascertained. To justify recovery on such grounds, it is reasonable to expect that there must be actual pain — in this instance, it would follow naturally from a compound-fracture of the leg. But the calculations of these estimates are always open to controversy, and Quebec jurisprudence has established no definite precedent in this matter and opinions may (and do) vary; although reasonable figures are usually accepted by the courts.[19]

Claims in regard to partial incapacity and the impairment of future earnings should be supported by satisfactory proof of the allegations of the claimant, and direct medical evidence should be sought to establish the extent of such future impairment.[20]

JOEL A. PINSKY*

[1952] S.C. 452. Those taking a more liberal view: *Dupras and the City of Montreal* v. *Johnston* (1937), 63 K.B. 496; *Dufour* v. *City of Chicoutimi*, [1945] K.B. 127; *Houle* v. *City of Montreal*, [1955] S.C. 419.

[18]At p. 453.

[19]For example, *Low* v. *Canadian Pacific Express* (1938), 77 S.C. 31.

[20]*Laplante* v. *Deslauriers et Fils Ltée.*, [1951] S.C. 93. For a discussion of the general measure of damages in sidewalk injury cases see especially *Mayer* v. *City of Montreal* (1941), 47 R.L.n.s. 185 and *Dame Ungar* v. *City of Montreal*, [1950] R.L. 214.

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