THE FIRST CANADIAN TRADE UNION LEGISLATION: AN HISTORICAL PERSPECTIVE

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I. INTRODUCTION

In attempting to fathom the social, economic, political and other forces that provoke changes in our law, Canadian common law scholars have concentrated almost exclusively on a study of case law. This may in part result from a legal education that over-emphasizes the role of the judiciary at the expense of, most notably, an adequate consideration of the role of lawmakers and legislative institutions. Examinations, classroom discussions and students' legal imaginations seldom involve any activity other than critical assessment of judicial reasoning. As a result, law students, lawyers and legal academics are often ill-equipped to provide incisive criticism of legislation and, more important, of the legislative process.

This imbalance, however caused, is serious enough to require a shift in the focus of some legal thinking and writing from judicial to legislative activity. Statutes enjoy no greater likelihood than judicial decisions of being self-explanatory, or of serving the ends of justice.

This article examines the first Canadian legislation enacted in response to the phenomenon of trade unions: The Trade Unions Act, 1872[1] and An Act to amend the Criminal Law relating to Violence, Threats and Molestation.[2] These two Bills were introduced in the House of Commons together on 7 May 1872, summarily debated prior to first reading on that day and second reading on 12 June, and expeditiously given Senate approval and Royal Assent on 14 June.

Sir John A. Macdonald was solely responsible for the introduction of the Bills. In his preliminary remarks in the House of Commons he said that they were modelled after British statutes enacted in the previous year that had emancipated union members from existing laws that were considered to be "opposed to the spirit of the liberty of the individual"[3]

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[1] 35 Vict., c. 30.

[2] 35 Vict., c. 31 [hereafter referred to as the Criminal Law Amendment Act].

[3] H.C. DEB., 1st Parl., 5th sess., at 392 (7 May 1872).

and "too oppressive to be endorsed by free men".[4] He suggested that it was in Canada's best interest to enact analogous legislation so that Canadian and British immigrant workers "would have . . . the same right to combine for the accomplishment of lawful objects, as [workers] had in England".[5] During the debate of 12 June, he noted that "[r]ecent events in Toronto had shown the necessity of adopting some amendment [to existing law] here",[6] and also expressed his concern that if "workingmen [*semble*, in Britain] should learn that the old law remained unchanged, they would not come to settle in Canada".[7]

In essence then, Macdonald proffered two reasons in support of the Bills: first, that trade union activity in Canada had matured to the point where existing law failed to reflect the importance of that activity and, hence, unconscionably repressed what had come to be socially legitimate purposes; and second, that if the existing law were allowed to persist, British workers might be dissuaded from emigrating to Canada. This article provides a critical assessment of the assumptions underlying these and two other propositions as to the legal and extra-legal forces that prompted the Canadian Parliament to enact this legislation in 1872.

II. Modernization of the Law in Favour of Trade Unionism

The first proposition appears to be the most obvious; namely, that trade union activity in Canada had matured to the point where existing law failed to reflect the importance of that activity and, hence, unconscionably repressed what had come to be socially legitimate purposes. A cursory reading of the Acts themselves and the related debates in the House of Commons would provide support for this proposition. However, three major assumptions are implicit in it: first, that union activity had rendered existing law obsolete, second, that existing law repressed the socially legitimized pursuits of unions, and third, that the Acts effected a substantial amelioration of existing law by legalizing those pursuits. If any of these assumptions cannot be supported, less credence should be given to the proposition.

The first inquiry, then, must involve a consideration of whether or not increased union activity had, by 1872, rendered existing law obsolete.

A. *Trade Union Activity Before 1872*

Although the details of the statutory and common law that existed prior to the passage of the Acts will be described later, it may be shortly

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[4] *Id.* at 1121 (12 Jun. 1872).
[5] *Id.* at 392 (7 May 1872).
[6] *Id.* at 1121-22 (12 Jun. 1872).
[7] *Id.* at 1122 (12 Jun. 1872).

stated for present purposes that before 1872 the law treated unions of workers as illegal to the extent that they embodied agreements in restraint of trade. Restraint of trade was interpreted broadly, so as to cover any agreement that impinged on the free and regular operations of trade and commerce, such as an agreement not to work except for a certain minimum wage. Nevertheless, the number of Canadian trade unions increased rapidly between the early 1830s and 1872. An agreement among the Journeymen Printers of York, for example, set up the York Typographical Society in 1832 and provided that members would not work for lower wages than the minimum set by the Society.[8] In 1836 the Society struck for higher wages against all Toronto newspapers.[9]

Indeed, there were numerous strikes by unions in this period. In Lower Canada, the Mechanics Mutual Protection Society, a union of carpenters, struck for the reinstatement of a ten-hour day in 1834, and the Montreal Stonecutters struck in 1854. The Quebec Cordwainers Society succeeded in obtaining a wage increase following a strike and went on to demand a closed-shop agreement.[10] There is also evidence of strikes in Ontario and the Maritime provinces.[11]

Since by 1872 unions had been carrying out manifestly unlawful purposes for forty years, the discordance between existing law and union activity was nothing new and the suggestion that the Acts were responding to a novel problem created by the maturity of these unions seems incorrect. However, the maturity of unions must be assessed not only in legal terms but, as well, in terms of their changing social role. During the 1860s, the underlying philosophy of trade unionism was shifting focus as the number of unions grew, resulting in deeper conflicts with employers.

At the 1833 anniversary dinner of the York Typographical Society, newspaper publishers and employers, invited as guests, expressed their approval of the purposes of such unions. They were assured that the Society was "calculated to benefit society generally" and to "secure respectability to journeymen without interfering with the interests and prerogatives of the employers".[12] In 1854 the Toronto Typographical Society, the successor to the York Society, published a leaflet for public distribution which stated that its object was "to promote by every lawful means the interests of the employees, as well as the employer, [and] to uphold the respectability of the members of the printing profession in this City of Toronto".[13] Many such societies used the motto "united to support, not combined to injure".[14] Even when describing what were

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[8] H. LOGAN, TRADE UNIONS IN CANADA 23 n. 1 (1948).

[9] E. FORSEY, TRADE UNIONS IN CANADA 1812-1902, at 19 (1982).

[10] *Id.* at 16.

[11] *Id.* at 9-14, 16-30.

[12] H. LOGAN, *supra* note 8, at 25.

[13] C. LIPTON, THE TRADE UNION MOVEMENT OF CANADA 1827-1959, at 18 (1967).

[14] H. LOGAN, *supra* note 8, at 25 and E. FORSEY, *supra* note 9, at 17.

illegal purposes, the Saint John City and Country Sawyers Society insisted that such were in the employers' interest as well as that of its members; at its first meeting the sawyers agreed "to make rules and regulations for their future guidance — as to their wage and the number of hours per day for working — and so that a perfect understanding may be had between themselves and their employers".[15]

Despite the fact that intermittent strikes occurred during this period, mutual tolerance, willingness to make concessions, and even amicability characterized relations between these early workers' societies and the employers of their members. In this climate, the practical importance of the legality or illegality of the societies' objects was negligible.

From the 1860s on however, the number, size and consequently the damaging effect of strikes began to increase. Some 2300 members of the Quebec Ship Carpenters Union struck for a pay increase in 1867. Union leaders were arrested, police-protected strike breakers were brought in by employers and a man was killed when troops were deployed to control a union demonstration.[16] Events like this suggested to trade unionists that "the time had come for a show of strength in support of demands that were bound to stimulate an organized opposition"[17] on the part of the employers. Therefore, inter-union coalitions began to emerge.

The first major international union to set up lodges in Canada was the Knights of St. Crispin, a shoemakers' union from the United States. Lodges were established in Montreal, Quebec City, and Saint John between 1867 and 1870, each of which struck within a year of its founding.[18] Not surprisingly, during this period "[t]he practice of having the employers present as guests at anniversary dinners was discontinued . . . [and] less stress was laid upon viewing the interests of employers and employed 'as one and indivisible' ".[19] Irreversible divisions and mutual animosity were rapidly developing between unions and employers.

Under these conditions, the legality of trade union activity became relevant: the unlawfulness of its most important aims offered employers a powerful repressive tool. The interest of employers in law as a device for the disruption of trade unions at this time is illustrated in the reprint of a British article entitled "Trade Unions and Co-operative Associations" in the Upper Canada Law Journal in 1867.[20] This article reviewed contemporary English legislation, which had been interpreted by the courts in such a way as to permit combinations of workers or masters to set minimum wages or maximum hours per day so long as specific provisions of these laws were not breached. It also described a serious consequence:

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[15] E. FORSEY, *id.* at 10.
[16] *Id.* at 80.
[17] H. LOGAN, *supra* note 8, at 35-36.
[18] E. FORSEY, *supra* note 9, at 32-33.
[19] H. LOGAN, *supra* note 8, at 36.
[20] *Trades Unions & Co-operatives Associations*, 3 U.C.L.J. (N.S.) 57 (1867).

> The attempt to prevent collisions between labour and capital, and yet to preserve to each its peculiar rights, is, though simple in theory, most difficult in practice. It is the right of the capitalist to have labour at a fair compensation, and it is the right of the labourer to have a fair compensation for his personal strength, energy and skill. But as each views the amount of 'fair compensation' from his own standpoint, it is no wonder that they often disagree.[21]

This dilemma found poignant expression in Canada from and after the late 1860s.

In addition to the international unions, city central organizations began to emerge. The Hamilton Trades Union was in existence from 1863 to 1875, and a central organization in Toronto appears to have been operating in 1867.[22] However, the first city central to effectively capitalize on the strength of organized coalitions was the Toronto Trades Assembly. It was formed in 1871 and as early as the end of 1872 was composed of fourteen affiliated unions, including the highly active Toronto Typographical Union. During its seven active years, the Assembly performed a wide variety of functions.[23] Perhaps its most important contribution to the development of domestic unions, however, was its organization of a massive appeal to Toronto employers to reduce the number of working hours per day to nine. On 13 March 1872 the Toronto Typographical Union submitted demands, including one for a nine-hour working day, to the master printers, the refusal of which resulted in a strike on 25 March.[24]

Employers and employees in Toronto fully recognized that this strike was merely a model for a general nine-hour movement. During the strike, the Assembly organized a mass demonstration of workers to promote this demand; over ten thousand workers took part in a march and later heard speeches concerning various union interests, including the inherent rightfulness of the nine-hour day. The master printers, as employers of the striking members, retaliated by initiating criminal proceedings against fourteen of the leading strikers in which they alleged conspiracy in restraint of trade. On 18 April, the trial began before Magistrate MacNabb. Counsel for the accused union members adduced evidence to the effect that the Typographical Union was an organization

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[21] *Id.* at 57-59.

[22] E. FORSEY, *supra* note 9, at 90-91.

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> It took a leading part in the nine-hour movement. It agitated for better legislation on a variety of subjects. Through lectures and a TTA library, it undertook workers' education. . . . It carried on correspondence with labour organizations in other parts of Canada, in Britain, and in the United States. It took the lead in organizing the Canadian Labour Union [the first nation-wide union in Canada]. It started a labour paper, organized demonstrations, picnics, concerts, and moonlight excursions.

E. FORSEY, *id.* at 95.

[24] Creighton, *George Brown, Sir John Macdonald, & the "Working Man"*, 24 CAN. HISTORICAL REV. 362, at 366 (1943).

designed to benefit its members and not to injure others, and that it had been a tacitly accepted institution in Toronto for over twenty-five years, a fact exemplified by the attitudes of the master printers themselves, who had often acceded to its demands. Counsel for the prosecution summoned numerous witnesses to describe incidents of intimidation and molestation by the accused. Mr. Justice MacNabb dismissed the union members' arguments as irrelevant and refused to hear the majority of Crown witnesses on the ground that intimidation and molestation were separate offences. At the conclusion of the first hearing, he decided that the facts disclosed by both parties were sufficient to establish guilt: a combination existed, the accused were members, and a strike had occurred. The accused trade unionists were, therefore, guilty of conspiracy in restraint of trade. A second hearing was, however, considered necessary and was set for 7 May 1872.[25] It was on this day that The Trade Unions Act, 1872 and the Criminal Law Amendment Act were introduced in Parliament.

It appears then that by 1872 increased trade union activity had in fact rendered existing law obsolete. The expansion of unions in both size and social importance in the 1860s and early 1870s had led to an antagonism between employers and union members that had been infrequent before that time. Consequently employers had reason to mobilize the outdated common law in order to cut off increased union activity at its roots. Legislation, therefore, became necessary to formally legitimize trade unionism.

B. *The Law Before 1872*

The second inquiry involves a detailed consideration of the law as it existed prior to 1872 so as to assess whether or not that law was truly adverse to the socially legitimized pursuits of unions and if so, whether or not The Trade Unions Act, 1872 and the Criminal Law Amendment Act substantially liberalized the legal attitude towards those pursuits.

The most notable limitations placed on the existing law by The Trade Unions Act, 1872 were those contained in sections 2 and 3, which addressed the criminal and civil law respectively.

1. *The Criminal Law*

Section 2 implied that prior to its enactment a trade union's pursuit of purposes that were in restraint of trade constituted a criminal conspiracy.[26] Prime Minister Macdonald suggested that the source of this rule lay in British statutes:

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[25] *Id.* at 374. It is worthy of note that the Crown decided to stay these proceedings permanently; the trial never went beyond the second hearing.

[26] The Trade Unions Act, 1872, 35 Vict., c. 30, s. 2:

> The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

> [T]he English mechanic, who came to this country as well as the Canadian mechanic, was subject [prior to the passage of the Acts] to penalties imposed by statutes that had been repealed in England, [by the Imperial Trade Union Act, 1871] as opposed to the spirit of the liberty of the individual.[27]

This was apparently based on the belief that certain Imperial statutes continued in force in Canada despite being repealed in Britain, which is probably erroneous. The Imperial Trade Union Act, 1871[28] only explicitly repealed one statute, namely The Trades Unions Funds Protection Act, 1869[29] which was not adverse to the purposes of trade unions, but exempted their members from certain penalties even though their agreements were in restraint of trade. Further, it seems that any other British statutes which would have been implicitly repealed by section 2 of the Imperial Act[30] were enacted after the reception date of English criminal law into Ontario, Quebec, New Brunswick and Nova Scotia, and hence never formed part of the law of those provinces.[31] The Unlawful Societies Act, 1799[32] and The Seditious Meetings Act, 1817,[33] for example, which conflicted in part with the Imperial Trade Union Act, did not require repeal in the provinces in question because they were never received there. Unless some earlier British statute proscribing combinations by persons for purposes in restraint of trade was received into one or more of these provinces, Macdonald's suggestion was erroneous.

The existence and extent of laws proscribing such combinations are, however, evident from an examination of the indigenous common law and legislation in the field of criminal conspiracy.

Perhaps surprisingly though, there is not a single case in any Canadian law report prior to the promulgation of The Trade Unions Act, 1872 and the Criminal Law Amendment Act that deals with a criminal conspiracy charge against workers combining for purposes in restraint of trade. A possible explanation is that most such cases would have been heard by magistrates, an echelon of the court structure too low to have its decisions commonly reported. One such trial before a magistrate in 1872, discussed above, involved the charge of criminal conspiracy against fourteen strike leaders from the Toronto Typographical Society that same year. Although the trial was never completed, Magistrate MacNabb was adamant that "[f]rom [his] recollection of the law, combinations of this

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[27] *Supra* note 3.

[28] 34 & 35 Vict., c. 31, s. 24.

[29] 32 & 33 Vict., c. 61.

[30] S. 2 of the Imperial Trade Union Act is identical to s. 2 of the Canadian Act.

[31] It should also be noted that certain British statutes in conflict with this section in the Trade Unions Act, 1872 were received into British Columbia and Manitoba due to their relatively late reception dates, 1868 and 1870 respectively. However, these are not relevant to this discussion, given that the development of trade unions in these areas was very limited at this date.

[32] 39 Geo. 3, c. 79.

[33] 57 Geo. 3, c. 19.

kind are illegal". He stated that Crown counsel, "hav[ing] proved that there has been and is a combination, and that there was a strike, and that these men [i.e. the accused] are members", the elements of the offence were made out.[34]

Unfortunately, the magistrate provided no sources that would justify his recollection of the law. Two possible ones are *The Magistrate's Manual*[35] and *The Provincial Justice*.[36] These were Canadian handbooks designed for the often ill-trained provincial magistrates; they provided summaries of the elements of various offences, citations for their sources, and examples of informations and indictments for certain crimes. *The Magistrate's Manual* defined the crime of conspiracy as:

> a combination of two or more persons to injure a third person or to do something evil or illegal. . . . And whether the confederacy is entered into for an unlawful purpose to be effected by lawful means — or the purpose is lawful and the means unlawful, — or whether the purpose be or be not, effected, — the conspiracy is equally criminal.[37]

The *Manual* added that "the object of conspiracy is not confined to an immediate wrong to particular individuals; it may be to injure public trade . . . or to do any other act which is in itself illegal".[38] The crime of conspiracy for purposes in restraint of trade was elaborated in a sample information for a conspiracy charge entitled "Information against Journeymen for conspiring to raise wages and not to work but at certain hours". The body of the information detailed some acts by journeymen that would constitute criminal conspiracy. These acts included agreements made at an assembly not to work but for a certain minimum wage established by the assembly or not to work more than a maximum number of hours per day fixed by it or to attempt to procure affiliations from others not present but in the same trade.[39]

The Provincial Justice confirmed that criminal conspiracy could have as its object "injur[ing] a man in his trade [and] combining not to work unless for certain wages".[40] Under the title "Workmen", the other particular objects of conspiracy set out in the information in *The Magistrate's Manual* were substantially reiterated.[41]

The definition of criminal conspiracy set out in *The Magistrate's Manual* is supported by four reported Canadian cases from the period. The first of these is *R. v. Baker*,[42] an 1828 New Brunswick decision. John Baker was charged with conspiring to "bring the King's authority

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[34] Creighton, *supra* note 24, at 371.
[35] H. TAYLOR, THE MAGISTRATE'S MANUAL (1843).
[36] W. KEELE, THE PROVINCIAL JUSTICE (1864).
[37] H. TAYLOR, *supra* note 35, at 128.
[38] *Id.*
[39] *Id.* at 128-29.
[40] W. KEELE, *supra* note 36, at 181.
[41] *Id.* at 835.
[42] 1 N.B.R. 211 (S.C. 1828).

into contempt; to spread false opinion among his subjects as to his power and prerogative over them; and in fact completely to unsettle their minds as to their allegiance to the government under which they lived''.[43] Baker had entered the parish of Madawaska in the county of York in New Brunswick, planted an American flag, and declared the territory to be under the governing authority of the United States. He solicited surrounding inhabitants for signatures to a petition which had as its object opposition to the government of Britain, and in addition obstructed the mail system, declaring that the British government had no authority to transmit mail in the area. Chipman J. instructed the jury that the elements of the offence would be made out if they found that a seditious intention was evident from overt acts of the accused and that two or more persons were engaged in it.[44] The jury found Baker guilty; he was fined £25 and imprisoned for two months. No distinction was made in the case between means and purposes, perhaps because it was unnecessary, as both were unlawful: the unlawful means of obstructing the mail and seditiously planting a foreign flag were employed to effect the unlawful purposes of subverting and displacing the governing authority of Britain.

This case was followed by *R. v. Hannawell*,[45] a trial again presided over by Chipman J. Conspiracy was defined ''in general terms, as an agreement between two or more to do an unlawful act'',[46] without mention of the lawfulness or not of the purpose behind it, but the charge to the jury distinguished acts (or means) and purposes. It alleged a conspiracy to effect the purpose of establishing the governing authority of the United States and of subverting the rule of Great Britain by means of a meeting to elect town officers for the town of Madawaska, a town purportedly incorporated by an Act of the State of Maine. The accused persons were found guilty as charged, which subsumed both the unlawful means and purposes.

A decision of the Upper Canada Queen's Bench in 1858 distinguished between means and purposes in assessing whether or not an indictment for conspiracy sufficiently charged an offence.[47] The indictment charged four members of a municipal council with ''get[ting] into [their] hands and possession'' monies of the Municipal Council and also ''unlawfully contriving and intending to defraud the Municipal Council''.[48] Although the reasons for judgment are difficult to ascertain, the conclusion was that the conspiracy charge was incomplete. First, the means of getting their hands on monies was perfectly lawful because the accused persons constituted a majority of the Council, and therefore had

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[43] *Id.* at 213-14.
[44] *Id.* at 214.
[45] 1 N.B.R. 324 (S.C. 1831).
[46] *Id.* at 341.
[47] Horseman v. The Queen, 16 U.C.Q.B. (N.S.) 543 (1858).
[48] *Id.*

legal control over the disposition of the funds. Second, the purpose of intending to defraud the Municipal Council was not unlawful because the property in the funds was vested in the municipality, not in the Municipal Council: the latter could not be defrauded because it had no proprietary interest. Similarly, in a decision of the Court of Queen's Bench of Quebec,[49] an indictment for conspiracy was quashed because it alleged neither unlawful means nor an unlawful purpose. It charged that the accused persons had created fictitious sales of a bankrupt's chattels in order to "cheat and defraud [his] . . . creditors".[50] The purpose of cheating and defrauding creditors, as well as the means employed, were held not unlawful at common law.[51]

In light of these cases, the definition of criminal conspiracy in *The Magistrate's Manual* can be regarded as accurate. Yet aside from case law, indigenous criminal conspiracy legislation prior to the passage of the Trade Unions and Criminal Law Amendment Acts must be considered.

Four pre-Confederation criminal law statutes dealt with aspects of conspiracy. These continued in force in the enacting provinces after Confederation, subject to amendment by federal legislation.[52] Two of them, both entitled Of Offences Against The Public Peace, were included in the Revised Statutes of New Brunswick in 1854[53] and the Revised Statutes of Nova Scotia in 1864[54] respectively. Both statutes established two distinct offences involving conspiracy: the New Brunswick Act provided, first, if twelve or more persons "riotously and tumultuously" assembled "to the disturbance of the public peace" and failed to disperse after an order to do so by an authorized person, they were subject to imprisonment for up to four years;[55] second, if three or more persons assembled "with intent illegally to execute any common purpose with force and violence, or in a manner calculated to create terror and alarm amongst Her Majesty's subjects", they were guilty of an unlawful assembly and liable to imprisonment for two years.[56] That Act added sections that provided for successively greater punishments for the latter offence if the assembly "endeavoure[d] to execute such purpose"[57] or "wholly or in part execute[d] such purpose".[58]

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[49] R. v. Roy, 11 L.C.J. 89 (Q.B. 1867).

[50] *Id.* at 90.

[51] *Id.* at 94.

[52] *See* The British North America Act, 1867, 30 & 31 Vict., c. 3, s. 129.

[53] R.S.N.B. 1854, c. 147.

[54] R.S.N.S. 1864, c. 162.

[55] Of Offences Against the Public Peace, R.S.N.B. 1854, c. 147, s. 2. *See also* Of Offences Against the Public Peace, R.S.N.S. 1864, c. 162, s. 1.

[56] S. 6. *See also* Of Offences Against the Public Peace, R.S.N.S. 1864, c. 162, s. 5.

[57] S. 7.

[58] S. 8.

The first of these offences was substantially reproduced in An Act respecting Riots and Riotous Assemblies,[59] a federal Act passed in 1869 that extended that law to all the provinces. That same year another federal Act expressly repealed the outstanding provincial statutes.[60] The second of the pre-Confederation offences was enacted by the federal government in 1868,[61] incorporating the successive increases in punishment that had been provided by the New Brunswick Act. This federal Act was in force until it was repealed in conjunction with the enactment of the Criminal Code in 1892.[62]

The third pre-Confederation statute was An Act respecting seditious and unlawful Associations and Oaths,[63] which appeared in the Consolidated Statutes for Lower Canada in 1861 and remained in force until repealed by the enactment of the Criminal Code.[64] It provided that any person who administers

> any oath or engagement purporting or intending to bind the person taking the same [*inter alia*] to disturb the public peace — or to be of any association or confederacy formed for any such purpose . . . shall be guilty of a felony and may be imprisoned for any term of years not exceeding twenty-one years.[65]

The section applied equally to persons aiding or even "present at and consenting to" this offence.[66] In addition, members of societies or associations that required secrecy of their members in respect of their proceedings and persons who aided, abetted or supported this requirement were guilty of an "unlawful combination or confederacy" and were liable to imprisonment in a penitentiary for from two to seven years or for under two years in "the common gaol or house of correction".[67]

An Act to regulate the duties between Master and Servant, and for other purposes mentioned (hereafter referred to as the Master and Servant Act)[68] dealt more directly with conspiracy in a trade union context. It provided in section 3 that any "person [who] shall induce or persuade any servants or labourers to confederate for demanding extravagant or high wages, and prevent their hiring, then, upon due proof of the offence such . . . person shall be subject to a fine or imprisonment". The

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[59] 31 Vict., c. 70.

[60] An Act respecting the Criminal Law, and to repeal certain enactments therein mentioned, 32 & 33 Vict., c. 36.

[61] An Act respecting Riots, unlawful assemblies, and Breaches of the Peace, R.S.C. 1886, c. 147, ss. 11-14.

[62] 55 & 56 Vict., c. 29, sched. 2.

[63] CONSOLIDATED STATUTES FOR LOWER CANADA 1861, c. 10.

[64] The Criminal Code, 1892, 55 & 56 Vict., c. 29, sched. 2.

[65] An Act respecting Seditious and unlawful Associations and Oaths, CONSOLIDATED STATUTES FOR LOWER CANADA 1861, c. 10, s. 1.

[66] S. 1.

[67] Ss. 6 and 7. There were other offences with regard to secrecy.

[68] 10 & 11 Vict., c. 23.

maximum fine was £5 and no imprisonment could be for a term greater than one month or less than one day. The criminal provisions of this Act were repealed in 1877.[69]

A federal act, An Act respecting Procedure In Criminal Cases, and other matters relating to Criminal Law,[70] set the parameters of sentences for a conviction for conspiracy when a sentence was not otherwise provided by statute. Imprisonment could be from two to seven years in a penitentiary or for any term less than two years "in any other gaol or place of confinement".[71] Another federal act, An Act respecting Offences against the Person contained a section of particular relevance:

> Whosoever, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any persons concerned or employed therein, unlawfully assaults any person, or in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour.[72]

Both federal statutes remained in force until repealed in 1892 with the enactment of the Criminal Code.[73]

A careful consideration of these common law and statutory fetters on trade union activity, as well as certain other provisions of The Trade Unions Act[74] and the Criminal Law Amendment Act,[75] reveal the impotence of section 2 of The Trade Unions Act. This section only declared that the *purposes* of a trade union were no longer unlawful merely because they were in restraint of trade, and did not provide the same protection for the *means* used by trade unions to effect those purposes. Therefore, the section would protect a trade union that used lawful means to effect, for example, an increase in wages or shorter working hours; however, the section offered no liberalization of criminal conspiracy laws if the means used to effect those purposes were in restraint of trade. Affiliations of trade unions and, more important, the strikes conducted by them were clearly not purposes themselves but rather the means to effect certain purposes, such as increases in wages

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[69] The Breaches of Contract Act, 1877, 40 Vict., c. 35, s. 1. If the person committing the offence was a tavern keeper, he was subject to special penalties in the original Act.

[70] 32 & 33 Vict., c. 29.

[71] S. 86.

[72] 32 & 33 Vict., c. 20, s. 42. It is anomalous that the residual provision of the sanctions for conspiracies in the Act respecting Procedure in Criminal Cases, 32 & 33 Vict., c. 29, provided a greater maximum term of imprisonment than this section, which deals with conspiracy coupled with assault or violence or threats of violence.

[73] The Criminal Code, 1892, 55 & 56 Vict., c. 29, sched. 2.

[74] 35 Vict., c. 30.

[75] 35 Vict., c. 31.

and the establishing of safer working conditions; therefore they remained illegal. It could even be argued that the mere process of negotiation with employers constituted a means of restraining trade and was therefore a criminal conspiracy, irrespective of the legality or illegality of the purposes to be attained through that negotiation. The legalization of the purposes of trade unions that would otherwise be in restraint of trade was a virtually sterile concession to the trade union movement, since the most effective and often the only means of achieving those purposes remained criminal offences.

This failure to legalize the means used by unions in restraint of trade was perhaps intended to be rectified by subsection 1(5) of the Criminal Law Amendment Act. It provided, in part, that:

> [S]o that *no person shall be punished twice for the same offence*: Provided that no person shall be liable to any punishment for doing or conspiring to do any *act*, on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned.[76]

The word "act" as used here contemplates the means used to effect certain objects.

It seems that the subsection permitted union members to use means in restraint of trade except those specified in the section. The applicability of this rule, however, depended on the existence of the evil the rule was designed to redress, namely, the possibility of an accused person being "punished twice for the same offence". This is absurd. If a person used any means in restraint of trade not specified in the section, a strike for example, he would *ipso facto* not be in danger of having committed the same offence as one of those specified, and therefore the subsection would not apply. Consequently, the means used would be an offence at common law merely because it was in restraint of trade. It follows that means used by union members that were in restraint of trade would be illegal whether those means were specified in the section or not.

In short, subsection 1(5) was entirely self-defeating. Generally, if the courts do not understand the policy behind particular legislation they will defer to the legislature and enforce the legislation nonetheless. But when the policy espoused (in this case, the avoidance of double punishment) forms part of the legislation, the policy must be given the same consideration as the rule itself. In the event of some irreconcilable conflict between the policy and the rule, it would be equally justified for a court to abandon the rule on the ground that it does not serve the policy as it would be for it to abandon the policy and enforce the rule.[77] In any

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[76] Sub. 1(5). (Emphasis added.)

[77] The absurdity of the policy and rule in sub. 1(5) is unavoidable. It is worthy of note, however, that if the subsection read "no one shall be punished twice for the same [*act*, rather than] offence" the rule would be justified by the policy. For example, if a member of a striking union violently offended a person during a strike to prevent the

event, in enacting subsection 1(5) of the Criminal Law Amendment Act, Parliament failed to prescribe a clear rule allowing unions to use means in restraint of trade that were in pursuit of lawful purposes, but effectively relegated the problem to the courts, who have not addressed the issue.

Even making the generous assumption that subsection 1(5) did allow trade unions as a general rule to use means in restraint of trade, the alteration of existing law in favour of trade unions by the Acts was minimal. The common law rule to the contrary was repealed by section 5,[78] insofar as that rule related to union activity, but restrictions in subsections 1(1)-(4) severely limited the scope of that repeal. For example, it was still illegal for a union to "molest or obstruct" any persons (which, under paragraph 1(4)(c), included simply watching and besetting that person where he worked) with a view to coercing either an employer not to hire "scabs" during a strike (under paragraph 1(3)(b)), or an employee to join the union (under paragraph 1(3)(c)). These exceptions seriously undercut important methods trade unions could have employed to enhance their bargaining position. Moreover, none of the pre-Confederation provincial criminal law statutes described above were repealed by The Trade Unions Act or section 5 of the Criminal Law Amendment Act. The New Brunswick and Nova Scotia Acts disallowed conspiring to use unlawful means to achieve any purpose whatever, which means were not unlawful because they were in restraint of trade, but for other reasons. They disallowed, subject to certain conditions, riotous and tumultuous assemblies "to the disturbance of the public peace" and assemblies that used "force or violence". The Quebec statute declared to be unlawful confederacies for the *purpose* of "disturbing the public peace" and that Act was unaffected by either subsection 1(5) of the Criminal Law Amendment Act, which dealt only with means, or section 2 of The Trade Unions Act, which declared legal only purposes in restraint of trade. Therefore, even after the passage of the trade union acts, if an intention could be ascribed to a union to have

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latter's acceptance of work, the union member would have only engaged in one act, but committed two offences: the strike itself would be an act in restraint of trade, punishable as a criminal conspiracy, and the violence used against the person to coerce him not to accept employment would be an act in contravention of sub. 1(1) and para. 1(3)(b) of the Criminal Law Amendment Act. By providing that the greater penalty applied to the exclusion of the other, sub. 1(5) would avoid the cumulation of the terms of imprisonment that would otherwise occur. However, even if the word "act" were read into sub. 1(5) instead of the word "offence", an act by a trade union in restraint of trade *not coupled* with an offence under this Act would not be protected by the rule, because the policy sought to be protected would not be endangered.

[78] Criminal Law Amendment Act, 35 Vict., c. 31, s. 5:

> So much of any Act or law as may be inconsistent with this Act, is hereby repealed: Provided that such repeal shall not affect anything duly done or suffered, or any right acquired, or any liability, penalty or forfeiture incurred, before the passing of this Act, or any proceeding pending at the time of the passing thereof, for enforcing any such right, liability, penalty or forfeiture.

acted in order to disturb the public peace, the harsh maximum twenty-one year prison sentence prescribed in the Quebec statute could be imposed. All of these pre-Confederation statutes seriously curtailed permissible activities during strikes.

In addition, section 42 of the federal Act respecting Offences against the Person, set out above, remained unrepealed by section 5 of the Criminal Law Amendment Act because the means proscribed as criminal in the former Act were "unlawful . . . assaults" and "violence or threats of violence", which were not inconsistent with the legality of means "in restraint of trade" established by subsection 1(5).

In short, even assuming that subsection 1(5) allowed unions to use means in restraint of trade, its effect was to repeal the common law only in this regard, subject to the harsh exceptions in the preceding subsections. Moreover, of all the statutes considered above, only section 3 of the Master and Servant Act would be repealed.[79] Subsection 1(5) even provided that in case of convictions under these statutes, if a greater penalty was provided therein it overrode the penalties imposed under the Criminal Law Amendment Act.

It is clear that most of the impediments to the activity of trade unions under the criminal law of conspiracy persisted notwithstanding the enactment of the trade union acts. The consequent irritation experienced by prominent trade unionists found expression in numerous appeals to Parliament to repeal the Criminal Law Amendment Act in the four years following its promulgation. These proved largely unsuccessful, however, producing only an amendment in 1876 that provided a more stringent definition of watching and besetting.[80]

Before leaving this discussion of the relevant criminal law, it is worth noting that in Ontario a substantial impediment to the development of trade unionism existed apart from the law of conspiracy. Section 2 of the Master and Servant Act provided that any employee

> who shall during the period of [any written or oral employment contract, unless in the latter case it be for longer than one year] refuse to go to work . . . or who shall refuse to obey the lawful commands of the person under whose direction [his] services are to be performed . . . shall . . . be liable to punishment for every such offence. . . .[81]

The punishment was a fine not exceeding £5 or imprisonment for between one day and one month.[82] Clearly every participant in a strike would be liable to conviction under this section. No provision in the

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[79] It would be repealed by s. 23 of The Trade Union Act, 1872, which provided that "[a]ny statute or law inconsistent with this Act is hereby repealed . . .". S. 3 of the Master and Servant Act dealt with a conspiracy for the *purpose* of "demanding extravagant or high wages", which was inconsistent with s. 2 of the Trade Unions Act.

[80] C. LIPTON, *supra* note 13, at 41.

[81] 10 & 11 Vict., c. 23, s. 2.

[82] S. 5.

Trade Unions or Criminal Law Amendment Acts affected the section. It was not repealed until 1877.[83]

2. *The Civil Law*

The next inquiry involves a consideration of the relevant civil law in existence prior to the passage of the Acts and an assessment of the extent to which section 3 of the Trade Unions Act modified that law. Only the law of the province of Ontario is considered.[84]

Section 3 of the Trade Unions Act implies that, at common law, agreements or trusts involving trade unions were void or voidable if their purposes were in restraint of trade.[85] Again, Macdonald was probably wrong in suggesting that the source of this rule lay in British statutes:[86] the relevant date for the reception into Ontario of the English law respecting property and civil rights is 15 October 1792,[87] and no British legislation concerning such agreements or trusts existed before that date. Nor does there appear to have been any indigenous legislation on the subject that would have been applicable in Ontario in 1872.

The rule was, however, frequently expressed in Upper Canadian and Ontario case law. Strong V.C. in *Ontario Salt Co. v. Merchants Salt Co.* stated that "[p]*rima facie* every contract in restraint of trade is void; but if an agreement appears to be for a partial restraint only, for valuable consideration and reasonable, the law sanctions it".[88]

The reason for a general rule treating such contracts as void was stated to be that "[p]ublic policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract . . .".[89] Nonetheless, there were some exceptions to it: for example, if a vendor of a business were never permitted to agree to refrain from exploiting his talents, his capacity to sell his business would suffer, since potential purchasers would tend to hold back for fear that he would undermine their profitability by exploiting his talents in close proximity to them after the sale. Therefore, courts tolerated contracts in which a vendor

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[83] The Breaches of Contract Act, 1877, 40 Vict., c. 35, s. 1.

[84] Trade union activity, especially the nine-hour movement, was greatest in Ontario, and an analysis of the extent to which s. 3 emancipated Ontario trade unions from previous civil law constraints suffices to show how important this emancipation was to the proponents of the trade union bills.

[85] The Trade Unions Act, 1872, 35 Vict., c. 30, s. 3:

> The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

[86] *Supra* note 3.

[87] Cote, *The Reception of English Law*, 15 ALTA. L. REV. 29, at 88 (1977).

[88] 18 Grant 540, at 544 (Ch. 1871).

[89] Mossop v. Mason, 18 Grant 453, at 460 (Ch. 1871), citing Leather Cloth Co. v. Lorsont, L.R. 9 Eq. 345, at 354 (1869).

promised not to compete with a purchaser after the sale in this manner, so long as the vendor's restraint was only partial, reasonable and conditional on his receiving consideration for his promise.

Despite these three requirements, courts were reluctant to dismiss a claim by a plaintiff who had relied on such a covenant, even if they declared it void as in restraint of trade. In *Fisken v. Rutherford*[90] a deed provided that Rutherford was to purchase all stock in trade and materials for his business exclusively from Ross, Mitchell and Co., but contained no correlative obligation requiring the Company to supply Rutherford with those goods. Rutherford lacked the means to carry on his business unless supplied by the Company; therefore, as security, the Company provided in the deed that Fisken, its agent, was empowered, in his discretion, to carry out transactions concerning Rutherford's business and even to wind it up. Rutherford was conscientiously supplied by the Company for two and one-half years, but thereafter refused to continue performance under the agreement. Fisken then moved in with the intention of winding up Rutherford's business, but the latter resisted. The plaintiff[91] sought an injunction to restrain Rutherford from selling stock supplied by it and sought, moreover, to take possession of those goods and any funds derived from their sale that could be traced. Rutherford argued that the deed could not be relied on because it was in restraint of trade and therefore void. Esten V.C. did not address the issue of whether the restraint was partial or general, though it was clearly partial as Rutherford was not absolutely precluded from carrying on his business. He held the deed to be reasonable "because it enabled the defendant to obtain capital of which he was quite destitute, and to commence and conduct a considerable business".[92] However, he found it void for want of consideration, because there was no provision requiring the Company to supply Rutherford. Nonetheless, because the Company had in fact always diligently supplied the defendant, the Court granted the Company's demand to the extent of enabling it to seize property and money derived from property owned by it that remained in the hands of the defendant.[93]

A similar result was reached in 1871 in *Mossop v. Mason*. Mason agreed, in a deed under seal, to sell

> "all his goods, chattels, and effects, and good-will of the [hotel] business carried on by him" [and] . . . agreed to pay $4000 to respondents if he directly or indirectly continued, commenced, or carried on, the business or calling of an innkeeper within the term of ten years.[94]

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[90] 18 Grant 9 (Ch. 1860).
[91] Fisken died and Ross, Mitchell & Co. became plaintiffs.
[92] *Supra* note 90, at 20.
[93] *Id.* at 21.
[94] *Supra* note 89, at 454.

The purchaser, Mossop, took possession of the premises, which had been leased to Mason by one Smith. Soon after, the hotel burned down and Mossop moved out, setting up another hotel close by. Smith, however, still held Mason responsible under the lease and Mason consequently re-established his hotel business on the original site after renovations were completed. Mossop sought an injunction to restrain Mason from carrying on a hotel business in the city and all damages resulting from having done so. Mason claimed that the agreement was void because it was in restraint of trade. Draper C.J. held that although consideration could be found for the restrictive clause, it was unreasonably broad, and therefore void: no geographical limit had been placed on the prohibition against competition. Nonetheless, Mossop succeeded in his action, on the grounds that Mason had sold him his goodwill and only a few months later "carried on the same business, on the same premises, and for two months in the same name [as he had before the sale]. It seems to [be] a species of fraud on the purchasers of the goodwill".[95]

Ontario Salt Co. v. Merchants Salt Co.,[96] also decided in 1871, illustrates the limited scope of unreasonableness as a ground for declaring void an agreement in restraint of trade. The plaintiff there sought to restrain the defendant from acting in contravention of a covenant entered into by numerous salt manufacturers, including the plaintiff and the defendant. That covenant provided that no signatory could sell salt except through designated trustees. The defendant claimed that the agreement was in restraint of trade and therefore void.

Strong V.C. held that the restraint was only partial because it did not absolutely prohibit the manufacture or sale of salt, and that consideration for it could be found in the mutual obligations of the signatories. In assessing whether or not the restraint was reasonable he considered " 'whether the restraint [was] such only as to afford a fair protection to the interest of the party in favor of whom it [was] given, and not so large as to interfere with the interests of the public' ".[97] He then reviewed pertinent British cases and concluded there must be " 'without doubt' an 'unquestionable' interference with the public interests"[98] for the deed to be declared void for unreasonableness. He said that it was not detrimental to the public for manufacturers to agree to set prices through a trustee when in the absence of such an agreement competition might force some members out of business, and added:

> Did I even think otherwise than I do, that this arrangement was injurious to the public interests, I should hesitate much before I acted on such an opinion, for I should feel that I was called on to relieve parties from a solemn contract,

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[95] *Id.* at 465.
[96] *Supra* note 88.
[97] *Id.* at 545, quoting from Horner v. Graves, 7 Bing. 735, at 743 (C.P. 1831).
[98] *Id.* at 547.

> not by the mere application of some well established rule of law, but upon my own notion of what the public good required — in effect to arbitrarily make the law for the occasion.[99]

The defendant's objection was overruled and the plaintiff was ultimately granted the injunction.[100]

Section 3 of the Trade Unions Act, like section 2, was severely restrictive in granting rights to unions unavailable at common law. Indeed, the *Ontario Salt Co.* case illustrates that the requirements of the exception to the rule proscribing agreements in restraint of trade (*i.e.*, that the restraint be only partial, not unreasonable and that consideration exist for it) were easy to establish. Section 3, then, seems to have been little more than declaratory of existing law. The factual and historical contexts of the *Ontario Salt Co.* case merit closer attention, however. The case involved a convention among manufacturers whose object was to avoid an otherwise severely competitive market that could have resulted in numerous bankruptcies and consequently a decline in the industry as a whole. Strong V.C. borrowed Lord Ellenborough's words from *Hearn v. Griffin*,[101] a case that involved a uniform price agreement between two coach masters:

> "How can you contend that it is in restraint of trade; they are left to charge what they like, though not more than each other. This is merely a convenient mode of arranging two concerns which might otherwise ruin each other." I see no difference in principle between that case and the present.[102]

In 1871, one of Canada's largest socio-economic problems was its lack of industrialization. Strong V.C. was probably concerned that a decision that stifled manufacturers' attempts to conclude agreements that promoted industrial development would be highly detrimental to the national interest. If this concern was the real reason for his decision, his broad treatment of the exception to the common law rule would almost certainly not translate into the sort of context contemplated by section 3 of the Trade Unions Act, for agreements among workers in restraint of trade were seen as adverse to the growth of industry. If Strong V.C. and other judges of the day were in fact preoccupied with the rudimentary state of industrialization, section 3 could be considered progressive legislation from the point of view of trade unions.

It is, however, also plausible that the overriding concern of Strong V.C. in deciding as he did was to maintain the principle of freedom of contract, for he sharply expressed his reluctance to "relieve the parties from a solemn contract".[103] If this statement represented his primary

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[99] *Id.* at 549.
[100] Ontario Salt Co. v. Merchants Salt Co., 18 Grant 551, at 556 (Ch. 1871).
[101] 2 Chitty's 407 (K.B. 1815).
[102] *Supra* note 88, at 548, quoting from Hearn v. Griffin, *id.* at 408.
[103] *Id.* at 549.

concern, section 3 would have to be regarded as declaratory, because the broad exception it expressed would be available to manufacturers and trade unions indiscriminately.

In any case, assuming that section 3 to some extent created new rights for unions, section 4 substantially curtailed the practical significance of those rights. Under subsection 4(1), a trade union could not legally enforce any mutually restrictive agreements among its members. Conversely, under paragraph 4(3)(a), no individual member could sue his union for a benefit he was entitled to by virtue of an agreement among union members for the application of union funds. For example, it was suggested in an *obiter dictum* in *Simard v. Couturier*[104] that paragraph 4(3)(a) would preclude an employee from suing his union in order to obtain a pension to which he was entitled pursuant to a union compensation plan. In addition, subsection 4(4) precluded the enforcement of agreements between trade unions. These substantial denials of legal remedies and others contained in section 4 rendered the rights of unions and their members granted by section 3 largely ineffective. Section 4, then, inhibited the growth of unions by undermining their capacity to act as a centralizing, authoritative voice for their members.

One decision, however, recognized a right granted by section 3 that was not precluded from enforcement by section 4. In *Amalgamated Soc'y of Carpenters & Joiners v. Sinclair*,[105] a trade union decided to withdraw from the Society and affiliate with an American organization. Before turning over the funds belonging to the Society, some members, including Sinclair, appropriated some of them for a banquet. The Society sued those members for monies spent. Riddell J. held that the Society was entitled to succeed because the expenditure was in contravention of the agreement stating the Society's objects. He added that "such an action would not come under any head of sec. 4: [the expenditure] is not an application of the funds of the trade union for any of the purposes [in subsection 4(c)], but an order [is sought] that these funds shall be put into the hands of the union for administration".[106] He also rested his decision on the broader ground that, irrespective of any trade union agreement, the defendants "took the money of the plaintiff and converted it to their own use without lawful authority or excuse".[107] The plaintiff, then, would probably have succeeded even if the agreement sought to be enforced had been covered by section 4. Although the agreement relied upon by the Society was held to be valid, this broader ground for the decision is reminiscent of judges' reluctance to refuse a deserving plaintiff a remedy notwithstanding that the agreement he relied on was in

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[104] 72 Qué. C.S. 574 (1933).

[105] 56 O.L.R. 559, [1925] 2 D.L.R. 774 (C.A.).

[106] *Id.* at 563, [1925] 2 D.L.R. at 777. Sub. 4(c) referred to is the equivalent of sub. 4(3) of the Trade Unions Act, 1872.

[107] *Id.*

restraint of trade and therefore void, as in *Fisken v. Rutherford*[108] and *Mossop v. Mason*.[109] In those cases, discussed above, the plaintiff had relied on an agreement that was held by the court to be in restraint of trade and consequently void, but nevertheless largely succeeded in his action against the defendant. It is somewhat paradoxical that Riddell J. in *Sinclair*[110] still felt a need to express an opinion concerning the moral conduct of one of the litigants, as did the judges in those cases, not in avoidance of the rule that agreements in restraint of trade were void however, but as a safeguard against the impediments in section 4 to the enforcement of agreements to which trade unions were parties.

In addition to the neutralizing effect of section 4 upon section 3, subsection 22(2) expressly provided that the terms of the Trade Unions Act did not apply to "[a]ny agreement between an employer and those employed by him as to such employment". Moreover, nothing in the Act freed unionized employees from suits against them by their employers for breach of contract. In mid-nineteenth century Ontario the law provided two means to enforce employment contracts: the sanctions in the Master and Servant Act and common law civil actions. At common law "there was a contractual duty upon the employee to work faithfully", and if that duty was breached, the employer's principal remedy was an award of damages, but he could in addition dismiss the employee concerned. Any strike would entail a breach by participating employees of the obligations to work faithfully and, therefore, give rise to the threat of civil action by the employer.[111] It is true that "employers recognized the futility of suits in damages against workers, who for the most part would not have had the wherewithal to pay",[112] but there was no legal impediment to prevent employers from dismissing union agitators on the simple grounds that they had breached their employment contract by not working faithfully. If a major reason for the passage of the Trade Unions Act and the Criminal Law Amendment Act was to modify the law in favour of trade unions, it is anomalous that these possible legal actions were not abolished but were, to the contrary, expressly perpetuated by subsection 22(2).[113]

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[108] *Supra* note 90.

[109] *Supra* note 89.

[110] *Supra* note 105.

[111] Craven, *The Law of Master & Servant in Mid-Nineteenth-Century Ontario*, in ESSAYS IN THE HISTORY OF CANADIAN LAW 175, at 181 (D. Flaherty ed. 1981).

[112] *Id.*

[113] In addition to the civil action for breach of contract, it is worth noting that a civil action for conspiracy also existed; but in Municipality of the Township of East Nissouri v. Horseman, 16 U.C.Q.B. (N.S.) 556, at 568 (1858), its scope was confined to "cases of injury to life or limb, or to personal liberty . . . [or] where a party has suffered in reputation, or in property, by a false and malicious prosecution for any crime". For example, in Davis v. Minor, 2 U.C.Q.B. (N.S.) 464, at 470 (1846), an action for conspiracy was rejected *inter alia* because malice was neither alleged nor proved, both of which were considered requisites for the action to succeed.

C. *Summary: The Effect of the Trade Unions and Criminal Law Amendment Acts*

It is clear from the foregoing analysis that by 1872 the growth of trade unionism had rendered a number of statutes and common law doctrines anachronistic and oppressive, but that the Trade Unions Act and the Criminal Law Amendment Act offered shamefully few ameliorations of that law. When examined in the light of pre-existing law, sections 2 and 3 of the Trade Unions Act and subsection 1(5) of the Criminal Law Amendment Act, because of their restrictive wording and the limitations imposed on them by other sections in those Acts, were no more than hollow, rhetorical responses to the need to modernize the law in relation to trade unions. Consequently, despite the heavy emphasis placed on this motive in the debates of the House of Commons in support of the trade union bills, it is highly doubtful that it operated as a major reason for their enactment.

A careful reading of Macdonald's speeches in those debates clearly supports this conclusion. The speeches indicate a lack of genuine interest in the plight of trade unions. As noted above, certain of his statements demonstrate the mistaken belief that English statutes were the source of the law that the Trade Unions Act and the Criminal Law Amendment Act purported to rectify. Moreover, Macdonald insisted that "[t]he subject was too important to be taken *ab initio* without great care and study",[114] and chose instead to reenact the Imperial Statutes almost verbatim. The implication is that the subject was not important enough to be carefully studied *ab initio*. Furthermore, no attempt was made to tailor the Canadian Acts to meet the limitations of a federal legislative authority. In *Starr v. Chase*, Duff J. (as he then was) stated in an *obiter dictum* that "as to many of its provisions [*i.e.* the Trade Unions Act] there is, to say the least, doubt as to the authority of the Dominion to enact them." In particular, he said, section 32 (the equivalent of section 3 in the original Trade Unions Act) "is, *prima facie* dealing with the subject of civil rights and property", part of provincial legislative jurisdiction.[115] In *Amalgamated Builders Council v. Herman*, Middleton J.A. went further still, dismissing an action by the plaintiff union primarily on the ground that "the Dominion Act is nothing but a statute dealing solely with property and civil rights and therefore *ultra vires*, and for that reason quite ineffectual to confer any valid status upon the trade union".[116]

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[114] *Supra* note 3.
[115] [1924] S.C.R. 495, at 508, [1924] 4 D.L.R. 55, at 65.
[116] 65 O.L.R. 296, at 301, [1930] 2 D.L.R. 513, at 520 (C.A.).

III. Encouragement of Immigration by British Industrial Workers

A rejection of the most obvious reason for the passage of the Acts leaves unresolved our inquiry into the real reason or reasons. In the debates in the House of Commons, Macdonald tendered an additional motive: if the existing law in relation to trade unions were to persist, British workers might have been dissuaded from emigrating to Canada.[117] This suggestion presumed that the federal government was seeking to encourage the emigration to Canada of British industrial workers. If so, it is plausible that this was a motive for the passage of the Acts.

The Canadian government had always encouraged immigration. Canada's viability as a nation depended heavily upon the advancement of colonization and industrialization, and the predominant impediment to both was underpopulation. However, prior to 1867, "the policy in force was one of indiscriminate immigration, unorganized and uncontrolled, leaving loopholes for the entry of unsuitable persons".[118] On 7 November 1867, Macdonald introduced a motion to establish a Standing Committee on Immigration and Colonization that would investigate matters referred to it by the House of Commons and subsequently submit data and advisory reports.[119] Its first report was published in 1868, and in that report Dr. Taché, Deputy Minister of Agriculture,[120] answered certain questions submitted to him by the Committee. When asked about the results obtained from a temporary agent sent to England by the Department of Agriculture to encourage emigration to Canada, he replied that no accurate statistics were available as to the increase in immigrants from Britain since the opening of the agency, but that "the action of our Agent has caused to emigrate to Canada, many of a class of persons, whose advent in the country has proved a great hardship for those poor people and a great embarrassment for our own citizens . . .".[121] He added: "In my opinion such immigration is simply calculated to prevent the coming to our shores of the better classes of settlers." The Committee concluded that "great caution and circumspection should guide any public effort to induce persons to immigrate".[122]

The substantial influx of which Dr. Taché spoke was a consequence of the severe economic depression which took place in Britain between 1868 and 1872. The industrialized cities there were overcrowded with unemployed workers whose financial support was beyond the means of both the government and the unions. One remedial measure carried out

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[117] *Supra* note 3.

[118] N. MacDonald, Canada: Immigration and Colonization 1841-1903, at 90 (1966).

[119] 1 H.C. Jo. 5 (1867).

[120] The Department of Agriculture dealt with immigration matters.

[121] 1 H.C. Jo., app. 8, at 8 (1867).

[122] *Id.* at 8-9.

by certain charitable organizations was the aiding of workers to emigrate to Canada and elsewhere. These organizations "faced appalling destitution among unemployed boiler-makers, iron workers, fitters, etc., who were regarded as unsuitable material for immigration by all colonies of settlement and as the worst class that could emigrate to Canada".[123] The Boards of Guardians, a large British union, also sent some of its members to Canada in order to mitigate the financial burden of their support. Needless to say, they sent their most unskilled workers.[124] Canadian legislation was clearly necessary: under the open door policy, immigrants could "generally be stated to be poor people; about the [*sic*] half of the English immigrants . . . were destitutes".[125]

The Canadian government reacted by enacting the Immigration Act, 1869,[126] which resolved certain legislative impediments resulting from joint federal-provincial jurisdiction over immigration, systematized its administration and provided in section 16 that the Governor-General could "whenever [he] deemed necessary, prohibit the landing of pauper or destitute Immigrants in all Ports or any Port in Canada" until temporary support could be provided for them.[127]

By 1872, however, the situation in England had changed: "the industrial depression of 1868-70 had spent its force . . . labour was as well paid as in Canada, and emigration, at least for the moment, was less attractive to industrial workers than formerly".[128] Although Canada had provided for the exclusion of undesirable British immigrants it had yet to succeed in attracting desirable ones. The Canadian Parliament responded in 1872 by passing two acts. An amendment to the Immigration Act, 1869[129] improved the protection of emigrants during their passage. It required the presence of a surgeon on the ship, the provision of proper equipment to preserve the health of passengers and the protection of female passengers against seduction and illicit intercourse. Criminal sanctions were imposed if these provisions were breached. In addition, the Immigration Aid Societies Act, 1872[130] established societies

> for the purpose of assisting immigrants to reach Canada from Europe, and to obtain employment on their arrival in Canada . . . [and receiving] applications from persons desiring to obtain artisans, workmen, servants or laborers from the United Kingdom, or from any part of Europe. . . .[131]

Moreover, in that same year, the federal government gave financial support to an advertising campaign designed to induce emigration from

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[123] N. MACDONALD, *supra* note 118, at 93.
[124] *Id.* at 94.
[125] 3 H.C. Jo., app. 5, at 9 (1870).
[126] 32 & 33 Vict., c. 10.
[127] S. 16.
[128] N. MACDONALD, *supra* note 118, at 107.
[129] The Immigration Act of 1872, 35 Vict., c. 28.
[130] 35 Vict., c. 29.
[131] *Supra* note 3, at 429 (8 May 1872).

preferred countries, including England, and "instituted a system of passenger warrants which reduced the cost of passage by one-third for approved emigrants".[132]

There were, however, strong forces inhibiting immigration. Most continental Europeans enjoyed reasonably stable conditions at home, and understandably, only contemplated departure "to improve rather than to flee from their economic lot".[133] Quebec had attempted in vain during this period, through elaborate advertising schemes, to attract persons from France, Belgium, Switzerland and Germany.[134] More important, those Europeans who did emigrate most often had as their ultimate destination the United States, which had "millions of acres to dispose of, adequate capital and [the] foresight to use it in a constructive manner".[135] American railway companies and individual states engulfed the emigrating public of favoured countries with propaganda expounding the virtues of the United States "till it seemed as if the United States was everything, appeared everywhere, and the rest nowhere".[136] In the second report of the Standing Committee on Immigration and Colonization in 1870, the Deputy Minister of Agriculture reported that in 1869, 57,170 of the 75,800 emigrants who came to Canada were ultimately destined for the United States. This staggering proportion was substantially the same for the preceding three years.[137]

In order to colonize and industrialize, it was clear that Canada desperately needed to encourage immigration. The government's interest in doing so culminated in 1872 with the passage of the two immigration acts and the adoption of those policies outlined above, and it is quite possible that the same concerns had some role in motivating the passage of the acts concerning trade unions that same year.

IV. Political Appeal to Canadian Industrial Workers

Another possible reason for the enactment of the Trade Unions Act and the Criminal Law Amendment Act was that Macdonald, preoccupied with an impending federal election, sought to derive political advantage by attracting the support of the industrial working class. When those two Acts were brought before the House for the first time, a federal election was less than four months away and the two major political issues that had arisen in that Parliamentary session seemed beyond any resolution that would leave the Conservative government in favourable public opinion.

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[132] N. MacDonald, *supra* note 118, at 108.
[133] *Id.* at 101.
[134] *Id.* at 94-97.
[135] *Id.* at 118.
[136] *Id.* at 119.
[137] *Supra* note 125 at 8-9.

The first of those issues was the ratification of the Washington Treaty. Macdonald was the sole Canadian representative at a convention of delegates from the governments of the United States, Britain, and Canada that met in March 1871 for the purpose of coming to a "general settlement of Anglo-American relations".[138] The major United States-Canadian tension in issue before the convention was the Canadian requirement that fishing vessels in the Canadian portion of the St. Lawrence River be licensed. The price of that licence had recently increased and its enforcement was being effected by armed Canadian vessels. The clear purpose of the licence was to induce the United States to agree to some general policy of reciprocal trade, a policy that would greatly accelerate Canadian economic development. Unfortunately, New England fishing vessels had successfully ignored Canadian licencing requirements, and unless Canada could effectively close off access to its waters to them it would be precluded from offering the meaningful benefit of unrestricted fishing in exchange for a reciprocal trade agreement. Macdonald knew that effective closure depended on British military support, which Britain refused to offer; in fact, one of the terms of the Treaty was the complete withdrawal of British troops from Canada. Britain had repeatedly admonished Canadians against closure of the fisheries to Americans.[139]

In effect Macdonald had virtually no hopes of obtaining reciprocal trade. What he eventually did obtain in exchange for his agreement to unrestricted American fishing in the Canadian St. Lawrence was an agreement to unrestricted Canadian fishing and navigation in Lake Michigan and other American waters in the Yukon and Alaska.[140] Moreover, knowing that any "rejection of the Treaty by Canada might have disastrous results" for Britain, Macdonald was able to mitigate his failure by offering the British "a moral certainty of success" in the ratification of the Treaty in exchange for a guarantee of £4,000,000 for the purpose of railway construction. The British countered with, and Canada accepted, a guarantee to build fortifications in Montreal and a loan of £2,500,000 for the railway.[141] When Parliament opened on 11 April 1872, then, Macdonald was not empty-handed, but he had clearly failed to obtain reciprocity. Not surprisingly, the Washington Treaty had been "the object of continuous attack in Canada since May of 1871 by the Liberals, as 'the humiliating Treaty' ".[142]

The second major issue in that Parliamentary session was the commencement of a railway to the Pacific. By 1871, Canada had greatly expanded its western and northwestern boundaries.

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[138] W. MORTON, THE CRITICAL YEARS 252 (1964).
[139] *Id.* at 251-55.
[140] *Id.* at 257.
[141] *Id.* at 266-67.
[142] *Id.* at 266.

> The key to political tenure and commercial exploitation of such an expanse was, of course, some adequate means of communication. These . . . had grown, but by no means as before 1861. In that year the provinces of Canada, New Brunswick, and Nova Scotia had some 2,146 miles of railway in all. In 1871, Canada had 2,685 miles, a mere 500 more. . . .[143]

Furthermore, the prime impetus for British Columbia's decision to join Canada in that year was the federal government's promise to begin a railway to the Pacific within two years and complete it within ten, a promise which the Liberals denounced "as being reckless and improvident, and far beyond the resources of the Dominion".[144]

In 1871, the Government had decided to undertake the construction of the railway by employing a private company; however, this had resulted in an acute dilemma. Both a Toronto and a Montreal company had tendered offers, but each refused to amalgamate with the other.[145] The Government was forced to defer its choice, for fear of alienating voters in the province of the excluded company. When Parliament convened on 11 April 1872, therefore, the Conservatives had to face the strenuous obligation to British Columbia of expeditiously commencing the railway in a manner that would not alienate either competitor.

In addition to these issues, Macdonald's position was made worse by the defeat of the provincial Conservative government in Ontario in late 1871 and the ascendency of a strong Liberal coalition.[146]

All these politically damaging issues were in Macdonald's mind when he introduced the trade union legislation on 7 May 1872. The Washington Treaty had not yet been ratified by Parliament, and on that same day Cartier introduced a bill concerning the Canadian Pacific Railway.[147] In this tempest, Macdonald "was watching eagerly for any political advantage — any political opportunity — that fortune might fling in his way".[148]

During the preceding months, trade unions had begun to seriously press employers in furtherance of the nine-hour movement, and their sentiments culminated in the mass demonstration in Toronto discussed above.[149] *The Globe*, the most influential Liberal newspaper, was the prominent anti-union voice in Toronto, while the leading Conservative newspaper, *The Leader*, vehemently supported the development of unions: "[a]n impression rapidly pervaded the city that the Liberals were

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[143] *Id.* at 264.
[144] *Id.* at 249.
[145] *Id.* at 262.
[146] *Id.* at 259-60.
[147] Ratification of the Washington Treaty was only effectively completed on 15 May 1872. The railway bill provided that any two or more companies that could unite for the purpose of constructing the railway within ten years would receive 50,000,000 acres of land and $30,000,000.
[148] Creighton, *supra* note 24, at 372-73.
[149] *See* note 24 and accompanying text.

hand in glove with the capitalists and that the Conservatives were the true friends of the working man''.[150]

Macdonald almost certainly saw in this issue the possibility of winning the support of over 50,000 members[151] of the industrial working class and sympathizers with their cause. In his eyes, the solution was extraordinarily simple: ''[h]e had merely to re-enact, with suitable modifications, the two British statutes — The Trade Union Act and the Criminal Law Amendment Act of 1871'',[152] which he executed ''with enthusiasm and speed''.[153] A little over a month later, the Canadian Acts received Royal Assent.[154]

V. JOHN A. MACDONALD'S ANTIPATHY FOR GEORGE BROWN

A further possible motive for Macdonald's introduction of the trade union bills was a desire to express his contempt for George Brown, owner and editor-in-chief of *The Globe*, with whom he had a long-standing political and intellectual rivalry. The period immediately following Confederation was a highly personal era of politics and the enmity between Macdonald and Brown figured prominently at the time. Their antipathy had begun long before Confederation, and was never to be reconciled. As early as 1854, Brown ''had gradually come to be regarded as Macdonald's great antagonist in the public life of Canada''.[155]

Prior to the election of 1854, Brown had emerged as the leader of the Clear Grit party, and Macdonald had gradually developed significant clout within the Conservative party. The Clear Grits fought hard to dislodge the Liberal element of the existing coalition government in the 1854 election, and with the help of the votes won by the Conservatives, succeeded. However, the Conservatives obtained a plurality of the available seats and their leader, Sir Allan MacNab, was able to form a government by means of a coalition between himself and Morin, the French Liberal leader, thereby alienating the Clear Grits. The force behind this coalition was Macdonald, who ''had taken the trouble to ingratiate himself with the French [Liberals], to whom his buoyant disposition, his keen sense of humour, his courtesy and gaiety of manner and speech . . . presented an attractive contrast to the grimly earnest temperament of the Clear Grit leader''.[156] In this way, Macdonald neutralized the Clear Grits' electoral success.

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[150] Creighton, *supra* note 24, at 368.
[151] *Id.* at 365.
[152] *Id.* at 373.
[153] *Id.* at 374.
[154] The Conservative government was re-elected in the ensuing election.
[155] G. PARKIN, SIR JOHN A. MACDONALD 51 (1908).
[156] *Id.* at 62.

By 1856, MacNab and Morin had been replaced by Macdonald and Taché, respectively. During the Parliamentary session that commenced in May of 1856, Brown vociferously insulted Macdonald and the Conservatives for their hypocrisy in joining with the Liberals in 1854 after previously attempting, together with Brown's Clear Grit party, to defeat the coalition government of which the Liberals had been a part. Macdonald retorted with a

> torrent of invective, stating that in 1849 Brown, while secretary of a commission appointed to investigate the condition of the penitentiary at Kingston, had "falsified the testimony of witnesses, suborned convicts to commit perjury, and obtained the pardon of murderers confined in the penitentiary to induce them to give false evidence".[157]

Brown vehemently denied these charges and demanded that a commission be appointed to investigate them. The commission found no evidence to support the allegations, and MacNab, a member of the commission, "bluntly declared that the charge had been completely disproved, and that the committee ought to have had the manliness to say so".[158] Macdonald never apologized.[159] His underlying bitterness toward Brown is sharply expressed in a letter to his mother:

> I am carrying on a war against that scoundrel George Brown and I will teach him a lesson that he never learnt before. I shall prove him a most dishonest, dishonorable fellow & in doing so I will only pay him a debt I owe him for abusing me for months together in his newspaper.[160]

After this scandal, their animosity was irreparable. Even when Macdonald and Brown formed a coalition for the purpose of achieving Confederation, their tolerance of each other was only superficial. Macdonald said: " 'We acted together, dined at public places together . . . and went into society in England together' "; but later, when Brown could no longer bear the coalition, " 'we resumed our old positions and ceased to speak' ".[161]

During the course of the labour dispute in 1872 in Toronto led by the Toronto Typographical Union, Brown became extremely irascible. When union delegates showed up at *The Globe* with their demands, including a reduction of the working day to nine hours, Brown "exploded. He ordered the two men who had approached him discharged, and any others in the job office who threatened to strike."[162] When the union struck, it "annoyed him as a journalist, exasperated him as a proprietor, [and] outraged him as a stout believer in the Cobdenite philosophy of free

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[157] *Id.* at 80-81.

[158] J. LEWIS, GEORGE BROWN 89 (1906).

[159] G. PARKIN, *supra* note 155, at 82.

[160] 1 THE LETTERS OF SIR JOHN A. MACDONALD 1836-57, at 356 (J. Johnson ed. 1968).

[161] G. PARKIN, *supra* note 155, at 102.

[162] J. CARELESS, 2 BROWN OF THE GLOBE 292 (1963).

enterprise and *laissez-faire*''.[163] Consequently, he and other master printers initiated the criminal process that resulted in the trial of strike leaders of the Toronto Typographical Society before Magistrate MacNabb.[164]

On 7 May 1872, ''the very day on which the second hearing in the printers' trial was held'',[165] Macdonald introduced the trade union bills: ''To confound George Brown'' by this legislative initiative ''was a most gratifying manoeuvre''[166] for him; it was ''[a] chance to hit Brown . . . [that] was not to be neglected''.[167]

VI. Conclusion

On the whole, it seems probable that concern for the immigration of British industrial workers, political appeal to domestic industrial workers, and personal satisfaction derived from the frustration of Brown's impassioned efforts to stifle union activity, provided Macdonald with greater incentives to introduce the Trade Unions and Criminal Law Amendment Bills than any desire to ameliorate the harsh common law impediments to trade unionism. This article does not purport to exhaust the possible reasons for the passage of those Acts, but hopefully the most important of them have been canvassed adequately. It will have succeeded if it has provided sufficient insight to force the reader to suppress a smile when considering the following statement made by Macdonald on 11 July 1872 at a mass meeting sponsored by the Toronto Trades Assembly in his honour ''as the friend and saviour of the working man'':[168]

> I ought to have a special interest in this subject . . . because I am a working man myself. I know that I work more than nine hours every day, and then I think I am a practical mechanic. If you look at the Confederation Act, in the framing of which I had some hand, you will admit that I am a pretty good joiner; and as for cabinet-making, I have had as much experience as Jacques and Hay themselves.[169]

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[163] Creighton, *supra* note 24, at 363.
[164] J. Careless, *supra* note 162, at 294.
[165] Creighton, *supra* note 24, at 374.
[166] *Id.*
[167] E. Forsey, *supra* note 9, at 99.
[168] Creighton, *supra* note 24, at 374.
[169] *Id.* at 375.