

TAKING PICKETS ON THE ROAD

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We are all familiar with picket lines. The sight of workers, placards in hand, congregating outside of a place of business is one all of us have seen before. A picket line is undoubtedly the most visible evidence of a labour dispute.

Whether one agrees with it or not, picketing is a form of expression that is accepted by Canadian society. Workers, by picketing their employer, are attempting to get a message across. The workers are using their collective might to inform their employer that they want improvements in their employment status, be it better working conditions, increased benefits or higher wages.

This aim is acceptable to most so long as it involves only the workers and their employer, but what happens if the workers' picketing goes beyond their employer's place of business? What if the workers decide to picket a subsidiary of the employer, the residences of the employer's management or a retailer of the employer's product? Third parties who have nothing to do with the labour dispute between the employer and its workers may be economically harmed. Is this type of picketing, commonly referred to as secondary picketing, legal?

For many years in Canada there was divergence in judicial opinion on the issue of secondary picketing. Some judges were of the opinion that secondary picketing was illegal in itself. That is, regardless of whether the secondary picketing was harmful or benign, disruptive or peaceful, such picketing was illegal and should be prohibited.

A second, more moderate, position found secondary picketing to be illegal unless the secondary picketing involved a related company or an ally of the employer. Under this view, secondary picketing was legal only if the workers were picketing, for example, a parent company of the employer, a company with common ownership with the employer or a company that was assisting the employer carry on business during the labour dispute.

The third stream of judicial opinion was the most liberal of all in terms of workers' rights. It held that secondary picketing was legal. It only became illegal if the picketing involved a wrongful act, such as the commission of a crime or a tort (a tort is a civil, as opposed to a criminal, wrong such as defamation, trespass, nuisance, or intimidation).

The issue of whether secondary picketing is legal in Canada was addressed by the Supreme Court of Canada in the decision *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* This case arose out of a lengthy labour dispute in Saskatchewan, one where the workers had picketed retail outlets that sold the employer's product. In addition, they picketed the hotels where replacement workers stayed and the homes of management personnel. During the "home" picketing, there was evidence that threats and insults had been directed at management. The employer applied to court to prohibit this secondary picketing.

The Supreme Court of Canada decided that secondary picketing is legal and only becomes illegal if it involves the commission of a crime or a tort. The basis for this decision was that picketing is a form of expression. Since freedom of expression is a right that is protected under *The Charter of Rights and Freedoms*, the Court reasoned that secondary picketing should only be prohibited where reasonable and justified to remove that right. In situations where secondary

picketing involves the commission of a crime or a tort, it is reasonable and justifiable to prohibit the secondary picketing.

The decision itself provides a few examples of when secondary picketing becomes illegal. Turning first to the picketing of retail outlets, the Supreme Court of Canada found no reason to prohibit this behaviour. The picketing had been peaceful and informational. It was aimed at harming the employer's economic interests by persuading people not to purchase the employer's product. The same held true of the picketing that occurred at the hotel where the replacement workers stayed. It was peaceful picketing that did not involve any element of intimidation of the replacement workers.

The Court found the secondary picketing that occurred at the residences of the employer's management to be illegal. The picketing at these locations involved disorderly conduct and threats of harm to management. This type of conduct amounted to the torts of intimidation and nuisance.

As a result of the Supreme Court of Canada's decision, whether secondary picketing is illegal and can be prohibited depends primarily on whether the picketing involves the commission of a crime or a tort. This will involve an investigation into the actions and intentions of the workers. In other words, the location of the picketing is almost irrelevant. As such, workers are now free to picket third parties in an effort to resolve their labour dispute with their employer. The limitation is that they are prohibited from doing so where harm may result to the third parties through the commission of a crime or a tort.

Picketing triggers strong reactions for and against. The *Pepsi-Cola* case will not change that, but it may signal a reluctance to limit workers' rights in this area.

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