** Preliminary Version **

Case Name:

Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.

Pepsi-Cola Canada Beverages (West) Ltd., appellant;
v.
Retail, Wholesale and Department Store Union, Local 558,
Garry Burkart and Linda Reiber, personally and as
Representatives of all the members of the Retail,
Wholesale and Department Store Union, Local 558,
respondents, and
Attorney General for Alberta, Canadian Labour Congress
and Canadian Civil Liberties Association (CCLA),
interveners.

[2002] S.C.J. No. 7
2002 SCC 8

Supreme Court of Canada
File No.: 27060.

2000: October 31; 2002: January 24.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN
(118 paras.)

Labour law — Picketing — Secondary picketing — Union members picketing at locations other than employer's premises — Employer obtaining injunction prohibiting such secondary picketing — Whether secondary picketing illegal per se at common law — Whether picketing form of expression engaging s. 2 (b) of Canadian Charter of Rights and Freedoms — Whether wrongful action model making secondary picketing which amounts to tortious or criminal conduct illegal should be adopted.

The union engaged in a variety of protest and picketing activities during a lawful strike and lockout at one of the appellant's plants. These activities eventually spread to "secondary" locations, where union members and supporters picketed retail outlets to prevent the delivery of the appellant's products and dissuade the store staff from accepting delivery; carried placards in front of a hotel where members of the substitute labour force were staying; and engaged in intimidating conduct outside the homes of appellant's management personnel. An interlocutory injunction was granted which effectively prohibited

the union from engaging in picketing activities at secondary locations. A majority of the Court of Appeal upheld the order against congregating at the residences of the appellant's employees, as these activities constituted tortious conduct. However, the section restraining the union from picketing at any location other than the appellant's premises was quashed, thus allowing the union to engage in peaceful picketing at secondary locations.

Held: The appeal should be dismissed.

Secondary picketing is generally lawful unless it involves tortious or criminal conduct. This wrongful action model best balances the interests at stake in a way that conforms to the fundamental values reflected in the Canadian Charter of Rights and Freedoms. It allows for a proper balance between traditional common law rights and Charter values and falls in line with the core principles of the collective bargaining system put in place in this country in the years following the Second World War. The wrongful action approach focuses on the character and effects of the activity as opposed to its location. This approach offers a rational test for limiting picketing, and avoids the difficult and often arbitrary distinction between primary and secondary picketing. In addition, labour and non-labour expression is treated in a consistent manner.

The Hersees and modified Hersees approaches, which start with the proposition that secondary picketing is per se unlawful regardless of its character or impact, are out of step with Charter values. They also deny adequate protection for free expression and place excessive emphasis on economic harm, in a rigid and inflexible way. Both primary and secondary picketing engage freedom of expression, a value enshrined in s. 2(b) of the Charter. While protection from economic harm is an important value capable of justifying limitations on freedom of expression, it is an error to accord this value absolute or pre-eminent importance over all other values, including free expression.

A wrongful action rule offers sufficient protection for neutral third parties when weighed against the value of free expression. Picketing which breaches the criminal law or one of the specific torts will be impermissible, regardless of where it occurs. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, and will protect free access to private premises. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract. Moreover, to the extent that it may prove necessary to supplement the wrongful action approach, the courts and legislatures may do so. While legislatures must respect the Charter value of free expression and be prepared to justify limiting it, they remain free to develop their own policies governing secondary picketing and to substitute a different balance than the one struck in this case.

Cases Cited

Dis*approved*: Hersees of Woodstock Ltd. v. Goldstein, [1963] 2 O.R. 81; *referred to*: R. v. Jobidon, [1991] 2 S.C.R. 714; R. v. Salituro, [1991] 3 S.C.R. 654; Watkins v. Olafson, [1989] 2 S.C.R. 750; Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 2000 SCC 34; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130; Great Atlantic & Pacific Co. of Canada, [1994] OLRB Rep. March 303; Daishowa Inc. v. Friends of the Lubicon (1998), 39 O.R. (3d) 620; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. Keegstra, [1990] 3 S.C.R. 697; R. v. Butler, [1992] 1 S.C.R. 452; U.F.C.W., Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083; Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; R. v. Advance Cutting & Coring Ltd., 2001 SCC 70; Dunmore v. Ontario (Attorney General), 2001 SCC 94; A. L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway

Co., [1959] S.C.R. 271; Lescar Construction Co. v. Wigman, [1969] 2 O.R. 846; Refrigeration Supplies Co. v. Ellis, [1971] 1 O.R. 190; Nedco Ltd. v. Clark (1973), 43 D.L.R. (3d) 714; Nedco Ltd. v. Nichols (1973), 38 D.L.R. (3d) 664; Domtar Chemicals Ltd. v. Leddy (1973), 37 D.L.R. (3d) 73; Inglis Ltd. v. Rao (1974), 2 O.R. (2d) 525; Magasins Continental Ltée c. Syndicat des employé(es) de commerce de Mont-Laurier (C.S.N.), [1988] R.J.Q. 1195; 2985420 Canada Inc. c. Fédération du commerce Inc., [1995] R.J.Q. 44; Peter Kiewit Sons Co. v. Public Service Alliance of Canada, Local 20221, [1998] B.C.J. No. 1494 (QL); McLean Trucking Co. v. Public Service Alliance of Canada, 83 C.L.L.C. para. 14, 047; Alex Henry & Son Ltd. v. Gale (1976), 14 O.R. (2d) 311; Commonwealth Holiday Inns of Canada Ltd. v. Sundy (1974), 2 O.R. (2d) 601; Falconbridge Nickel Mines Ltd. v. Tye, [1971] O.J. No. 11 (QL); Air Canada v. C.A.L.P.A. (1997), 28 B.C.L.R. (3d) 159; Soo-Security Motorways Ltd. v. Kowalchuck (1980), 9 Sask. R. 354; 683481 Ontario Ltd. v. Beattie (1990), 73 D.L.R. (4th) 346; Neumann and Young Ltd. v. O'Rourke (1974), 53 D.L.R. (3d) 11; O.K. Economy Stores v. R.W.D.S.U., Local 454 (1994), 118 D.L.R. (4th) 345; Heather Hill Appliances Ltd. v. McCormack (1965), 52 D.L.R. (2d) 292, aff'd [1965] O.J. No. 504 (QL); Robertson Yates Corp. v. Fitzgerald, 65 C.L.L.C. para. 14, 091; Toronto Harbour Commissioners v. Sninsky (1967), 64 D.L.R. (2d) 276; CTV Television Network Ltd. v. Kostenuk (1972), 26 D.L.R. (3d) 385, aff'd (1972), 28 D.L.R. (3d) 180; J. S. Ellis & Co. v. Willis (1972), 30 D.L.R. (3d) 397; Rocca Construction Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S.A. and Canada, Local 721 (1978), 21 Nfld. & P.E.I.R. 198; PCL Construction Management Inc. v. Mills (1994), 124 Sask. R. 127; Maple Leaf Sports & Entertainment Ltd. v. Pomeroy (No. 2) (1999), 49 C.L.R.B.R. (2d) 285; Williams v. Aristocratic Restaurants (1947) Ltd., [1951] S.C.R. 762; Brett Pontiac Buick GMC Ltd. v. National Association of Broadcast Employees and Technicians, Local 920 (1989), 90 N.S.R. (2d) 342, application for leave to appeal dismissed (1989), 94 N.S.R. (2d) 398; Provincial Express Inc. v. Canadian Union of Postal Workers (1991), 94 Nfld. & P.E.I.R. 75; Domtar Inc., [2000] O.L.R.D. No. 3761 (QL); National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(b), (d), 32(1).

Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 104(3).

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 1.

Labour Relations Act, R.S.N. 1990, c. L-1, s. 128(3).

Labour Relations Code, R.S.A. 2000, c. L-1, s. 84.

Trade Union Act, R.S.S. 1978, c. T-17, ss. 27, 28.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (1998), 167 D.L.R. (4th) 220, 172 Sask. R. 40, [1999] 8 W.W.R. 429, [1998] S.J. No. 727 (QL), allowing in part the Union's appeal of a decision of the Saskatchewan Queen's Bench granting an interlocutory injunction enjoining secondary picketing during a labour dispute. Appeal dismissed.

Robert G. Richards, Q.C., and M. Jean Torrens, for the appellant.

Larry W. Kowalchuk, for the respondents.

Roderick Wiltshire, for the intervener, Attorney General for Alberta.

John Baigent, for the intervener, Canadian Labour Congress.

David Sherriff-Scott, for the intervener, Canadian Civil Liberties Association (CCLA).

Solicitors for the appellant: MacPherson Leslie & Tyerman, Regina.

Solicitors for the respondents: Kowalchuk Law Office, Regina.

Solicitor for the intervener, Attorney General for Alberta: Alberta Justice, Edmonton.

Solicitors for the intervener, Canadian Labour Congress:

Baigent & Jackson, Enderby, B.C.

Solicitors for the intervener, Canadian Civil Liberties Association (CCLA): Borden Elliot Scott & Aylen, Ottawa.

The judgment of the Court was delivered by

¶ 1 **McLACHLIN C.J. and LeBEL J.**:— This case raises the issue of when if ever secondary picketing - typically defined as picketing in support of a union which occurs at a location other than the premises of that union's employer - may be legally conducted. The respondents (the "Union") were on strike against Pepsi-Cola Canada Beverages (West) Ltd. ("Pepsi-Cola") in Saskatchewan. The strike escalated and the Union picketed some of Pepsi-Cola's retail outlets, placed placards outside a hotel where substitute workers were staying, and demonstrated outside the homes of Pepsi-Cola's management personnel. The issue is whether such conduct is unlawful and can be enjoined.

¶ 2 The law on this issue has been clarified by legislation in a number of Canadian provinces. Saskatchewan has legislated to abolish the tort of restraint of trade in the union context: The Trade Union Act, R.S.S. 1978, c. T-17, s. 27. However, apart from this it has left the common law in place. The Union, supported by the Canadian Labour Congress and the Canadian Civil Liberties Association, argues that the common law as presently articulated is difficult to apply and unnecessarily curtails the

right to free expression. Pepsi-Cola, on the other hand, defends the present rule as workable and appropriate to protect business interests and prevent labour disputes from spreading to non-parties to the dispute.

¶ 3 For the reasons that follow, we conclude that secondary picketing is generally lawful unless it involves tortious or criminal conduct, and that the Saskatchewan Court of Appeal correctly disposed of the issues on this basis.

I. Facts

¶ 4 The Union gained certification as bargaining agent for the employees of a bottling plant and delivery facility in Saskatchewan. Their collective agreement had expired, and negotiations broke down. The employer, Pepsi-Cola, locked out its employees and the employees walked out on strike. The lockout and strike were legal under The Trade Union Act. The conflict quickly grew bitter. At the news of the lockout, several employees took control of the warehouse, office and yard. They disabled trucks, blocked entrances and threatened management. Security guards left the scene in fear for their safety. An interim injunction was issued against the Union's acts of trespass, intimidation and nuisance. Pepsi-Cola then regained control of its facilities and resumed business, using management personnel and substitute labour brought in from Calgary and Winnipeg.

¶ 5 The following week, as Pepsi-Cola tried to resume deliveries to its clients, some of the Union members attempted to prevent the movement of trucks, interfere with deliveries, discourage the management and the substitute work force, and dissuade customers from carrying on business with Pepsi-Cola. Protests and picketing spread to "secondary" locations, where Union members and supporters engaged in a variety of activities. They picketed certain retail outlets, thus preventing the delivery of Pepsi-Cola's products and dissuading the store staff from accepting delivery; they carried placards in front of a hotel where members of the substitute labour force were staying; and they convened outside the homes of some of Pepsi-Cola's management personnel and chanted slogans, screamed insults, and uttered threats of harm.

II. Judgments

1. Saskatchewan Court of Queen's Bench

¶ 6 On May 16, 1997, Allbright J. of the Saskatchewan Court of Queen's Bench granted an interlocutory injunction ordering the Union to vacate and refrain from trespassing at Pepsi-Cola's premises in Saskatoon. The Union was also restrained from picketing "except in an orderly manner and provided such picketers remain off of the said premises." The order also prohibited the Union from obstructing or blocking access to Pepsi-Cola's premises and from attempting to intimidate Pepsi-Cola's employees, customers, or anyone else entering or leaving Pepsi-Cola's premises.

¶ 7 On May 23, 1997, Barclay J. dissolved the previous injunction and issued a new interlocutory order with the following terms:

> 1. The defendants and each of them and any person acting under their instruction, direction or behest and any member of the defendant Union, and any other person having knowledge of this Order are, until the trial of this action, or until further order, hereby:
> i) restrained from picketing or congregating at any location other than the plaintiff's premises located at the intersection of Millar Avenue and 43rd Street and bearing civic address 830 - 43rd Street East, Saskatoon,

Saskatchewan and the Custom Truck premises at 2410 Northridge Drive, Saskatoon, Saskatchewan, provided that all such picketers remain off the premises;

ii) restrained from obstructing or blocking places of entrance to or egress from the said premises;

iii) restrained from threatening, harassing, or intimidating or attempting to harass or intimidate in any way the plaintiff's employees, any person seeking to do business with the plaintiff, and/or any person seeking to enter or leave the said premises;

iv) restrained from picketing, watching or besetting, trespassing, creating a nuisance or congregating at the residences of the plaintiff's employees or their families, or intimidating, threatening or obstructing the plaintiff's employees or their family members;

v) restrained from blocking and/or impeding the plaintiff's vehicles or otherwise interfering in any manner whatsoever with the plaintiff's employees in the carrying out of their duties;

vi) restrained from trespassing upon or re-entering the plaintiff's premises.

¶ 8 Parts (i) and (iv) of Barclay J.'s order effectively prohibited the Union from engaging in picketing activities at secondary locations. The Union appealed these parts of the order on the basis that it breached the strikers' rights to freedom of expression and association under ss. 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms.

2. Saskatchewan Court of Appeal (1998), 167 D.L.R. (4th) 220

¶ 9 Writing for the majority of the Saskatchewan Court of Appeal, Cameron J.A. allowed the Union's appeal in part. The majority upheld the part of the injunction which prevented the Union from congregating at the residences of Pepsi-Cola's employees, as these activities were found to have amounted to tortious conduct. However, the section restraining the Union from picketing at any location other than Pepsi-Cola's premises was quashed, thus allowing the Union to engage in peaceful picketing at secondary locations.

¶ 10 Cameron J.A. reasoned that the nature and purpose of picketing involves the presence of pickets and the conveying of information in order to interfere with and put economic pressure on the operation of the enterprise. Cameron J.A. went on to note at p. 230 that "picketing constitutes an exercise of the fundamental freedom of expression which can only be circumscribed by laws, whether statutory, regulatory, or common, that accord with the constitutional norms" of the Charter. Given that the province of Saskatchewan had not imposed any statutory restriction on picketing, this form of collective expression remained lawful in principle, and courts could restrain it only when it was accompanied by a specific tort, such as trespass, nuisance, intimidation, breach of contract or defamation. The majority thus disagreed with the obiter comments of the Ontario Court of Appeal in Hersees of Woodstock Ltd. v. Goldstein, [1963] 2 O.R. 81, that held that secondary picketing was illegal per se at common law.

¶ 11 The Court of Appeal viewed the picketing at the secondary locations as essentially peaceful and informational, aimed at dissuading others from doing business with Pepsi-Cola. Once the truly violent or tortious acts had been enjoined, the picketing did not affect anyone's use or enjoyment of their property. In dissent, Wakeling J.A. viewed the secondary picketing as illegal per se at common law, and would have dismissed the appeal.

¶ 12 Pepsi-Cola was granted leave to appeal to this Court, and interveners were granted status to raise policy issues before the Court.

III. Legislation

¶ 13 Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

(d) freedom of association.

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Trade Union Act, R.S.S. 1978, c. T-17

27. A trade union and the acts thereof shall not be deemed to be unlawful by reason only that one or more of its objects are in restraint of trade.

IV. Issues

¶ 14 The main issue in this appeal is the legality of secondary picketing at common law. A secondary issue is whether the employer, Pepsi-Cola, can apply for relief against secondary picketing, or whether only the third parties affected by secondary picketing may apply.

V. Analysis

1. Preliminary Questions

¶ 15 Two preliminary issues arise: (1) whether the courts have the power to make the sort of change advocated by the Union; (2) if so, how the Charter may affect the development of the common law.

¶ 16 On the first issue, we conclude that the change in the common law here at issue lies within the proper power of the courts. The status of secondary picketing at common law remains unsettled and inconsistent across jurisdictions. The Court in this case is not required to overturn a well-established rule at common law, but rather to clarify the common law given two strands of conflicting authority, each with some claim to precedent. Resolution of the conflicting lines of authority lies well within the powers of a court of common law (see R. v. Jobidon, [1991] 2 S.C.R. 714, at p. 733). Moreover, any change to the common law should be incremental. Proposed modifications that will have complex and far-reaching effects are in the proper domain of the legislature (see R. v. Salituro, [1991] 3 S.C.R. 654, at p. 670; Watkins v. Olafson, [1989] 2 S.C.R. 750, at pp. 760-61; Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 43).

¶ 17 Against this conclusion, Pepsi-Cola argues that the failure of Saskatchewan to legislate on the matter, as some other provinces have, suggests that the Legislature intended to keep the common law as it is. We cannot agree. There is nothing to suggest that the statutory silence should be interpreted as a legislative intent to crystallize the common law and preclude its development in this area. The law as it

presently stands was developed by judges in response to social, moral and economic needs. Equally, judges can and should alter the common law to reflect these needs as they change over time: Salituro, supra; see also Watkins, supra, Friedmann Equity, supra. The Saskatchewan Legislature must be taken to have understood this when they chose to leave the matter of secondary picketing to the common law.

¶ 18 The second preliminary issue is how the Charter may affect the development of the common law. Here again the answer seems clear. The Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.

¶ 19 This Court first considered the relationship between the common law and the Charter in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, where McIntyre J. concluded, at p. 603:

> Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.

The reasons of McIntyre J. emphasize that the common law does not exist in a vacuum. The common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future. As such, it does not grow in isolation from the Charter, but rather with it.

¶ 20 Although s. 2(b) of the Charter is not directly implicated in the present appeal, the right to free expression that it enshrines is a fundamental Canadian value. The development of the common law must therefore reflect this value. Indeed, quite apart from the Charter, the value of free expression informs the common law. As McIntyre J. observed in Dolphin Delivery, supra, at p. 583.

> Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society.

¶ 21 At the same time, it must be recognized that the common law addresses a myriad of very diverse relationships and seeks to protect a host of legitimate interests not engaged by the Charter. Salient among these are the life of the economy and individual economic interests. Common law rules ensure the protection of property interests and contractual relationships. Nevertheless, where these laws implicate Charter values, these values may be considered.

¶ 22 In Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 97, the Court adopted a flexible balancing approach to addressing alleged inconsistencies between the common law and Charter values:

> Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.

The Court also cautioned that: "[f]ar-reaching changes to the common law must be left to the

legislature" (para. 96). Finally, the Court determined that the party alleging an inconsistency between the common law and the Charter bears the onus of proving "that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified" (para. 98). It is upon this basis that we proceed to balance the values at stake in the present appeal.

2. The Competing Values and Interests

(a) Historical Perspective of the Function of Picketing in a Labour Dispute

¶ 23 The relationship between picketing and free expression is cast against the backdrop of a labour relations system that has profoundly changed over the past half-century. It was not until after the Second World War that governments began to formally accept that unions have a role to play in the economy and society. In the decades that followed, the fundamental propositions of modern labour law took root.

¶ 24 Workers have the right to be represented by a union, and when a union supported by a majority of the workers is in place, employers are obliged to negotiate in good faith with the union. Good faith negotiation is the primary engine of industrial peace and economic efficiency. Occasionally, however, negotiations stall and disputes threaten labour peace. When this happens, it has come to be accepted that, within limits, unions and employers may legitimately exert economic pressure on each other to the end of resolving their dispute. Thus, employees are entitled to withdraw their services, inflicting economic harm directly on their employer and indirectly on third parties which do business with their employer. Employers are similarly entitled to exert economic pressure on their employees through the use of lockouts and, in most jurisdictions in Canada, through the hiring of replacement workers.

¶ 25 Labour disputes may touch important sectors of the economy, affecting towns, regions, and sometimes the entire country. The cost to the parties and the public may be significant. Nevertheless, our society has come to see it as justified by the higher goal of achieving resolution of employer-employee disputes and the maintenance of economic and social peace. The legally limited use of economic pressure and the infliction of economic harm in a labour dispute has come to be accepted as a legitimate price to pay to encourage the parties to resolve their differences in a way that both can live with (see generally G. Adams, Canadian Labour Law (2nd ed. (loose-leaf)), at pp. 1-11 to 1-15).

(b) Picketing and Free Expression

¶ 26 The term "picketing" attaches to a wide range of diverse activities and objectives, and allows for innumerable variations. One text on Canadian labour law hazards this general description of the common themes that define picketing, as well as the diversity this broad term allows:

> Ingredients common to the act of picketing in all jurisdictions appear to be the physical presence of persons called pickets, the conveying of information, and the object of persuasion. The "presence" element may take many forms, from one or two persons, in the vicinity of the entrance of the premises, comparatively indifferent to the outcome of the dispute, to large numbers calculated physically to prevent ingress and egress ... The conveying of information may also take many forms, from the use of handbills, arm bands, placards and sandwich boards to sound trucks, and from the recitation of events to the conveying of exhortative messages. The object of persuasion appears to remain constant, to induce a boycott of the picketed operations by employees, customers, suppliers and others on whom the employer is dependent for the successful operation of his enterprise.
> (A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, Collective Bargaining Law in Canada (2nd ed. 1986), at pp. 609-10)

¶ 27 In labour law, picketing is commonly understood as an organized effort of people carrying placards in a public place at or near a business premises. The act of picketing involves an element of physical presence, which in turn incorporates an expressive component. Its purposes are usually twofold: first, to convey information about a labour dispute in order to gain support for its cause from other workers, clients of the struck employer, or the general public, and second, to put social and economic pressure on the employer, and often by extension, on its suppliers and clients (see for example Great Atlantic & Pacific Co. of Canada, [1994] OLRB Rep. March 303, at paras. 32-33, per McCormack, chair).

¶ 28 Generally, provincial labour law statutes regulating picketing refrain from any attempt at expressly defining it (see for example the Newfoundland Labour Relations Act, R.S.N. 1990, c. L-1, s. 128(3); the New Brunswick Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 104(3); the Alberta Labour Relations Code, R.S.A. 2000, c. L-1, s. 84). The British Columbia Labour Relations Code, R.S.B.C. 1996, c. 244, is an exception, in which picketing is defined as:

> 1. (1) In this Code:
>
> ...
>
> "picket" or "picketing" means attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to
>
> (a) enter that place of business, operations or employment,
>
> (b) deal in or handle that person's products, or
>
> (c) do business with that person,
>
> and similar act at such a place that has an equivalent purpose;

This definition illustrates the breadth of the concept of picketing. On this definition, picketing arguably would extend to include the action of a group of people standing near a location - without carrying placards, handing out leaflets or addressing anyone - if their presence is intended to persuade someone else from doing business at that location.

¶ 29 A distinction is sometimes made between primary and secondary picketing. Primary picketing typically refers to picketing at the premises of the employer, secondary picketing is picketing at other premises. No provincial legislature has expressly defined "secondary picketing". However, in carving out the core of permissible picketing, legislatures sometimes resort to location as a marker. (See the Newfoundland Labour Relations Act, and the New Brunswick Industrial Relations Act.)

¶ 30 The above discussion illustrates the difficulty in defining picketing in a detailed manner. Picketing represents a continuum of expressive activity. In the labour context it runs the gamut from workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances of buildings. Beyond the traditional labour context, picketing extends to consumer boycotts and political demonstrations (see Daishowa Inc. v. Friends of the Lubicon (1998), 39 O.R. (3d) 620 (Ont. Ct. (Gen. Div.))). A picket line may signal labour strife. But it may equally serve as a physical demonstration of individual or group dissatisfaction on an issue.

¶ 31 For the purposes of this appeal, we find it unnecessary to define picketing in a detailed and exhaustive manner. We proceed rather on the basis that picketing may involve a broad range of activities, from the "traditional" picket line where people walk back and forth carrying placards, to the dissemination of information through other means.

¶ 32 Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in section 2(b) of the Charter. This Court's jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortious acts: Dolphin Delivery, supra. The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society (see R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. Keegstra, [1990] 3 S.C.R. 697; R. v. Butler, [1992] 1 S.C.R. 452). The core values which free expression promotes include self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

¶ 33 Free expression is particularly critical in the labour context. As Cory J. observed for the Court in U.F.C.W., Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083, "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth: Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; KMart, supra.

¶ 34 Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life. Moreover, the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship: see Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, at para. 92, per Iacobucci J. Free expression in the labour context thus plays a significant role in redressing or alleviating this imbalance. It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour dispute, elicit the support of the general public in the furtherance of their cause: KMart, supra. As Cory J. noted in KMart, supra, at para. 46: "it is often the weight of public opinion which will determine the outcome of the dispute".

¶ 35 Free expression in the labour context benefits not only individual workers and unions, but also society as a whole. In Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, the reasons of both La Forest and Wilson JJ. acknowledged the importance of the role played by unions in societal debate (see also R. v. Advance Cutting & Coring Ltd., 2001 SCC 70, and Dunmore v. Ontario (Attorney General), 2001 SCC 94). As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm.

¶ 36 This said, freedom of expression is not absolute. When the harm of expression outweighs its benefit, the expression may legitimately be curtailed. Thus, s. 2(b) of the Charter is subject to justificative limits under s. 1.

¶ 37 The same applies in interpreting the common law to reflect the Charter. The starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society.

(c) Protection of Innocent Third Parties to Labour Disputes

¶ 38 On the other side of the balance lies the interests of the employer and third parties in protection from excessive economic and other harm as a result of picketing and other labour action. As previously discussed, one important objective of labour picketing is the infliction of economic harm on the employer with an eye to compelling a favourable resolution of the dispute. Thus, expressive action in the labour context, as in other situations, may cause economic harm. However, the appellant argues that economic harm arising from labour disputes should be confined to the actual parties to the dispute - it should not be permitted to harm innocent third parties, who have neither influence over the outcome of the dispute, nor the ability to bring it to a close.

¶ 39 The appellant emphasizes that secondary picketing expands the labour dispute beyond its core, increasing both the incidence of picketing and the number of businesses and persons affected by it. The targets of secondary activity, such as retailers of a struck product, may suffer considerable economic damage, which may in turn affect customers and employees, as well as a host of other business relations. The appellant contends that the interests of these third parties, as well as public order generally, compel restraints on the scope of picketing activity.

¶ 40 On this point, the appellant relies on Dolphin Delivery, supra. In that case, the union represented the locked out employees of Purolator, an Ontario-based courier service. Dolphin undertook to supply delivery service to Purolator customers in the Vancouver area during this lockout. The union planned to picket Dolphin's premises, and Dolphin succeeded in getting an injunction to prohibit the intended picketing. The union challenged the injunction all the way to this Court, where it was ultimately upheld.

¶ 41 The challenge to this restriction on secondary picketing was framed as a violation of the union's right to freedom of expression under s. 2(b) of the Charter. As no picket line ever went up, the Court chose to assume that the picketing would have been peaceful and that Dolphin's unionized workers would have respected the picket line. In the end, McIntyre J. found that the Charter did not apply, and the injunction was upheld on the basis of the common law tort of inducing breach of contract.

¶ 42 McIntyre J. was of the view that if the Charter did apply, the injunction could have been justified under s. 1. While acknowledging that all picketing (even where accompanied by tortious conduct) involves some element of expression, McIntyre J. recognized the legitimacy of some curtailment of secondary picketing in order to prevent the economic harm of labour disputes from spreading too broadly into the community. McIntyre J. stated, at p. 591:

> When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others. [Emphasis added.]

¶ 43 To the extent that the appellant relies on the obiter comments in Dolphin Delivery to support the notion that secondary picketing in itself is a tort, the appellant's argument must fail. First, as Cory J. cautioned in KMart, supra, these comments from Dolphin Delivery must be read in the specific context of that case (see para. 36). McIntyre J. held that the picketing in question would have been tortious, amounting to inducing breach of contract. McIntyre J. stated at p. 588 that "[o]n the basis of the findings of fact that I have referred to above, it is evident that the purpose of the picketing in this case was to

induce a breach of contract between the respondent and Supercourier", and again at p. 603, "[i]n the case at bar ... [w]e have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract". It was therefore on the assumption that the anticipated picketing would have been tortious that McIntyre J. proceeded with the s. 1 analysis - not on the basis of secondary picketing being illegal per se. As such, Dolphin Delivery did not make any final pronouncement on the legality of secondary picketing as such, and up until now, the issue has never been addressed directly by this Court.

¶ 44 Secondly, although McIntyre J.'s comments reflect a concern with the interests of third parties to labour disputes who may incur collateral damage, they should not be read as suggesting that third parties should be completely insulated from economic harm arising from labour conflict. As Cory J. noted in KMart, supra, the objective of the restraint on picketing in Dolphin Delivery was to ensure that third parties did not "suffer unduly from the labour dispute over which it has no control" (para. 35). Therefore, third parties are to be protected from undue suffering, not insulated entirely from the repercussions of labour conflict. Indeed, the latter objective would be unattainable. Even primary picketing frequently imposes costs, often substantial, on third parties to the dispute, through stoppages in supplies or the loss of the primary employer as a customer (see Carrothers, supra, at p. 675). Indeed, labour disputes in important sectors of the economy may seriously affect a whole town or region, even the nation itself. As McIntyre J. recognized in the above quote, the social cost of a labour dispute is often great. Yet this impact on third parties and the public has never rendered primary picketing illegal per se at common law to protect the interests of third parties.

¶ 45 So we are left with this: innocent third parties should be shielded from "undue" harm. This brings us to the question that lies at the heart of this appeal. How do we judge when the detriment suffered by a third party to a labour dispute is "undue", warranting the intervention of the common law? At this stage, it suffices to note that the protection of innocent third parties from the economic fallout of labour disputes, while a compelling consideration, is not absolute. Some economic harm to third parties is anticipated by our labour relations system as a necessary cost of resolving industrial conflict.

3. Potential Solutions - Surveying the Landscape

¶ 46 Picketing engages distinct and frequently clashing interests among the parties affected by a labour dispute. The present appeal casts the right of unions to freely express their views on the conditions of their employment and the facts of a labour dispute against the resulting potential for economic damage to third parties. The parties' opposing submissions on the legality of secondary picketing - and the contending lines of authority on which they rely - represent conflicting views on how these competing interests are best reconciled in a democratic society.

¶ 47 Three possible options emerge from the parties' submissions: (1) an absolute bar on secondary picketing (the "illegal per se" doctrine); (2) a bar on secondary picketing except for "allied" enterprises (the modified "Hersees" rule); and (3) permitting secondary picketing unless the picketing amounts to a tort or other wrongful conduct. We will consider each option in turn.

(a) The Illegal Per Se Doctrine

¶ 48 This view holds that secondary picketing is illegal per se, in the manner of an independent tort, even in the absence of any other wrongful or illegal act.

¶ 49 The doctrine turns on location. It rests on a distinction between picketing the premises of the employer against whom the union is striking (primary picketing) and picketing other premises (secondary picketing). Primary picketing is legal unless it involves tortious or criminal conduct, while secondary

picketing is always illegal.

¶ 50 The "illegal per se" doctrine for secondary picketing originates from the obiter comments of the Ontario Court of Appeal in Hersees, supra. Hersees and its line of reasoning lie at the centre of this appeal. In Hersees, a union had been certified as a bargaining agent for workers of the clothing manufacturer, Deacon Brothers Sportwear Ltd. ("Deacon"). The union's policy was to avoid strikes if possible. As a result, it did not call a strike against Deacon when a labour dispute arose. Instead, the union approached the clothing retailer, Hersees, and asked it to refrain from ordering merchandise from Deacon. When Hersees refused, the union organized a picket line outside Hersees' retail outlet. The picketing was limited to two pickets each carrying one sign which read in part: "Attention Shoppers - Deacon Bros. Sportwear Ltd. sold at Hersee's-made by Non-union Labour" (p. 83).

¶ 51 Hersees asked for an injunction. The union answered that it was conducting an "educational campaign" in support of buying union-made goods. The trial court dismissed the action but the Court of Appeal found that the union had engaged in misrepresentation, because its signs suggested Hersees itself was in a labour dispute. The appellate judgment also held that the union had tried to induce breach of contract, and viewed picketing as an instance of "besetting," intended and likely to cause economic damage to the appellant, contrary to the Criminal Code.

¶ 52 The dispute could have been resolved by applying the established rule that picketing that involved tortious action was unlawful. However, the Court of Appeal, per Aylesworth J.A., proceeded to comment in obiter, at p. 86, on the legality of secondary picketing at common law:

> But even assuming that the [secondary] picketing carried on by the respondents was lawful in the sense that it was merely peaceful picketing for the purpose only of communicating information, I think it should be restrained. Appellant has a right lawfully to engage in its business of retailing merchandise to the public.... Therefore, the right, if there be such a right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.

Thus, the Court of Appeal held that peaceful, non-tortious picketing at locations other than that of the primary employer is illegal per se at common law. This decision has had an enduring - and heavily contested - influence on labour law.

¶ 53 Criticism of this decision was immediate and forceful (see, for example, D. M. Beatty, "Secondary Boycotts: A Functional Analysis" (1974), 52 Can. Bar Rev. 388). Most obviously, it rests on a weak precedential foundation. Indeed, Aylesworth J.A. conceded in Hersees that he could find no precedent to support his holding. He concluded, rather, that some judicial comments "would tend to support this conclusion but in each of such cases the secondary picketing which was the subject-matter under consideration, embraced one or more admittedly unlawful elements such as trespass, intimidation, nuisance or inducement of breach of contract" (p. 87).

¶ 54 Aylesworth J.A. attempted to find support for his holding in the judgment of this Court in A. L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co., [1959] S.C.R. 271. Patchett, however, offers no support for the illegal per se doctrine. Patchett involved the liability of a railway for failing to provide services to a client, Patchett. The failure to provide services was caused by picketing at the railway premises by a trade union whose members did not work either for the railway or for Patchett. The picketing in this case was anything but peaceful, and involved trespass as well as breaches of the

Criminal Code. Thus, the picketing was considered illegal for these reasons, and not because the Court found that peaceful secondary picketing was illegal per se. (see H. W. Arthurs, "Comments" (1963), 41 Can. Bar Rev. 573, at p. 582; see also Patchett, supra, at pp. 295-96, per Rand J.).

¶ 55 The decision in Hersees also reflects a deep distrust of unions and collective action in labour disputes. An expressive act that is legal and legitimate if done by an individual suddenly becomes illegal when done in concert with others. Aylesworth J.A.'s reasons reflect the common sentiments of early 19th century legislation and subsequent judgments which held that the combination of workers in pursuit of their economic interest was unlawful and against public policy (see Adams, supra, at pp.1-1 to 1-5). The effect of these judgments was to discount the importance of freedom of expression in the labour law context, a point which will later be discussed in greater detail. Despite the above criticism, the obiter comments in Hersees have had a significant impact on the treatment of secondary picketing by Canadian courts.

(b) Exceptions to Hersees - The Primary Employer and Ally Doctrines

¶ 56 Over time, necessary refinements to the bold "illegal per se" doctrine have riddled it with difficult exceptions. As a threshold matter, courts would refuse to enjoin picketing where the employees were found to be engaged in "primary" rather than "secondary" picketing. In some of these cases, the courts found that the location of the picketing, although not necessarily the primary workplace of the employees, was nonetheless owned by the same employer. The courts would also "lift the corporate veil" and refuse to enjoin picketing at the parent company, or at a company which shared corporate ownership with the primary employer. (See Lescar Construction Co. v. Wigman, [1969] 2 O.R. 846 (H.C.); Refrigeration Supplies Co. v. Ellis, [1971] 1 O.R. 190 (H.C.); Nedco Ltd. v. Clark (1973), 43 D.L.R. (3d) 714 (Sask. C.A.); Nedco Ltd. v. Nichols (1973), 38 D.L.R. (3d) 664 (Ont. H.C.); Domtar Chemicals Ltd. v. Leddy (1973), 37 D.L.R. (3d) 73 (Ont. S.C.); Inglis Ltd. v. Rao (1974), 2 O.R. (2d) 525 (H.C.); Magasins Continental Ltée v. Syndicat des employé(es) de commerce de Mont-Laurier (C.S.N.), [1988] R.J.Q. 1195 (C.A.), 2985420 Canada Inc. v. Fédération du Commerce Inc., [1995] R.J.Q. 44 (C.A.).) The picketing would therefore not be characterized as "secondary"; hence the definition of secondary picketing referred to in these reasons.

¶ 57 However, forbidding picketing at any place other than the primary employer's workplace continued to create difficulty. For example, strict application of the Hersees doctrine would effectively deny a union the ability to picket its own employer if, by virtue of a shared driveway, for example, an otherwise unrelated employer would also be affected. Courts have nevertheless allowed picketing in these circumstances, provided it is primarily directed at the struck employer. However, the search for primary purpose may, at times, prove a rather subtle intellectual exercise, as some courts have found. (See Peter Kiewit Sons Co. v. Public Service Alliance of Canada, Local 20221 (Union of Canadian Transport Employees), [1998] B.C.J. No. 1494 (QL) (S.C.); McLean Trucking Co. v. Public Service Alliance of Canada, 83 C.L.L.C. para. 14,047 (B.C.S.C.).)

¶ 58 Another exception to the strict Hersees approach is the ally doctrine (although there is a significant degree of overlap between this doctrine and the other exceptions discussed in this section). Some courts, while suggesting secondary picketing may be illegal per se, have refused to enjoin picketing where the struck operation was effectively assisting the employer in carrying on business during a labour dispute (see Alex Henry & Son Ltd. v. Gale (1976), 14 O.R. (2d) 311 (H.C.), Commonwealth Holiday Inns of Canada Ltd. v. Sundy (1974), 2 O.R. (2d) 601 (H.C.), Falconbridge Nickel Mines Ltd. v. Tye, [1971] O.J. No. 11 (QL) (H.C.), Air Canada v. C.A.L.P.A. (1997), 28 B.C.L.R. (3d) 159 (S.C.)).

¶ 59 Similarly, courts have refused injunctions where third parties allowed struck employers to conduct a business from their warehouse, on the basis that the secondary location was effectively a place

of business for the employer (see Soo-Security Motorways Ltd. v. Kowalchuck (1980), 9 Sask. R. 354 (Q.B.); 683481 Ontario Ltd. v. Beattie (1990), 73 D.L.R. (4th) 346 (Ont. H.C.)). Concerns such as these have required courts to make delicate distinctions regarding the amount of warehousing, for example, as evidence of the degree of cooperation between the primary and secondary employer (see Neumann and Young Ltd. v. O'Rourke (1974), 53 D.L.R. (3d) 11 (Ont. H.C.); Alex Henry & Son, supra).

¶ 60 These modifications to the Hersees doctrine have softened its harshest effects on unions and picketing, but have made the common law difficult to implement in a consistent, clear manner. For example, in the Saskatchewan case of O.K. Economy Stores v. R.W.D.S.U., Local 454 (1994), 118 D.L.R. (4th) 345, the Court of Appeal rendered a split judgment. One member of the court,Vancise J.A., characterized the picketing as secondary and impermissible because the union, on strike against Western Grocers, picketed at outlets of O.K. Economy, whose workers it did not represent. Yet both O.K. Economy and Western Grocers were divisions of the same enterprise, Westfair Foods. By reason of this common control, Jackson J.A, held that the two divisions should be considered as one employer and, as a result, this form of picketing was permissible. Gerwing J.A. was of the opinion that because the parties had settled their differences, the issue was moot and he refused to endorse either of his colleagues' analyses.

¶ 61 Despite these difficulties, the Ontario Court of Appeal and courts in some other provinces continue to apply the obiter of Hersees that secondary picketing is illegal per se (see Heather Hill Appliances Ltd. v. McCormack (1965), 52 D.L.R. (2d) 292 (Ont. H.C.), aff'd [1965] O.J. No. 504 (QL) (C.A.); Robertson Yates Corp. v. Fitzgerald, 65 C.L.L.C. para. 14,091 (Ont. H.C.); Toronto Harbour Commissioners v. Sninsky (1967), 64 D.L.R. (2d) 276 (Ont. H.C.); CTV Television Network Ltd. v. Kostenuk (1972), 26 D.L.R. (3d) 385 (Ont. S.C.), aff'd (1972), 28 D.L.R. (3d) 180 (Ont. C.A.); J. S. Ellis & Co. v. Willis (1972), 30 D.L.R. (3d) 397 (Ont. H.C.); Rocca Construction Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S.A. and Canada, Local 721 (1978), 21 Nfld. & P.E.I.R. 198 (P.E.I.S.C.); PCL Construction Management Inc. v. Mills (1994), 124 Sask. R. 127 (Q.B.); O.K. Economy Stores, supra, per Vancise J.A.; Maple Leaf Sports & Entertainment Ltd. v. Pomeroy (No. 2) (1999), 49 C.L.R.B.R. (2d) 285 (Ont. Ct. (Gen. Div.)), at para. 32). On balance, few judgments reflect the Hersees doctrine in its strictest form, but some courts continue to apply a modified version.

(c) Permitting Secondary Picketing Unless it Involves a Tort or Crime

¶ 62 A third approach starts with the proposition that all picketing is permitted unless it can be shown to be wrongful or unjustified (the "wrongful action" model). It defines wrongful or unjustified picketing as picketing that involves a tort (a civil wrong) or a crime (a criminal wrong).

¶ 63 Prior to the decision of the Ontario Court of Appeal in Hersees, there was no clear pronouncement on the issue of whether picketing activity should be enjoined by the common law in absence of an independently actionable tort, such as nuisance, inducing breach of contract, intimidation or trespass. However, authority for the wrongful action model can be found in the decision of this Court in Williams v. Aristocratic Restaurants (1947) Ltd., [1951] S.C.R. 762. In that case, the issue was whether the picketing activity by a striking union at the location of non-unionized restaurants belonging to the same employer was unlawful. The picketing in question involved two workers walking back and forth on a sidewalk in front of the targeted restaurant carrying placards which stated that the proprietor did not have a labour agreement with the union. The majority found that the picketing activity in question did not amount to trespass, unlawful assembly, nuisance, or any other criminal or tortious activity. As such, the activity remained lawful (although, as discussed, this form of picketing would probably fall within the "primary employer" or "ally" exceptions to the Hersees doctrine).

¶ 64 Even after Hersees, a number of Canadian courts have expressly declined to adopt its classification of secondary picketing as illegal per se; instead, they have refused injunctions to enjoin secondary picketing unless it involves tortious or criminal conduct. The majority decision of the Court of Appeal in the present case is just one example (see also: Brett Pontiac Buick GMC Ltd. v. National Association of Broadcast Employees and Technicians, Local 920 (1989), 90 N.S.R. (2d) 342 (S.C.T.D.), application for leave to appeal dismissed (1989), 94 N.S.R. (2d) 398 (S.C.A.D.); Provincial Express Inc. v. Canadian Union of Postal Workers (1991), 94 Nfld. & P.E.I.R. 75 (Nfld. S.C.T.D.)). This approach stems from the proposition, as articulated by Cameron J.A. for the majority in the court below, that "[g] enerally speaking, picketing constitutes an exercise of the fundamental freedom of expression which can only be circumscribed by laws, whether statutory, regulatory, or common, that accord with the constitutional norms of the Canadian Charter of Rights and Freedoms" (p. 230).

4. Resolving the Conflict: The Wrongful Action Model

¶ 65 Having canvassed the interests at stake and the conflicting approaches the law has adopted to reconcile them in the context of secondary picketing, we now confront the issue before us - which approach best balances the interests at stake in a way that conforms to the fundamental values reflected in the Charter?

¶ 66 We conclude that the third approach - the wrongful action model that makes illegal secondary picketing which amounts to tortious or criminal conduct - best achieves this goal. The following considerations, some of which involve overlapping themes, lead us to this conclusion.

(a) Conformity to Charter Methodology

¶ 67 While freedom of expression is not absolute, and while care must be taken in the labour context to guard against extending the more severe effects of picket lines beyond the employer, if we are to be true to the values expressed in the Charter our statement of the common law must start with the proposition that free expression is protected unless its curtailment is justified. This militates against a rule that absolutely precludes secondary picketing, whether harmful or benign, disruptive or peaceful. The preferred methodology is to begin with the proposition that secondary picketing is prima facie legal, and then impose such limitations as may be justified in the interests of protecting third parties.

¶ 68 Of the three possible approaches to the problem of regulating secondary picketing, the one that best conforms to this Charter-mandated methodology is the third approach of permitting secondary picketing except where it involves tortious or criminal action. The Hersees and modified Hersees approaches start from the proposition that secondary picketing is per se unlawful regardless of its character or impact. This runs counter to the values of the Charter which hold that intrusions on free expression are permitted only to the extent that they are justified. Such an approach would perhaps be justifiable in a case where all or most aspects of the expression at stake are clearly unjustifiable. But as our earlier discussion indicates, this cannot be said of secondary picketing. Secondary picketing encompasses a wide variety of conduct, much of which is neither coercive nor harmful. This compels the conclusion that the Hersees and modified Hersees approaches are out of step with the methodology mandated by the Charter. The wrongful conduct model, by contrast, conforms to Charter methodology.

(b) Protection of the Value of Free Expression

¶ 69 The wrongful action approach best protects the values of contemporary Canadian society as they find expression in the Charter. As discussed, labour speech engages the core values of freedom of expression, and is fundamental not only to the identity and self-worth of individual workers and the strength of their collective effort, but also to the functioning of a democratic society. Restrictions on any

form of expression, and particularly expression of this gravity, should not be lightly countenanced.

¶ 70 The Hersees rule, even in its modified form, denies free expression any value outside primary picketing. Given the vast scope of activities captured within the nebulous boundaries of the term "secondary picketing" from peaceful picketing to the highly disruptive, an absolute prior restraint on all such activities risks unduly compromising freedom of expression. It would extend, for example, to peaceful picketing aimed at consumers, without disruption of access to the store, employment, deliveries or any other facet of the secondary employer's business. In our opinion, a blanket prohibition is too blunt a tool with which to handle such a vital freedom.

(c) Avoidance of Excessive Emphasis on Protection from Economic Harm

¶ 71 In Hersees, the Ontario Court of Appeal appears to have viewed the issue as a conflict between a public right to trade and the rights of a smaller group, the union, to advance its purely private interests. The public interest in free expression and societal debate on working conditions and labour conflict receives no mention. The Hersees doctrine casts the economic protection of third parties from the effects of labour disputes as the pre-eminent concern of the law, regardless of the resulting incursion on free expression.

¶ 72 Protection from economic harm is an important value capable of justifying limitations on freedom of expression. Yet to accord this value absolute or pre-eminent importance over all other values, including free expression, is to err. The law has never recognized a sweeping right to protection from economic harm. As this Court observed in KMart, at para. 43: "[i]n the absence of independently tortious activity, protection from economic harm resulting from peaceful persuasion, urging a lawful course of action, has not been accepted at common law as a protected legal right" (see also: J. G. Fleming, The Law of Torts (9th ed. 1998), at pp. 765-77). If the legal foundation of the hierarchy of rights proposed in Hersees was doubtful at the time, it is even more problematic in light of the enactment of the Charter and contemporary labour relations.

(d) Adequate Flexibility

¶ 73 Not only do the Hersees and modified Hersees rules deny adequate protection for free expression and place excessive emphasis on economic harm, they do this in a rigid, unflexible way. These rules are more about shutting off the message than regulating the activity. By contrast, a wrongful action approach is sufficiently flexible to accommodate both interests. Courts may intervene and preserve the interests of third parties or the struck employer where picketing activity crosses the line and becomes tortious or criminal in nature. It is in this sense that third parties will be protected from "undue" harm in a labour dispute. Torts such as trespass, intimidation, nuisance and inducing breach of contract, will protect property interests and ensure free access to private premises. Rights arising out of contracts or business relationships will also receive basic protection. Torts, themselves the creatures of common law, may grow and be adapted to current needs.

¶ 74 In summary, a wrongful action approach to picketing allows for a proper balance between traditional common law rights and Charter values, and falls in line with the core principles of the collective bargaining system put in place in this country in the years following the Second World War.

(e) Rationality

¶ 75 A wrongful action approach to picketing is clearer and more rational than the absolute or modified prohibition approach represented by Hersees. The Hersees or modified Hersees approach uses location as the primary criterion for determining when picketing is legal. Yet the reason for prohibiting

picketing is not its location, but its character and impact - the wrong it represents and damage it does. Location is merely a legal marker, and not a very satisfactory one at that; as we have seen, the Hersees jurisprudence is dominated by formalistic debates centering on location.

¶ 76 The wrongful action approach, by contrast, focuses on the character and effects of the activity, as opposed to its location. It gets at the heart of why picketing may be limited. As discussed, the umbrella of picketing covers a diverse range of behaviours, tactics, and consequences that often have little to do with location. Where picketing occurs has little to do with whether it is peaceful and highly respectful of the rights of others on the one hand, or violent and disrespectful of the rights of others on the other hand. By focussing on the character and effect of expression rather than its location, the wrongful action approach offers a rational test for limiting picketing, not an arbitrary one.

¶ 77 Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation, will be impermissible, regardless of where it occurs.

(f) Avoidance of the Primary-Secondary Picketing Distinction

¶ 78 It follows from this analysis that the difficult and potentially arbitrary distinction between primary and secondary picketing is effectively abandoned on a wrongful action approach to picketing. Secondary picketing has been, as we have seen, location defined. Indeed, many of the difficulties the courts have encountered over the years in defining secondary picketing flow from how to determine the relevant location. A conduct approach based on tortious and criminal acts does not depend on location. All picketing is allowed, whether "primary" or "secondary", unless it involves tortious or criminal conduct.

¶ 79 We should not lament the loss of the primary-secondary picketing distinction. It is a difficult and arbitrary distinction that deserves to be abandoned. As MacPherson J. commented in Friends of the Lubicon, supra, at pp. 639-40:

> Moreover, the primary/secondary distinction has been criticized even in the labour context. In Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., 89 S.Ct. 1109 (1969), Harlan J. said, at p. 1120:
>
> > No cosmic principles announce the existence of secondary conduct, condemn it as evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labour relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

(g) Avoidance of Labour/Non-labour Distinctions

¶ 80 The wrongful action approach treats labour and non-labour expression in a consistent manner. The Hersees rule, by contrast, effectively creates an independent tort of secondary picketing that applies only in the labour context. This distinction is difficult to justify. Along with the diverse range of activities and objectives that may attach to the act of picketing, there is also a wide array of groups and organizations that rely on placards and pamphlets to inform and persuade the public on various issues. It is thus clear that activities common to picketing do not lie within the exclusive domain of the striking worker. As the Canadian Labour Congress points out in para. 35 of its brief:

> In an age of electronic imagery and nightly television clips, placards or pickets with their ability to instantly identify issues are not confined to labour disputes... . Whether

> picketing should be enjoined should not depend on who is carrying the picket signs or indeed, whether the communication is conveyed by a placard or as a pamphlet. Such distinctions operate to deprive union members of expressive rights available to other members of the public.

We can find no persuasive reason to deprive union members of an expressive right at common law that is available to all members of the public.

¶ 81 It might be argued that a union is different from a political organization, in that unions can use disciplinary measures to coerce their members not to cross picket lines. This argument, however, does not distinguish union speech from non-union speech as regards the public at large. It might also be argued that union and non-union expression can be differentiated on the basis of the "signal" effect - that the picket line acts as a barrier and thus goes beyond expression and into coercion. However, as discussed in part (j) below, there are a number of reasons for rejecting this argument as a justification for the illegal per se doctrine.

¶ 82 In sum, the wrongful action theory is used to assess the legality of political speech and leafleting, (see KMart) and there seems to be no principled ground on which to distinguish union speech.

(h) Balance of Power

¶ 83 Pepsi-Cola argues that the potential harm to the employer from secondary picketing may be much greater than the harm that would result from primary picketing alone, and that allowing secondary picketing may tilt the balance of power too much in the unions' favour.

¶ 84 By contrast, the Union argues that the right to inform the public and third parties of their position short of tortious or criminal acts is inherent in the Constitution and will not upset the appropriate balance between employers and employees.

¶ 85 Judging the appropriate balance between employers and unions is a delicate and essentially political matter. Where the balance is struck may vary with the labour climates from region to region. This is the sort of question better dealt with by legislatures than courts. Labour relations is a complex and changing field, and courts should be reluctant to put forward simplistic dictums. Where specialized bodies have been created by legislation, be it labour boards or arbitrators, they are generally entrusted to reach appropriate decisions based on the relevant statute and the specific facts of a given situation. Mediation and arbitration are also assuming increasingly important roles in the resolution of labour disputes. If the Saskatchewan Legislature had enacted a comprehensive scheme to govern labour disputes, then it might be argued that allowing secondary picketing would disturb a carefully crafted balance of power. In the absence of a legislative scheme, however, we find it difficult to say that determining illegal picketing on the basis of tortious or criminal conduct - an approach that prevailed at common law prior to Hersees - will unduly undermine the power of employers vis-à-vis employees.

¶ 86 We emphasize that the validity of legislation is not at stake in this appeal. It is the absence of such legislation that requires us to look to the common law to resolve the issue of the legality of secondary picketing. Nothing in these reasons forestalls legislative action in this area of the law. Within the broad parameters of the Charter, legislatures remain free to craft their own statutory provisions for the governance of labour disputes, and the appropriate limits of secondary picketing.

(i) Undue Harm to Neutral Third Parties

¶ 87 It is argued that although secondary picketing may yield a benefit for a limited class of people,

the neutral retailers' right to trade is "far more fundamental and of far greater importance ... for the benefit of the community at large"(Hersees, supra, at p. 86).

¶ 88 The first difficulty with this argument is that it gives no weight to free expression. As discussed above, this runs counter to Charter methodology and values.

¶ 89 A second difficulty is that the argument overstates the interests of third parties by positing a "fundamental" right to trade in the struck good. Again as discussed above, the basis for this purported fundamental right is unclear.

¶ 90 A third difficulty is that the argument glosses over the fact that third parties - producers and consumers - are harmed even as a result of primary picketing. As Rand J. noted in Patchett, supra, at p. 276: "a strike is not a tea-party and it may have consequential impacts on associated interests which cannot be met or disposed of overnight". To the extent that harm to neutrals is a rationale for restricting secondary picketing, it is also a rationale for restricting primary picketing.

¶ 91 Fourth, the argument contravenes at least the spirit of the Charter by sacrificing an individual right to the perceived collective good rather than seeking to balance and reconcile them. This fact has not escaped even Ontario courts. In Friends of the Lubicon, supra, MacPherson J. wrote at p. 644:

> In the passage from Aylesworth J.A.'s [Hersees] judgment set out earlier, he refers explicitly to a "right to trade". Moreover, he states that this right "is for the benefit of the community at large" and contrasts it with the union's speech through their picketing which he describes as being "exercised for the benefit of a particular class only".
>
> Without quarrelling with the ratio of Hersees and its continuing applicability in cases dealing with secondary picketing in a labour relations context, it strikes me that this component of Aylesworth J.A.'s reasoning is anachronistic today. The fact that freedom of expression is protected in the Canadian Charter of Rights and Freedoms, coupled with the absence of any economic rights, except for mobility to pursue the gaining of a livelihood, in the same document, is a clear indication that free speech is near the top of the values that Canadians hold dear.

¶ 92 It is important that neutral third parties be protected from wrongful conduct and that labour disputes be prevented from unduly spreading: Dolphin Delivery, supra, at pp. 590-91. We are not persuaded, however, that it is necessary to ban all secondary picketing in order to accomplish these goals. Prohibiting strike conduct which is tortious or criminal offers protection against a wide variety of misconduct associated with strike action. Insofar as conduct is non-tortious, it is not clear that more is required to protect third parties.

(j) The "Signalling" Effect

¶ 93 An extension of the previous argument is that secondary picketing is per se unjustified because it has the effect of "signalling" that people must not do business with neutral third parties. Expression through a picket line may "signal" that the line is a barrier and hence acquire coercive impact. The Court recognized the signal effect in KMart, where Cory J. stated at para. 40:

> There can be no doubt that picketing is an exercise of freedom of expression. Yet its trademark is the picket line, which has been described as a "signal" not to cross. Whatever may be its message, the picket line acts as a barrier. It impedes public access to goods or services, employees' access to their workplace, and suppliers' access to the site of deliveries.

¶ 94 This signalling effect, it is argued, goes beyond expression and becomes coercion. Many people, as a matter of principle or habit, will not cross a picket line. As stated in KMart, picketing attracts "an automatic reflex response from workers, suppliers and consumers. Its existence impedes access to picketed sites. This impediment to movement may discourage some people from making rational choices based on persuasive discourse" (para. 38). It is argued that while we are willing to allow that kind of pressure to be applied against the primary employer, we are not willing to allow it to be applied against a neutral third party.

¶ 95 The first point to note is that the signalling effect should be carefully assessed. A number of judgments have taken the signalling effect for granted. Doubtless there is a kernel of truth in this concept. Some people will see a picket ligne and automatically refuse to cross it, out of respect, sympathy, or the fear of an implied confrontation. It should be remembered, however, that this concept arose originally to describe the response to picketing among other unionized employees (see A.Cox, "Strikes, Picketing and the Constitution" (1951), 4 Vand. L. Rev. 574). Moreover, the so-called signalling effect is probably more likely to operate in specific contexts. It may vary sharply, depending on whether the dispute happens in a small tightly knit, and highly unionized community, or at a strongly organized construction site used by several employers (see Domtar Inc., [2000] O.L.R.D. No. 3761 (QL), at para. 7). In a large urban centre, where the population is diverse, and where the per capita unionization rate is low, the signalling effect may be exaggerated. We should be mindful to remember the words of caution written by Rand J. several years ago in Aristocratic Restaurants, supra, at p. 786, about peaceful picketing and its effect and the fact that it could be taken pretty well in stride by the common person:

> Through long familiarity, these words and actions in labour controversy have ceased to have an intimidating impact on the average individual and are now taken in the stride of ordinary experience ...

¶ 96 A second observation is that the signalling argument implicitly suggests that to the extent that picketing has a coercive signal effect, it is not expressive and hence not worthy of protection. We find such a suggestion problematic. It is difficult to see how a signal can be other than expressive; by definition, a signal is meant to convey information to others. Indeed, the underlying concern of KMart is that the signal will express too much, that it will be too effective. It seems better to us to admit that signalling is expression, the limitations of which must be justified. At this point, however, signalling ceases to suggest a special rule; rather, the question is when expressive signalling can be justifiably limited.

¶ 97 This brings us to a third difficulty with the signalling argument. Used to buttress the proposition that secondary picketing is per se illegal, it amounts to a special rule for union speech. As discussed under (g) above, it is difficult to explain why expression in the labour context should be treated as fundamentally less important than expression in other contexts. It is far from clear that union speech is more likely to elicit an irrational or reflexive response than, for example, speech by a political organization. If we say that the signalling effect justifies a special prohibition in the labour context, does it not follow that signalling in other contexts may also justify blanket prohibitions? Moreover, it seems clear that freedom of expression is not confined to "rational" speech. Irrationality may support according less protection to particular kinds of speech. But it does not justify denying all protection as a matter of principle.

¶ 98 A fourth problem with the signalling argument is that not all secondary picketing relies on the coercive potential of the picket line. A distinction is sometimes drawn between secondary picketing whose aim is to disrupt the production of the secondary employer (either by dissuading the secondary employer's employees from working or by persuading consumers not to deal at all with the secondary employer until it discontinues its commercial relationship with the primary employer), and secondary

picketing whose aim is merely to persuade consumers not to purchase from the secondary employer the products of the primary employer. (As an example of the latter form of labour activity, workers striking against a tobacco manufacturer might picket convenience stores in an effort to persuade customers to substitute another manufacturer's brand of cigarettes for the brand manufactured by the primary employer.) The danger of a coercive picket line that depends on a signalling effect is clearly much greater in the case of union activity whose aim is to harm the secondary employer. The danger of coercion and signalling is much less in the case of secondary picketing aimed merely at persuading consumers not to purchase the product of the primary employer.

¶ 99 The United States Supreme Court recognized this distinction in National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964), at pp. 133-34 and 137-38:

> All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.
>
> ...
>
> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product.

¶ 100 We should therefore be mindful not to extend the application of the signal effect to all forms of union expression. As Cory J. noted in KMart at para. 42, "[i]t is the 'signal' component of conventional picketing which attracts the need for regulation and restriction in some circumstances" (emphasis added). Given the diverse range of activities captured by the term "picketing," it is apparent that the signal effect operates to a greater degree in some situations than in others. We conclude that signalling concerns may provide a justification for proscribing secondary picketing in particular cases, but certainly not as a general rule.

(k) Does a Wrongful Action Rule Offer Adequate Protection?

¶ 101 Having concluded that there is no principled ground on which to ban secondary picketing per se and that an approach requiring tortious or criminal conduct is preferable, the practical question remains: does a wrongful action rule offer sufficient protection for neutral third parties when weighed against the value of free expression?

¶ 102 We must note at the outset that total protection is not the goal. As this Court asserted in KMart, total protection from all economic harm is not to be expected. The more appropriate question is whether, from a pragmatic point of view, a wrongful action approach to picketing will function well. Will it permit coercive picketing that in fact may be justifiably limited? In other words, while a wrongful action rule respects the Charter by starting from the premise that the expressive action is permitted absent

justified limitations, is it too permissive in that it does not provide a mechanism to permit neutral third parties to raise valid justifications - justifications that might prevail under s. 1 of the Charter had the matter arisen as a Charter case?

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

¶ 104 Undoubtedly, this new rule will not enjoin picketing in every situation where the old Hersees rule would have applied. As mentioned, the new rule acknowledges that the expressive activity involved in conveying information and trying to persuade will not be considered a sufficient ground for enjoining picketing. It is reasonable to expect, however, that the realities of labour relations will inject their own limits to prevent the unchecked spread of picketing beyond the primary parties. With limited people, energy and finances, it will be unlikely that unions will choose to picket a location which has absolutely no possible impact on their labour dispute.

¶ 105 It is also true that, while the wrongful action approach is grounded on conduct and hence less arbitrary than the per se illegal rule of Hersees (see above), the way torts or crimes are defined may introduce its own measure of arbitrariness. Some of the relevant torts require an unlawful act or the threat of an unlawful act. This makes the relevant inquiry circular: secondary picketing is unlawful if it is tortious but it is tortious only if it is unlawful. Other torts may end up drawing arbitrary lines. Inducing breach of contract, for example, requires (obviously) a contract. The result might be that a neutral employer who has a long term contract with the primary employer may be protected from secondary picketing, whereas a neutral employer who sells the same products without a long term supply contract would not be protected.

¶ 106 Despite some anomalies, it is safe to assert that a wrongful action-based approach will catch most problematic picketing - i.e. picketing whose value is clearly outweighed by the harm done to the neutral third party. Moreover, the law of tort may itself be expected to develop in accordance with Charter values, thus assuring a reasonable balance between free expression and protection of third parties.

¶ 107 Moreover, to the extent that it may prove necessary to supplement the wrongful action approach, the courts and legislatures may do so. Doubtless issues will arise around the elaboration of the relevant torts and the tailoring of remedies to focus narrowly on the illegal activity at issue. Doubtless too, circumstances will present themselves where it will become difficult to separate the expressive from the tortious activity. In dealing with these issues, the courts may be expected to develop the common law sensitively, with a view to maintaining an appropriate balance between the need to preserve third-party interests and prevent labour strife from spreading unduly, and the need to respect the Charter rights of picketers. The legislatures too may play a role. Clarification of the status of picketing at common law should not be viewed as a restriction on legislative intervention. Rather it should be seen merely as a tool to assist the courts where federal and provincial laws remain silent. As mentioned earlier, different circumstances in different parts of the country may call for specially tailored legislative regimes. Legislatures must respect the Charter value of free expression and be prepared to justify limiting it. But subject to this broad constraint, they remain free to develop their own policies governing secondary picketing and to substitute a different balance than the one struck in this case.

5. Status to Seek an Injunction

¶ 108 In this case, Pepsi-Cola, the primary employer, sought an injunction to restrain picketing and demonstrations at the premises of independent third parties.

¶ 109 Cameron J.A for the majority of the Court of Appeal, held that picketing is not subject to injunctive relief unless accompanied by the commission of a tort actionable at the instance of the primary company (i.e. Pepsi-Cola). Wakeling J.A., in dissent, concluded that Pepsi-Cola had suffered adequate injury and loss by the secondary picketing and thus would have allowed it to maintain an action for injunctive relief.

¶ 110 We would favour Cameron J.A.'s approach for the following reasons.

¶ 111 First, this approach is consistent with the wrongful action approach to secondary picketing. Since the wrongful action approach recognizes that secondary picketing is lawful where there is no tortious or criminal conduct, it follows that Pepsi-Cola should only be allowed to initiate injunction proceedings where it has been subjected to a tort or a crime - not where it has merely been the target of peaceful secondary picketing.

¶ 112 The contrary view, espoused by Wakeling J.A., is based on accepting secondary picketing as an independent tort against the primary company. The approach we adopt is inconsistent with such a tort. It follows that allowing Pepsi-Cola to maintain an action for injunctive relief on the basis of secondary picketing alone should also be rejected.

¶ 113 This does not mean that Pepsi-Cola has no ability to maintain an action for injunctive relief in a secondary picketing situation. It simply means that Pepsi-Cola would have to base its claim on a specific tort. Not all torts limit the cause of action to the person primarily affected by the actions of another. Intimidation serves as a good example. The elements of intimidation include both intimidating the plaintiff and intimidating others, to the injury of the plaintiff. Thus, as Cameron J.A. points out, in the context of labour-management disputes, intimidation would be actionable at the instance of the employer whether the person intimidated be the employer or an employee. Hence, the tort-based approach only limits Pepsi-Cola's cause of action to the extent that it is limited by the tort itself.

VI. Application and Conclusion

¶ 114 The relevant portions of the order under appeal are: (1) generally prohibited picketing at any location other than the company's premises; and (2) specifically prohibited picketing at the homes of the company's other employees.

¶ 115 The general prohibition on picketing affected only two or three discrete instances of picketing. These consisted of the peaceful picketing that occurred on the sidewalks adjacent to Delta Bessborough Hotel and the Mohawk outlet, together with the threatened picketing of the Macs' outlet or outlets.

¶ 116 The Chambers judge enjoined this conduct on the basis that such picketing involved the tort of "conspiracy to injure" the third parties. However, s. 28 of the Saskatchewan Trade Union Act expressly abolishes this tort. In effect, such a tort would render secondary picketing per se illegal. Therefore, we agree with the majority of the Court of Appeal that this injunction cannot be supported on the basis relied on by the Chambers judge. We also agree with the majority of the Court of Appeal that the conduct of the Union provided no basis for inferring any other tort, much less crime. It was peaceful informational picketing. It was aimed at supporting the strike and harming the business of Pepsi-Cola by discouraging people from trading or buying Pepsi-Cola's products. It did not amount to the tort of intimidation, which

has to do with the intentional infliction of loss by unlawful means. Nor did the pickets support the tort of interference with contractual relations. First, Pepsi-Cola did not establish the required contractual basis under which the outlets allegedly acquired its product for resale. Second, the evidence as to picketing was, in the view of the Court of Appeal, "so ambiguous as to have made it impossible to conclude that the picketers ... induced the breach of any contract or hindered its performance".

¶ 117 With regard to the demonstration outside the homes of Pepsi-Cola's management personnel, we agree with the Court of Appeal that the injunction was well-founded, since the conduct was tortious. As Cameron J. A. stated, at pp. 243-44:

> What occurred at the homes in the present case did not constitute peaceful picketing. Indeed it did not so much constitute picketing as such (though it took the outward form thereof), as it amounted to disorderly conduct accompanied by threats of harm to the resident employees of the company in an effort to have them refrain from doing what they had every right to do, namely come and go as they wished for whatever purpose. Chief among these purposes at the time in question was doing the work assigned to them by the company in consequence of the strike and lockout. That being so, the union can have no complaint over the restraint of this picketing. The actions of the striking employees amounted to intimidation, not of the company but of its other employees, which as noted earlier was actionable at the instance of the company. Their actions also amounted to a private nuisance. However, this would not as such have been actionable at the instance of the company, because it was the use and enjoyment of the property of these persons, not that of the company, that was unreasonably interfered with. In any event, the appeal against paragraph (4) of the order must fail, and nothing more need be said of the matter.

¶ 118 We would therefore dismiss the appeal, with costs to the respondents.

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