

Secondary Picketing after *Pepsi-Cola*: What's Clear, and What Isn't?

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In Pepsi-Cola, the Supreme Court of Canada overturned the common law prohibition against secondary picketing set out in the Hersees case on the basis that it offends the Charter value of freedom of expression. Rejecting even the so-called modified Hersees approach, which permits secondary picketing in limited circumstances, the Court ruled that picketing is illegal only if it involves "wrongful action." However, as the author points out, the decision in Pepsi-Cola leaves unanswered several key questions. In particular, if the picketing is not accompanied by a crime or a nominate tort, what will make it unlawful? The author strongly opposes any attempt to revive the regime of industrial torts, and argues that a better point of departure would be the Court's discussion of situations in which picketing has an excessive "signalling effect," crossing the line between persuasion and coercion. Another question that remains to be resolved is the impact of Pepsi-Cola on the regulation of picketing by labour relations boards pursuant to statute. Both in provinces which have specific statutory provisions on picketing and in those where it is regulated under more general provisions on illegal strikes, the existing law often parallels either the Hersees or modified Hersees approach. Thus, there may be tension between Pepsi-Cola's emphasis on the principle of deference to the legislature and its emphasis on the importance of respecting freedom of expression.

1. INTRODUCTION

For nearly forty years, Canadian law on secondary picketing has been dominated by the 1963 decision of the Ontario Court of

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Appeal in the *Hersees* case,¹ which held such picketing to be automatically illegal. The recent Supreme Court of Canada decision in the *Pepsi-Cola* case² expressly overrides *Hersees* and holds that the constitutionally entrenched value of freedom of expression requires the courts to treat secondary picketing as being legal at common law, except where it involves what the Court calls “wrongful action.”³

The basic focus of the Court’s judgment in *Pepsi-Cola* is on raising the priority to be given to freedom of expression in labour disputes, and on emphasizing the importance of picketing to unions and employees. In that respect, the judgment is straightforward, and it does a valuable service. However, it leaves many unanswered questions about the meaning of “wrongful action” in the context of secondary picketing, and about the implications of the decision for legislatures and labour relations boards. In the first part of this comment, I will set out what I think the judgment makes clear. In the second part, I will try to explain what it leaves unclear. My main worry lies in the fact that the Court shows a sort of nostalgia for the convoluted regime of industrial torts that preceded the *Hersees* case, and suggests again and again that the “wrongful action” approach will be clearer and easier to apply than the so-called “modified *Hersees*” approach which it is intended to replace.⁴

The *Pepsi-Cola* case arose during a legal strike and legal lock-out involving the Pepsi distributor in Saskatoon and its employees. Among the various acts that the strikers engaged in, the only one that is pertinent here was their peaceful picketing of several retail outlets which had no corporate connection to Pepsi-Cola, but which sold its

1 *Hersees of Woodstock Ltd. v. Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.) [hereinafter “*Hersees*”]. The seminal discussion (or dissection) of *Hersees* is H.W. Arthurs, “Labour Law — Secondary Picketing — *Per Se* Illegality — Public Policy” (1963), 41 Can. Bar. Rev. 573.

2 *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* (2002), 208 D.L.R. (4th) 385 (S.C.C.) [hereinafter “*Pepsi-Cola*”].

3 “Only in Manitoba is peaceful secondary picketing, regardless of its object, expressly permitted”: D.D. Carter, G. England, B. Etherington & G. Trudeau, *Labour Law in Canada*, 5th ed. (The Hague: Kluwer, 2002), at p. 345, citing *The Court of Queen’s Bench Act*, C.C.S.M. 1987, c. C280, s. 57(2).

4 *Pepsi-Cola*, *supra*, note 2, at paras. 56-57, 59-60, and 75.

products.⁵ On the basis of a number of common law torts, including conspiracy to injure, an interlocutory injunction was granted at first instance, prohibiting (among other things) picketing “at any location other than [Pepsi’s own] premises”⁶ — in other words, prohibiting all secondary picketing. The Saskatchewan Court of Appeal quashed that part of the injunction.⁷ In a unanimous judgment written by McLachlin C.J. and LeBel J., the Supreme Court of Canada upheld the Court of Appeal’s decision.

2. WHAT’S CLEAR AFTER *PEPSI-COLA*

(a) Courts can no longer apply the *Hersees* approach, even in a modified form.

- (i) *Even though common law rules are not directly subject to scrutiny under the Canadian Charter of Rights and Freedoms, the “Charter values” approach now requires courts to shape the common law so that it does not contradict values which the Charter seeks to protect.*

The *Charter* does not directly apply to common law actions between private parties.⁸ The *Pepsi-Cola* case was an action of that sort. However, in recent years the Supreme Court of Canada has quite often acted on the idea that even where the *Charter* does not directly apply, the common law should be interpreted in accordance with “*Charter* values.”⁹ A leading statement to that effect is found in *R. v. Salituro*, where Iacobucci J. said on behalf of the entire Court:¹⁰

5 Early on in the dispute, the strikers engaged in violent or disorderly picketing on Pepsi-Cola premises and at the homes of some of the company’s managers. This picketing was clearly illegal, and it was so held by the courts at all levels. I will say no more about this aspect of the case, which was not dealt with at length by the Supreme Court of Canada.

6 *Pepsi-Cola*, *supra*, note 2, at para. 7.

7 (1998), 167 D.L.R. (4th) 220 (Sask. C.A.).

8 *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 592-604 [hereinafter “*Dolphin Delivery*”].

9 *Pepsi-Cola*, *supra*, note 2, at paras. 21-22.

10 [1991] 3 S.C.R. 654, at p. 675.

Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action . . . then the rule ought to be changed.

- (ii) *Freedom of expression is a very important Charter value, and picketing always involves an element of expression, so excessive restrictions on picketing are inconsistent with Charter values.*

“Free expression is particularly critical in the labour context,” the Court points out.¹¹ Such expression enables employees “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.”¹² It also furthers “the free flow of ideas which is an integral part of any democracy.”¹³ However, the Court adds, “[w]hen the harm of expression outweighs its benefit, the expression may legitimately be curtailed,” as shown by the fact that s. 1 of the *Charter* envisages limitations in certain circumstances.¹⁴

- (iii) *Courts can no longer treat picketing as illegal merely because it is secondary (the Hersees approach).*

The *Hersees* approach was encapsulated in a dictum in the Supreme Court of Canada’s 1986 decision in *Dolphin Delivery*: “It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties.”¹⁵ From now on, however, in the context of secondary picketing, the Court says in *Pepsi-Cola*, “third parties are to be protected from undue suffering, not insulated entirely from the repercussions of labour conflict.”¹⁶ In the Court’s words, the *Hersees* approach has the unacceptable result that “[a]n expressive act that is

11 *Pepsi-Cola*, *supra*, note 2, at para. 33.

12 *Ibid.*, at para. 34.

13 *Ibid.*, at para. 35.

14 *Ibid.*, at para. 36.

15 *Dolphin Delivery*, *supra*, note 8, at 591.

16 *Pepsi-Cola*, *supra*, note 2, at para. 44.

legal and legitimate if done by an individual suddenly becomes illegal when done in concert with others.”¹⁷ Thus, *Hersees* can no longer be treated as good law.¹⁸

- (iv) *Nor may courts continue to use the “modified Hersees” approach, which allows secondary picketing if the struck employer and the picketed party are really one and the same, or if the picketed party has become an ally of the struck employer.*

Not long after *Hersees* was decided, it became apparent to most observers that a total prohibition against picketing anyone other than the struck employer would excessively limit the capacity of unions to pursue legal strikes, at least where there was a substantial connection between the businesses of the struck party and the picketed party. To mitigate the rigours of the *Hersees* approach, the courts began to apply two doctrines: the “ally doctrine,” and what the Supreme Court of Canada refers to in *Pepsi-Cola* as the “primary employer doctrine.” The ally doctrine treats picketing as primary rather than secondary if the picketed party has become an “ally” of the struck party by “effectively assisting [the latter] in carrying on business during a labour dispute.”¹⁹ The “primary employer” doctrine, roughly speaking, holds that picketing is primary rather than secondary where both parties are under common corporate ownership,²⁰ at least if they do not operate as totally separate enterprises.²¹

In *Pepsi-Cola*, the Supreme Court of Canada does not squarely hold that this modified version of the *Hersees* approach provides inadequate protection for employee freedom of expression; it acknowledges that the modifications just mentioned “have softened [*Hersees*’] harshest effects on unions and picketing.”²² However,

17 *Ibid.*, at para. 55.

18 *Ibid.*, at paras. 42-43.

19 *Ibid.*, at para. 58.

20 *Ibid.*, at para. 56.

21 *Ibid.*, at para. 57. Picketing is also treated as primary if the struck employer and an unrelated employer operate at a common site, where picketing of one of them will inevitably affect the other.

22 *Ibid.*, at para. 60.

the Court does emphasize that in many cases the modified *Hersees* approach has called for complex and delicate assessments of the links between the struck employer and the picketed party, making the common law “difficult to implement in a consistent, clear manner.”²³

(b) Courts can hold picketing illegal only if it involves “wrongful action.”

(i) *Wrongful action includes criminal conduct.*

Wrongful action clearly includes breaches of the federal *Criminal Code* and provincial penal statutes. Assault, mischief, nuisance and threats of violence are breaches of the *Criminal Code*, and trespass is a breach of provincial penal legislation. More controversially, picketing has at times been held to constitute the *Criminal Code* offence of “watching and besetting.”²⁴ In recent decades, peaceful picketing has rarely if ever been held to constitute a breach of the criminal law.²⁵

(ii) *Wrongful action includes nominate torts.*

Traditional or “nominate” torts sometimes committed by picketers include assault, battery, trespass, defamation and nuisance. The concept of wrongful action as articulated in *Pepsi-Cola* clearly includes such torts.²⁶

23 *Ibid.*, at para. 60.

24 R.S.C. 1985, c. C-46, s. 423(1)(f).

25 For a history of the use and misuse of the criminal law with respect to picketing, see J. Eaton, “Is Picketing a Crime?” (1992), 47 *Relations industrielles* 100.

26 For a recent example of court regulation of picketing that involved physical obstruction of access to the struck employer’s premises, see *Industrial Hardwood Products (1996) Ltd. v. I.W.A., Local 2693* (2001), 52 O.R. (3d) 694 (C.A.).

3. WHAT ISN'T CLEAR AFTER *PEPSI-COLA*

(a) **If the picketing in question is not accompanied by a crime or a nominate tort, what will make it illegal?**

(i) *The presence of an “industrial” (or “economic”) tort.*

In trying to explain what sorts of conduct might be wrongful for the purposes of the “wrongful action” model, the Court in *Pepsi-Cola* first refers to the traditional nominate torts of trespass, nuisance, defamation and misrepresentation.²⁷ Along with them, the Court mentions intimidation, which consists of injuring someone by threatening to do an illegal act. The tort of intimidation originally required a threat of physical violence or the equivalent, but it was expanded in the 1960s to include a threat to stop work in breach of a contract of employment or a labour relations statute.²⁸ Intimidation can thus be included as one of a group of non-traditional torts called the innominate or “economic” torts — or perhaps least ambiguously, the “industrial” torts.²⁹

In addition to intimidation, the Court refers to three other industrial torts: inducing breach of contract,³⁰ conspiracy to injure and interference with contractual relations.³¹ On the facts at hand, it found that none of those torts had been established. The union’s picketing of the retail establishments, the Court says, was merely “peaceful informational picketing . . . aimed at supporting the strike and harming the business of Pepsi-Cola by discouraging people from trading or buying Pepsi-Cola’s products.”³² Absent was the element of “unlawful means” required for the tort of intimidation.³³ Also absent was proof that any of the picketed retail outlets was bound by

27 *Supra*, note 2, at para. 103.

28 *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.); *Teamsters, Local 213 v. Therien*, [1960] S.C.R. 265 [hereinafter “*Therien*”].

29 “Industrial torts” is the term used by I.T. Smith & J.C. Wood, *Industrial Law*, 4th ed. (London: Butterworths, 1989), at p. 514.

30 *Pepsi-Cola*, *supra*, note 2, at para. 103.

31 *Ibid.*, at para. 116.

32 *Ibid.*

33 *Ibid.*

a contract to buy Pepsi products, or that the picketing led to the breach of any other contract.³⁴ Thus, the picketers could not be found to have committed the torts of inducing breach of contract or interference with contractual relations.

The basis for the injunction in the courts of first instance was the tort of conspiracy to injure. The hallmark of that tort is the infliction of economic harm by a group of people through conduct that is perfectly legal if engaged in by one person alone. The Supreme Court of Canada's remarks on conspiracy to injure are quite cryptic, and leave ample room for speculation on what role that tort might play in the wave of litigation that undoubtedly lies ahead on the meaning of "wrongful action." First, the Court says: "In effect, such a tort would render secondary picketing *per se* illegal."³⁵ This seems to overlook the fact that for many years the position at common law has been that no conspiracy to injure arises if the predominant purpose of the picketing in question is not to harm the picketed party, but merely to further the legitimate interests of the picketers,³⁶ which would appear to have been the case in *Pepsi-Cola*.

Second, the basis on which the Supreme Court of Canada holds the courts of first instance to have erred in finding a conspiracy to injure³⁷ is that this tort was abolished by s. 28 of the Saskatchewan *Trade Union Act*, which provides that if two or more union members do an act "in contemplation or furtherance of a trade dispute," there is no cause of action "unless the act would be actionable if done without any agreement or combination." Section 28 is closely modelled on long-standing English statutory language embodying the so-called "golden formula" — that is, language intended to prevent action taken in connection with a labour dispute from being held illegal for the sole reason that it is taken by a number of people acting in concert. Similar golden formula provisions are found in several Ontario statutes. However, in the spirit of the *Hersees* case, the Ontario courts and the Ontario Labour Relations Board have for the past two or three decades read those provisions very narrowly, holding that any truly secondary picketing goes beyond the bounds of the labour

34 *Ibid.*

35 *Ibid.*

36 *Crofter Hand Woven Harris Tweed v. Veitch*, [1942] A.C. 435 (H.L.).

37 *Pepsi-Cola*, *supra*, note 2, at para. 116.

dispute and thus is not protected from judicial or administrative regulation by the golden formula. I will come back later to the question of whether the *Pepsi-Cola* decision (which, strictly speaking, deals only with the common law) means that courts and tribunals can no longer interpret those statutory provisions so narrowly. For the moment, it is enough to note that in holding that s. 28 “expressly abolishes” the tort of civil conspiracy in the context of picketing, the Supreme Court of Canada seems to take that golden formula provision at face value. Conspiracy to injure appears to be obsolete everywhere in Canada, either because (as in some places) it has been abolished by statute or because it would unjustifiably infringe the *Charter* value of freedom of expression. However, this is by no means entirely clear.

The tort of conspiracy has two branches: conspiracy to injure and conspiracy to do an illegal act. Inducing breach of contract also has two branches: direct inducing and indirect inducing. One branch of each tort requires a separate illegality in addition to the existence of a conspiracy or the inducing of a breach of contract, and the other branch does not. Both branches of both torts have a rather amorphous checklist of elements, developed mainly by the English courts. For example, a Canadian casebook offers this summary of the requirements for the “direct inducing” branch of the tort of inducing breach of contract:

This requires (1) an intention by the defendant to cause economic injury to the plaintiff; (2) knowledge by the defendant that there is a contract between the plaintiff and a third party; (3) the use of lawful means by the defendant to persuade the third party to breach the contract; (4) a breach of the contract; and (5) economic injury to the plaintiff as a reasonable consequence of the breach.³⁸

All of these elements must in theory be proven before liability is established. However, Canadian courts have a long history of applying the elements loosely. To take once again the example of direct inducing of breach of contract:

The requirements of knowledge and persuasion have been whittled away significantly in recent decades. The requisite knowledge will exist if the

38 Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 6th ed. (Kingston, Ontario: Queen’s IRC Press, 1998), at p. 467.

defendant ought reasonably to believe that a contractual relationship exists, even if he or she may not know of its terms, or if the defendant acts “recklessly,” without caring whether a contract exists. As for the element of persuasion, it is enough that the defendant conveys information to a third party whom the defendant would like to see act in a certain way (for example, to honour a picket line) and the third party does in fact act in that way. There is a defense of “justification” to this tort, but the pursuit of union objectives has traditionally not been considered justification. See Lord Pearce’s judgment in *Stratford v. Lindley*, [1965] A.C. 269 (H.L.), and compare it with *Thomson v. Deakin*, [1952] Ch. 646 (C.A.).³⁹

Two extensive scholarly studies of the role of industrial torts in Canadian labour law, published in the mid-1960s, failed completely to bring any clarity to the area.⁴⁰ Before *Hersees*, when the courts made much more use of the industrial torts than they have in recent years,⁴¹ unions tended to argue that those torts were little more than museum pieces, and that picketers’ conduct should be legal as long as it did not amount to a crime or a nominate tort. In the alternative, unions contended that where a particular industrial tort (narrow-form conspiracy, indirect inducing of breach of contract, intimidation) required an independent element of illegality, that element could be provided only by conduct which amounted to a crime or a nominate tort, and not by a breach of labour relations legislation (in the form of an illegal strike or the threat of one).⁴² Even before *Hersees*, these arguments had been rejected by the Supreme Court of Canada, and the threat of a work stoppage to secure union recognition or to obtain redress of a grievance was held to furnish the element of illegal conduct needed to ground one or more of the torts.⁴³

39 *Ibid.*

40 A.W.R. Carrothers, *Collective Bargaining Law in Canada* (Toronto: Butterworths, 1965), Part III (see especially chap. 25, “Sources of Confusion in the Law”); I.M. Christie, *The Liability of Strikers in the Law of Tort* (Kingston, Ontario: Queen’s IRC Press, 1967).

41 In more recent years, as one textbook puts it, “the courts in purporting to apply common law doctrine are in fact enforcing what they conceive to be the policies and express requirements of the *Labour Relations Act*,” and “[b]eginning in the 1970s, there has been a growing tendency to do so directly and without obfuscating references to common law doctrine.” Carter *et al.*, *supra*, note 3, at p. 332.

42 This argument was clearly stated, and accepted, in the dissenting judgment of Judson J. in *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, at pp. 460-64.

43 *Therien*, *supra*, note 28; *Gagnon*, *ibid.*

The *Hersees* case itself involved peaceful secondary picketing at the premises of a clothing retailer, with the aim of dissuading consumers from buying goods produced by the struck employer (a clothing manufacturer). Aylesworth J.A. (MacGillivray J.A. concurring) first purported to fit the facts into the mould of the tort of directly inducing breach of contract, inferring from scant evidence that there was a contract in existence between the primary and secondary parties, that the picketers intended to breach it, and that a breach in fact resulted.⁴⁴ Only after finding that the elements of inducing breach of contract had indeed been established — a finding which he plainly sensed was stretching things greatly — did Aylesworth J.A. go on to offer the much-reviled observation that in any event it was time for the courts to stop worrying about whether the elements of an existing tort had been made out, and to simply declare secondary picketing illegal *per se* because it furthered the sectarian interests of employees over the more broadly-based right to trade.⁴⁵ In a separate and less well-known concurring judgment, Mackay J.A. found not only that the picketers had induced a breach of contract, but also that they had engaged in a conspiracy to injure, despite the fact that the Ontario legislature had tried to abolish the latter tort through the golden formula provision in s. 3(1) of the *Rights of Labour Act*. “[T]he purpose of the defendants in picketing the plaintiff’s store,” Mackay J.A. said, “was to injure the plaintiff in his trade as a punishment or reprisal” for his refusal to help the union put pressure on the struck employer.⁴⁶

In *Pepsi-Cola*, the Supreme Court of Canada suggests that the *Hersees* case “could have been resolved by applying the established rule that picketing that involved tortious action was unlawful.”⁴⁷ One problem with this suggestion is that, as just noted, both judgments in *Hersees* tried to do exactly that.

Over the years, critics have often pointed out, correctly, that Aylesworth J.A.’s weighing of the competing social interests in *Hersees* was egregiously biased. Both he and Mackay J.A. can also be faulted for taking what was, at best, an offhanded approach to the elements of the industrial torts. However, Aylesworth J.A. was at

44 *Hersees*, *supra*, note 1, at p. 454.

45 *Ibid.*

46 *Ibid.*, at p. 457.

47 *Supra*, note 3, at para. 52.

least frank enough to distance himself from the fiction that those torts provided a coherent analytical framework, and to acknowledge that he was making new law. In *Pepsi-Cola*, the Supreme Court of Canada does a far better job of weighing the conflicting social interests at play. However, it shows surprisingly little scepticism about whether reviving those torts will really contribute to a new and improved body of jurisprudence on the regulation of secondary picketing.⁴⁸ In contrast, the Court repeatedly stresses that the primary-secondary distinction and the ally doctrine (which in my view are not nearly as opaque or amorphous as the industrial torts) are incapable of being applied coherently.

Interestingly, employer counsel Harold Rolph has predicted that although claims for inducing breach of contract may now succeed in some cases of secondary picketing,⁴⁹ *Pepsi-Cola* means that “in most cases involving peaceful picketing, obtaining injunctions will be more difficult, more time consuming, more expensive and more uncertain of success.”⁵⁰ That prediction may or may not turn out to be accurate, given the strongly anti-picketing thrust of much of the jurisprudence on the industrial torts. The Supreme Court of Canada in *Pepsi-Cola* is indeed seeking to encourage respect for freedom of expression by loosening the legal restraints on peaceful secondary picketing, but it is hard to see how it can be good policy to mortgage that objective to a disreputable old body of caselaw that has persistently defied clear analysis and predictable, even-handed application. As Innis Christie commented 35 years ago:

... it is clear that the activism of the ordinary courts has resulted in a body of tort law that is not in harmony with the statutory framework of industrial relations. “Watching and besetting,” “conspiracy” and “inducing breach of contract” have little meaning in the language of the labour relations statutes of the mid-twentieth century . . . The established heads of tort liability do not strike

48 *Ibid.*; the only clear expression of such scepticism is at para. 105 of the judgment.

49 “Injunctions . . . perhaps may be available in cases where the picketing causes a breach of contract between the party being subjected to the secondary picketing and another party not directly involved in the labour dispute (for example, a transport company that would fail to make scheduled deliveries and pick-ups”:
H.P. Rolph, “A real Pepsi challenge,” *National Post*, February 15, 2002, at p. FP13.

50 *Ibid.*

a satisfactory balance, and there is little reason to think that judicial creativity will remedy that imbalance.⁵¹

In the same vein are these very recent observations by Cromwell J.A. of the Nova Scotia Court of Appeal:

In this case, the legal bases of the claims advanced consist of the various “economic” torts. The law in relation to these torts is not well developed; the learned editors of *Clerk & Lindsell on Tort* (18th, 2000) say that “. . . the general patterns of liability still contain ‘ramshackle’ elements”: at 24 - 01. They also note the important policy questions raised by the formulation and application of these torts, particularly their relationship to rights of free speech and association: at 24 - 01.

The invocation of these torts in the labour relations context is particularly troublesome and nonetheless so in light of the fact that most areas of labour relations law have been entrusted primarily, if not exclusively, to specialized labour relations tribunals . . .⁵²

Times do change, and it is of course possible that the courts will be able to “reimagine” the industrial torts in a way that accords with the *Charter* value of freedom of expression.⁵³ However, I remain pessimistic.

(ii) *Too much “signalling effect”?*

As it had done in 1999 in the *KMart* case,⁵⁴ which is discussed in more detail below in connection with the British Columbia statutory provisions on secondary picketing, the Supreme Court of Canada in *Pepsi-Cola* recognizes that picketing can have what it calls a “signalling effect.” This is a less colourful name (and in my view a less helpful one) for what an Ontario judge once called the “electric

51 Christie, *supra*, note 40, at p. 193.

52 *Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1 v. I.B.E.W., Local 625* (2002), 203 N.S.R. (2d) 362, at paras. 38-39 (C.A.).

53 In *Pepsi-Cola*, the Court does say the following, immediately after its one acknowledgement that there have been problems with the industrial torts: “[T]he 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.” *Supra*, note 2, at para. 106.

54 *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 [hereinafter “*Kmart*”].

fence” effect.⁵⁵ It denotes the fact that even when picketing is entirely peaceful, it often transcends the realm of persuasion and moves into the realm of psychological coercion. In the *KMart* case, the union did not use picket signs at secondary locations, but handed out leaflets at those locations. In ruling that the *Charter* right to freedom of expression was violated by British Columbia legislative provisions prohibiting leafleting at the premises of non-allied secondary parties, the Supreme Court of Canada in *KMart* held that leafleting had much less of a signalling effect than picketing and was much closer to pure expression. In *Pepsi-Cola*, however, the Court adjusts its aim; in a fairly lengthy portion of the judgment devoted to the signalling effect, it says that picketing remains within the realm of expression if the picketers merely try to persuade the customers of a secondary party not to buy the struck employer’s products, but moves into the realm of coercion if the picketers seek to harm the secondary employer by trying (in the words of an American decision quoted by the Court) “to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer.”⁵⁶

As the pertinent facts in *Pepsi-Cola* involved only an attempt to persuade consumers not to buy the struck product, the case did not require the Court to make clear what would constitute an attempt to “shut off all trade.” The Court seems, however, to see it as including attempts to deprive the secondary party of the services of its employees, or to prevent that party from bringing in supplies or shipping out its products.⁵⁷ In any event, wherever the borderline is between permissible and impermissible signalling, the Court concludes that “signalling concerns may provide a justification for proscribing

55 Stewart J. in *Heather Hill Appliances Ltd. v. McCormack*, [1966] 1 O.R. 12 (H.C.), at p. 13.

56 *Supra*, note 2, at para. 99, citing the U.S. Supreme Court in *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58 (1964), at p. 70.

57 The Court refers to (but does not clearly adopt) the somewhat more restrictive view that secondary picketing is objectionable if the picketers go beyond trying to “persuad[e] consumers not to purchase from the secondary employer the products of the primary employer,” and venture into the area of trying to persuade them “not to deal at all with the secondary employer until it discontinues its commercial relationship with the primary employer.” *Supra*, note 2, at para. 98.

secondary picketing in particular cases, but certainly not as a general rule.”⁵⁸ It is not clear whether this means that an excessive signalling effect will provide a new and separate legal rationale for restricting secondary picketing, or will merely provide one of the elements required to make out an existing industrial tort (maybe the element of illegality required for intimidation, narrow-form conspiracy or indirect inducing of breach of contract).

The elaboration in *Pepsi-Cola* of the distinction between acceptable and excessive signalling effects looks to me to be the most novel and precise part of what the Court has to say about the “wrongful action” model. If that discussion of the signalling effect is treated as a new point of departure rather than a vehicle for resuscitating the industrial torts, it could provide a relatively promising basis for a fresh and more rational jurisprudence on the limits of secondary picketing.

(b) What effect will *Pepsi-Cola* have on the regulation of picketing by other branches of government?

(i) *How far can legislatures go in restricting secondary picketing?*

(A) COMPETING CONSIDERATIONS: LEGISLATIVE SUPREMACY AND S. 1 OF THE *CHARTER*

The Supreme Court of Canada in *Pepsi-Cola* briefly but clearly emphasizes that its decision applies only to the common law, and that legislatures and administrative tribunals (which are creatures of the legislature) are not squarely bound to adopt the “wrongful action” model. In an important dictum, the Court explains that, in line with long-standing notions of parliamentary supremacy, the legislatures have a better title than the courts to balance the conflicting interests of unions and employers. It seems to indicate that legislative initiatives to that end will be entitled to more deference than the work of the courts in applying the common law:

⁵⁸ *Ibid.*, at para. 100.

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 . . . 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.

...

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.⁵⁹

However, assessing the likely effect of *Pepsi-Cola* on explicit statutory regulation of picketing is complicated, in theory and potentially in practice as well, by an anomaly which arises from the difference between “*Charter* rights” and “*Charter* values.” Section 1 of the *Charter* provides that if a law breaches a “right” which is protected by the *Charter*, the law in question may be upheld if the breach is “reasonable” and “demonstrably justified in a free and democratic society.” Thus, if a statute restricting picketing is found to breach the *Charter* right of freedom of expression, the government which seeks to defend the statute has the onus of showing that the breach is justified within the meaning of s. 1. To do so, the government must satisfy a court-created test called the “*Oakes* test,” which requires proof “that the impugned legislation was designed to address a pressing and substantial concern, and that the particular means chosen by the government were proportional to this goal.”⁶⁰ In contrast, a common law rule of the sort that was in issue in *Pepsi-Cola* — a rule which does not contravene the *Charter*-protected right of freedom of expression, but which is alleged to be inconsistent with the “*Charter* value” of freedom of expression — should be easier to justify, because it does not constitute a direct breach of the *Charter*. In 1995,

59 *Ibid.*, at paras. 85-86.

60 J.E. Magnet, *Constitutional Law of Canada*, 8th ed. (Edmonton: Juriliber, 2001), vol. 2, at p. 220.

the Supreme Court of Canada emphasized that when a common law rule is challenged as breaching a *Charter* value, the onus is on the party challenging the rule rather than on the party defending it, and the Court said that “the balancing [of interests] must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action.”⁶¹ This seems to indicate that a government which enacts legislation restricting expression in the context of secondary picketing will have to meet an even higher standard of justification than the standard the employer in *Pepsi-Cola* tried (and failed) to meet. On the other hand, however — and this is where the anomaly arises — the idea of legislative deference that the Court so clearly articulates in the above-quoted passage from *Pepsi-Cola* seems to point in the opposite direction and to imply that it will in practice be easier, not harder, to justify a statutory scheme that imposes substantial limits on secondary picketing than it will be to justify a common law rule that imposes such limits.⁶²

Thus, the outcome of any application of s. 1 of the *Charter* to legislative attempts to restrict secondary picketing is difficult to predict. The Supreme Court of Canada’s increasing tolerance for picketing points in one direction, but its pronouncements on deference to the legislature point in the other. In *Dolphin Delivery*, an early *Charter* values case which dealt not with legislation but with the common law industrial tort of inducing breach of contract, McIntyre J. acknowledged that picketing always involves an element of freedom of expression, and that restrictions on picketing infringe that freedom. However, McIntyre J. went on: “It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legitimate weapon to be employed in a labour dispute by the employees against their

61 *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 97.

62 “Despite various tendencies in the Supreme Court, the overall trend has been towards less rigorous application of the *Oakes* test. Initially, this trend was particularly noticeable in those cases where the Court was called upon to balance competing claims of different groups within the community. These cases required the Court to scrutinise legislation dealing with social policy and which could be characterised loosely as ‘regulatory’ in nature. In this category of case, the Court applied a relaxed standard of review, asking only whether government had a ‘reasonable basis’ for infringing the right or freedom at stake”: Magnet, *supra*, note 60, at p. 232.

employer, it should not be permitted to harm others.”⁶³ In both the *KMart* and *Pepsi-Cola* judgments, the Court comes close to rejecting these comments. “[T]hey should not be read,” the Court says in *Pepsi-Cola*, “as suggesting that third parties should be completely insulated from economic harm arising from labour conflict”⁶⁴ — a degree of insulation which would, in the Court’s words, be “unattainable” in any event.⁶⁵

(B) THE BRITISH COLUMBIA LEGISLATIVE APPROACH

The British Columbia *Labour Relations Code* has by far the most detailed legislative provisions on picketing found anywhere in Canada. The *Code* in effect adopts both the primary employer doctrine and the ally doctrine referred to above. It allows primary picketing at the site of a legal strike⁶⁶ and prohibits it everywhere else,⁶⁷ but goes on to authorize the Labour Relations Board to permit picketing at other places where struck work is being done by the struck employer itself or by an ally.⁶⁸ The provisions also specify that an enterprise is not a part of the primary employer if the two are “separate and distinct operations,”⁶⁹ even if they are under the same corporate umbrella. The *Code*’s definition of picketing is very broad,⁷⁰ clearly encompassing leafleting as well as conventional picketing. Thus, the legislation purports to prohibit all leafleting anywhere except at the premises of the primary employer or an ally of the primary employer.

The *KMart* case⁷¹ involved a *Charter* challenge to the validity of the British Columbia *Code*’s prohibition against secondary leafleting. Cory J., speaking for the entire Court, accepted that both

63 *Dolphin Delivery*, *supra*, note 8, at p. 591.

64 *Pepsi-Cola*, *supra*, note 2, at para. 44.

65 *Ibid.*

66 R.S.B.C. 1996, c. 244, s. 65(3) [hereinafter the “*Code*”].

67 *Ibid.*, s. 67.

68 *Ibid.*, ss. 65(4)-65(b); s. 65(7) deals specifically with common site picketing.

69 *Ibid.*, s. 65(8).

70 *Ibid.*, s. 1(1).

71 *Supra*, note 54.

leafleting and picketing were protected forms of expression under the *Charter*, and that the statutory restrictions on both of them breached the *Charter*. However, in applying the *Oakes* test with respect to the justification of those breaches, Cory J. said that “there is little doubt that a substantial and pressing concern exists to ensure the regulation of conventional picketing” because of its “potentially disruptive” effect.⁷² In contrast, he held, no such concern had been shown in support of the restrictions on leafletting. “Consumer leafletting,” he said, “is very different from a picket line,” because it “seeks to persuade members of the public . . . through informed and rational discourse,” and it has neither “the ‘signal’ effect inherent in picket lines” nor “the same coercive component.”⁷³ For similar reasons, Cory J. found, even if there was a valid legislative objective in limiting secondary leafletting, a total ban had a disproportionate effect on freedom of expression. The government, he concluded, had failed to prove that the objective could not be just as well met by “a partial ban, such as a restriction on conventional picketing activity alone . . .”⁷⁴

The *KMart* judgment certainly left the impression that stringent legislative restraints on secondary picketing would be acceptable under s. 1 of the *Charter*, even though the suggestion that regulation of picketing could be much more easily justified than regulation of leafletting was not essential to the decision. However, the tenor of the *Pepsi-Cola* judgment is more supportive of the importance of picketing, and it leaves quite a different impression on the permissible scope of legislative regulation. British Columbia’s statutory provisions on picketing represent a legislative compromise that was worked out over a period of three decades, and one that seems to have been relatively well accepted in the labour relations community.⁷⁵ In

72 *Ibid.*, at para. 38.

73 *Ibid.*, at para. 43.

74 *Ibid.*, at para. 77.

75 A tripartite committee considering reform of the British Columbia *Labour Relations Code* ten years ago agreed unanimously that these provisions should remain largely as they stood. J. Baigent, V. Ready & T. Roper, *Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota, Minister of Labour* (Victoria: Ministry of Labour and Consumer Services, 1992), Appendix 4, at pp. 1 and 9.

light of what the Supreme Court of Canada says in *Pepsi-Cola* about the desirability of deference to the legislature, those provisions would probably withstand a *Charter* challenge today, but they have enough similarities to the modified *Hersees* approach to warrant some doubt in that regard.

(C) THE LEGISLATIVE APPROACH IN ALBERTA, NEW BRUNSWICK AND NEWFOUNDLAND

The Alberta, New Brunswick and Newfoundland labour relations statutes totally prohibit secondary picketing, even of parties that have allied themselves with the struck employer.⁷⁶ For example, the Alberta *Labour Relations Code* provides that during a legal strike or lockout, peaceful and non-tortious picketing may take place only at the “striking or locked out employees’ place of work and not elsewhere.”

In *Alberta (Attorney General) v. Retail Wholesale Canada, Local 285*,⁷⁷ the primary employer had moved all of its economic activity to an ally’s premises during a strike, and had shut down its own premises. The Alberta Labour Relations Board concluded that although the complete statutory ban on secondary picketing was “rationally connected to the pressing and substantial objective of preventing economic damage to neutrals in a labour dispute,”⁷⁸ the fact that it prohibited even the picketing of non-neutral employers meant that, like the prohibition of all secondary leafleting in *KMart*, it was “overbroad” and caught “more conduct than [was] justified by the government’s objective . . .”⁷⁹ On an application for judicial review, the Alberta Court of Queen’s Bench upheld the Board’s decision.

76 Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 84(1) and 84(4); New Brunswick *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, ss. 104(1) and 104(2); Newfoundland *Labour Relations Act*, R.S.N.L. 1990, c. L-1, ss. 128(1) and 128(2).

77 [2001] 6 W.W.R. 643 (Alta. Q.B.).

78 *Ibid.*, at para. 83.

79 *Ibid.*, at para. 84.

- (ii) *In the absence of specific statutory restrictions on secondary picketing, must labour relations boards now stop taking a “modified Hersees” approach?*

According to a dictum in *Pepsi-Cola*, quoted above, the courts should take a relatively deferential attitude not only to legislation that endeavours to regulate secondary picketing, but also to efforts by labour relations boards and other “specialized bodies” to apply such legislation. Part of that dictum is worth repeating here: “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 . . .”⁸⁰

This call for deference obviously applies to tribunal decisions interpreting and applying statutory schemes, such as British Columbia’s, that specifically deal with secondary picketing. However, some labour relations statutes, such as Ontario’s, go farther than the Saskatchewan *Trade Union Act* in giving the labour relations board the authority to regulate conduct that leads to illegal strikes, but do not go as far as to mention picketing of any sort, whether primary or secondary. For example, s. 81 of the Ontario *Labour Relations Act, 1995*, prohibits unions or anyone on their behalf from threatening, encouraging or supporting an illegal strike, while s. 83(1) prohibits any person from doing anything that could reasonably be expected to cause someone else to strike illegally. However, a golden formula provision in s. 83(2) states that the prohibition in s. 83(1) “does not apply to any act done in connection with a lawful strike or lawful lockout.”

What does this exemption in s. 83(2) of the Ontario statute mean with respect to picketing that leads to an illegal strike by employees who are not in the legally striking unit? At first sight, it might appear to cover not only primary picketing at the place where the legal strikers normally work, but also any secondary picketing designed to marshal support for the legal strike. Nevertheless, in keeping with a long history of generally narrow interpretation of golden formula provisions both in England and in Canada, the

80 *Supra*, note 2, at para. 85.

Ontario Labour Relations Board twenty years ago adopted the position that the exemption in s. 83(2) does not apply to truly secondary picketing. In the *Consolidated Bathurst* case,⁸¹ still the leading decision on the matter, Board Chair George Adams wrote:

One interpretation might be that as long as the picketers are on lawful strike somewhere in Ontario they can picket anyone and anywhere else without restriction by this Board. We do not, however, believe that the Legislature intended to insulate picketing to this extreme extent . . . Reading subsections [83](1) and (2) together, we believe the Legislature intended to protect innocent third parties from the effects of labour disputes while, at the same time, accommodating the traditional actions of employees involved in lawful strike action, i.e. picketing . . . Picketing directed at a neutral third party is not in connection with a lawful strike occurring between other parties within the meaning of the subsection.⁸²

The Board went on to hold that if the picketed party is an ally of the legally struck employer, the picketing remains within the scope of the labour dispute.⁸³

Thus, in exercising its statutory powers over illegal strikes, the Ontario Labour Relations Board in *Consolidated Bathurst* basically adopted the modified *Hersees* approach, holding secondary picketing illegal unless it targets an ally of the legally struck employer. However, in *Consolidated Bathurst* and in subsequent cases that referred to it, the picketing in question had actually caused an unlawful

81 *Consolidated Bathurst Packaging Ltd.*, [1982] 3 Can. L.R.B.R. 324 (Ont. L.R.B.) [hereinafter "*Consolidated Bathurst*"].

82 *Ibid.*, at p. 339.

83 Recently, the Ontario Labour Relations Board noted that it has not applied the ally doctrine very often over the years, and that the doctrine does not serve to extend the protection of s. 83(2) to employees of the ally party who engage in an illegal strike in response to picketing by the legal strikers. In *Lafarge Canada Inc.*, [2001] O.L.R.D. No. 2614 (QL), at para. 18, the Board said:

. . . whether or not the doctrine ought to be applied in Ontario, it has no application to the facts of this case. The furthest extent of the "ally doctrine" is to extend the ambit of section 83(2) to bring within the phrase "any act in connection with a lawful strike," picketing activity directed at an entity other than the employer with whom the striking union has bargaining rights. The "ally doctrine" does not protect those who *respond* to the strike activity. If employees [of the ally] . . . choose to engage in a work stoppage, they are *not* engaged in activities in connection with a lawful strike. They are engaged in an unlawful strike. [emphasis in original]

strike by the secondary employees or was likely to cause one, and the Board focused not on the fact of the secondary picketing itself but on its link to the unlawful strike activity. For example, in *Walter Construction*,⁸⁴ picketing carried on in support of a legal strike against the Toronto Transit Commission (TTC) may have caused the employees of construction contractors doing work on TTC sites to refuse to work at a time when they could not strike legally. The Board said:

... although the underlying TTC strike is lawful, aspects of the picketing may be unlawful if the picketing . . . is aimed at a wholly unrelated employer (again see: *Sarnia Construction*; *Bird Construction* and *Consolidated Bathurst*, above).

...

*Employees should understand that if their employer is requiring them to work, they are not entitled to “respect the picket lines” of their fellow union members because such activity will generally constitute an unlawful strike. And the picketers may not be able to picket a “wholly unrelated employer” if that picketing is causing an unlawful strike.*⁸⁵

More recently still, in *Lafarge Canada Inc.*,⁸⁶ legal strikers at one of the company’s cement plants picketed another of its plants where the employees did not have the right to strike and where no struck work was being done. This led to an illegal strike at the latter plant. In restraining the illegal strike, but refusing to restrain the picketing, the Board quoted this passage from its 1978 decision in *Canteen of Canada*:⁸⁷

... picketing not in connection with a lawful strike that causes other employees to strike, is considered to fall within the prohibitions set out in section [81] and [83]. Falling outside of these provisions, however, is picketing done in connection with a lawful strike. If such picketing causes other employees to engage in an illegal strike, then that illegal strike, but not the picketing that causes it, can be the subject of a Board direction. This conclusion does not necessarily mean that such picketing is permitted by the general civil and criminal law. Rather, it simply means that picketing done in connection with a

84 *Walter Construction (Canada) Ltd.*, [1999] O.L.R.D. No. 1025 (QL), at paras. 11 and 13 (Ont. L.R.B.).

85 *Ibid.*, at paras. 11 and 13 [emphasis in original].

86 *Supra*, note 83.

87 *Canteen of Canada Ltd.*, [1978] O.L.R.B. Rep. 207, at para. 34.

lawful strike is not touched directly by the Board's remedial authority as set out in the *Labour Relations Act*. Accordingly, if persons wish to restrain such picketing, they must seek their remedy in the courts.

Thus, the Board's position is that although it has the authority to restrain any illegal strike which results from picketing in support of a legal strike, it does not have the authority to restrain the picketing. "[T]he conduct of the picketing," the Board noted in *Lafarge*, "is still regulated by [the courts under] s. 102 of the *Courts of Justice Act*."⁸⁸ The Board went on to say in *Lafarge* that "nothing in the *Consolidated Bathurst Packaging Limited* case contradicts this reasoning," and that "*Canteen of Canada Inc.* is a correct statement of the application of the Act to these facts."⁸⁹ It should, however, be noted that the Board in *Consolidated Bathurst* distinguished *Canteen of Canada* on the basis that the picketing in the latter case was primary rather than secondary, and it does not appear that the Board, in *Lafarge* or elsewhere, has squarely called into question the modified *Hersees* approach laid down for secondary picketing in *Consolidated Bathurst*. Thus, it remains a live question whether, in the aftermath of *Pepsi-Cola*, the Ontario Labour Relations Board must abandon that approach in favour of what the Court calls the wrongful action approach, or whether the deference to the legislature of which the

88 *Lafarge Canada Inc.*, *supra*, note 83, at para. 22. Section 102 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, sets out certain important procedural prerequisites to the granting of labour injunctions by the courts. A major thrust of these requirements, as indicated by s. 102(3), is to ensure that an injunction is granted only where there is a real risk of injury to persons or property, physical obstruction or breach of the peace. However, golden formula language in several subsections of s. 102 specifies that the requirements apply only where the injunction seeks to restrain "an act in connection with a labour dispute." Although "labour dispute" is defined very broadly in s. 102(1), Ontario courts, as the Ontario Labour Relations Board explained in *Consolidated Bathurst*, "have held that picketing directed at neutral third parties or at employers not connected with a labour dispute falls outside the section and is amenable to injunctive relief:" *supra*, note 81, at p. 338. This is yet another example of the application of *Hersees*-like reasoning to hold golden formula protection inapplicable to secondary picketing, and it is another area where the likely impact of *Pepsi-Cola* on such reasoning is unclear.

89 *Supra*, note 83, at para. 23.

Court speaks in *Pepsi-Cola* will extend to the Board as a creature of the legislature.

4. CONCLUSION

In *Pepsi-Cola*, the Supreme Court of Canada explicitly recognizes that the *Canadian Charter of Rights and Freedoms* leaves the legislative branch of government with considerable leeway to work out a regulatory framework for secondary picketing, though undoubtedly with less leeway than would be needed to justify the complete ban on secondary picketing now found in the statutes of Alberta, New Brunswick and Newfoundland. We can hope that legislatures across the country will move quickly to take up the Court's invitation to act, before the judiciary gets embroiled in the hopeless task of trying to resuscitate the industrial torts and breathe into them some of the clarity and objectivity that they have never had. If the legislatures do not act promptly, it is to be hoped that the lower courts will focus not on the industrial torts but on the Supreme Court of Canada's analysis of the signalling effect. That analysis gives more promise of providing the basis for a rational and predictable body of jurisprudence on picketing.