

THE EMPLOYERS' CHOICE BULLETIN

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SECONDARY PICKETING NOT ILLEGAL

Standing nearly forty years of established law on its head, the Supreme Court of Canada ("SCC") has ruled that secondary picketing in a labour dispute is not illegal in all cases. In *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* (the "Pepsi case"), released on January 24, 2002, the SCC limited the circumstances where the courts may restrain picketing at the premises of a stranger to a labour dispute.

In the Pepsi case, Pepsi and the union representing its employees at a bottling facility in Saskatoon were involved in bitter collective agreement negotiations. A strike and lockout ensued at the company's facility. Picketing spread to retail customers of Pepsi in order to disrupt the delivery of Pepsi products. In addition, picketers carried placards outside a hotel where Pepsi's replacement employees were staying and they demonstrated outside the homes of Pepsi's management personnel by chanting slogans, screaming insults and uttering threats of harm. Demonstrations of this type are commonly referred to as secondary picketing.

Pepsi sought an injunction to restrain the secondary picketing. The trial court issued an injunction that, among other things, prevented the employees from picketing anywhere except Pepsi's facility. On appeal, the Saskatchewan Court of Appeal and the SCC allowed the picketing outside the hotel and the retail outlets. However, the picketing outside the private homes was upheld by those courts as being unlawful.

Prior to the Pepsi case, the law in Ontario was clear that picketing in a labour dispute was lawful only at the premises controlled by the employer and any "allied" companies. Secondary picketing of third parties was, by definition, unlawful. In the Pepsi case, the SCC rejected the distinction

between primary and secondary picketing and held that all forms of picketing are lawful. The SCC further held that some economic harm to third parties caused by picketing is acceptable.

However, picketing, whether primary or secondary, will become illegal and subject to an injunction if the picketing amounts to a crime or a civil wrong or tort.

The Pepsi case has a number of implications for employers. First, it may shift the balance of power in a labour dispute. Picketing short of a crime or tort may be conducted at facilities owned by an employer's suppliers and customers, potentially harming the employer's relationships with these parties. This shifts the balance of power in bargaining and, in some instances, may lead to more costly settlements.

Second, employers who are not involved in a labour dispute or strike may face picketing from the employees of another employer who is involved in such a dispute. Employers who wish to end such demonstrations must provide evidence that the picketing activity constitutes criminal or tortious conduct. Employers can no longer expect that secondary picketing will be automatically restrained.

In the Pepsi case, the SCC suggests that its decision will not result in secondary picketing becoming commonplace, nor will the majority of labour disputes be widened to affect third parties. Whether this is accurate remains to be seen.

In the event that your business becomes the subject of secondary picketing, it will be important to contact a lawyer to discuss your options for controlling this activity and minimizing the disruption to your business.

Please Note: This bulletin is prepared as an informational service for our clients and other interested parties. It is not intended to constitute legal advice, a complete statement of the law or an opinion on any subject. Although we endeavour to ensure the accuracy of the content, no one should act upon the information provided without a thorough examination of the law after the facts of a specific situation are fully considered.