SHERRARD KUZZ LLP
Barristers & Solicitors

# Management Counsel

*Employment and Labour Law Update*

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## Supreme Court of Canada Expands Scope of Legal Picketing

On January 24, 2002, the Supreme Court of Canada released an important decision in which the Court – for the first time – directly addressed the issue of what is commonly known as "secondary picketing".

In *Retail Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Beverages (West) Ltd. ("Pepsi-Cola Beverages")*, Canada's highest Court unanimously ruled that secondary picketing – the act of picketing at premises other than at the picketers' own place of employment – is lawful, so long as the activity engaged in does not itself constitute a separately actionable wrong (*ie*. tortious or criminal conduct).

The basis for the Supreme Court affording picketing such high level of protection is the Courts' finding that picketing – in whatever form – is expression as defined in the Canadian *Charter of Rights and Freedoms*. Accordingly, the act of picketing, so long as it is otherwise legal, must be afforded the highest level of Charter protection.

THE FACTS:

Employees from one of Pepsi-Cola's Saskatchewan facilities were engaged in a lawful strike. The strike activity escalated and striking employees began to picket places other than the Pepsi-Cola facility, including the hotel where replacement workers were staying, retail outlets where the company's goods were sold, and outside the homes of management personnel.

The employer was initially granted an injunction preventing picketing at these secondary locations. The union appealed and a majority of the Saskatchewan Court of Appeal ruled that only the picketing of individuals' homes was unlawful, because it constituted a separately actionable wrong, or tort. The Saskatchewan Court of Appeal struck down that portion of the original order which prevented picketing at "any location other than Pepsi-Cola's premises", on the basis that the order unreasonably restricted the picketers' right to free expression. The Supreme Court of Canada ultimately agreed.

SECONDARY PICKETING CONSIDERED UNLAWFUL BY DEFINITION:

British Columbia is the only province where the term 'picketing' is expressly defined in legislation. In Ontario, employers have had to rely on the court's jurisprudence which, throughout the past decades, has evolved into a three-part analysis: First, is the picketing primary or secondary; second, if the picketing is secondary, it is unlawful per se or by definition; and third, if the picketing is unlawful, the Ontario courts provided a remedy to the aggrieved party.

> *"All picketing is allowed, whether 'primary' or 'secondary', unless it involves tortious or criminal conduct."*

The difficulty with the Ontario analysis is that its application has not been consistent. For instance, Ontario Courts often refused to restrict secondary picketing where it found that the target of the picketing was an "allied" employer or in other words an employer which was assisting the primary employer in carrying on its business during the labour dispute. Ontario courts have also been prepared to look behind the corporate veil and therefore refused to prohibit picketing of a parent company, or a company which shared corporate ownership, with the striking employees' primary employer.

THE COURT'S DECISION:

The Supreme Court of Canada noted the inherent difficulties and inconsistencies in the application of the illegal per se doctrine and rejected it.

Instead, the Supreme Court chose to embrace what is called the "wrongful action model" an approach adopted in eastern Canada. The wrongful action model starts with the proposition that all picketing is permitted unless it can be shown to be wrongful or unjustified. In other words, only where the picketing constitutes an independently actionable tort, such as nuisance, inducing breach of contract, intimidation or trespass, will the picketing be found to be unlawful.

Under the Canadian *Charter of Rights and Freedoms*, restrictions on free expression (in this case "picketing") are permitted only to the extent that those seeking to restrict that expression prove that the restrictions are justified. The illegal per se approach was precisely the opposite because the expression – picketing – was considered unlawful unless the union or employees was able to prove otherwise. The Supreme Court rejected the illegal per se doctrine because it ran counter to the principles of the *Charter*.

The Court also rejected Pepsi-Cola's argument that picketing at locations

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*LEGAL PICKETING*
*Continued from p.1*

other than the employees' place of employment should be restricted because it caused economic harm to third parties who had no control over the dispute that gave rise to the picketing, and had no ability to effect a resolution to that conflict. Noting that innocent parties are often affected by labour disputes, the Supreme Court ruled that a court should only interfere if the harm to third parties rises to the level of "undue" harm. The Court concluded: while "protection from economic harm is an important value capable of justifying limitations on freedom of expression...to accord this value absolute or pre-eminent importance over all other values, including free expression, is to err."

The Supreme Court's decision in *Pepsi-Cola Beverages* therefore eliminates the primary/secondary picketing distinction long applied by the Ontario Courts. However, the Supreme Court took care to state that nothing in its decision should be interpreted as preventing legislative action concerning picketing, so long as that action falls within the parameters of the Charter.

> *"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."*
>
> *- Supreme Court of Canada*

WHAT DOES THIS DECISION MEAN FOR EMPLOYERS?

The decision in *Pepsi-Cola Beverages* is problematic for third party employers who may find their premises picketed by employees of another, separate employer. For instance, retailers may find their stores picketed by striking employees of a manufacturer of goods sold in the store, and parts manufacturers may face picketing by the employees of the company that is the ultimate purchaser of those parts.

If the picketing employees are engaged in a legal strike, and economic harm is caused to the third party employer (*i.e.* customers are refusing to enter the third party's retail outlet), the third party employer must now establish a separate actionable tort before it can expect to receive the court's assistance.

This is a significant departure from well entrenched Ontario law which only required a third party employer to demonstrate to a court that it was not an allied employer, and was not involved in the labour dispute. The test is now much higher.

Finally, it should be noted that the Supreme Court of Canada in *Pepsi-Cola Beverages* addressed picketing in the course of legal strike action. This decision does not grant protection to picketing associated with illegal strike activity, in respect of which relief is still available from the Ontario Labour Relations Board.

## DID YOU KNOW...?

Ontario's Workplace Safety & Insurance Board (WSIB) offers a confidential compliance audit for employers which can be downloaded from the WSIB's website.

We offer you a direct link to the WSIB and other useful employment and labour law websites at *www.sherrardkuzz.com*

# Court of Appeal: Employers May Not Rely Upon Ambiguous Policy Manuals

In a recent decision of the Ontario Court of Appeal (November 16, 2001), the Court found certain portions of an employer's policy manual so ambiguous and unclear as to be of no force and effect.

In *Christensen v. Family Counselling Centre of Sault Ste. Marie and District* (2000), [2001] O.J. No. 4418 an employee with seven years service sued her former employer for damages for wrongful dismissal after she was terminated. She alleged that her notice of termination (one month) was inadequate, notwithstanding that the employer's policy manual stated that the notice to which she would be entitled in the event she was terminated was one months' notice.

At trial, three substantial issues were raised:

1. Were the provisions regarding termination of employment contained in the employer's policy manual part of the employee's contract of employment?

2. Did such provisions limit the employee's common-law entitlement to damages in lieu of reasonable notice?

3. What was the appropriate quantum of damages, if any, to which the employee was entitled?

The trial judge held that regardless of the answer to the first question, the provisions contained in the employer's policy manual were not sufficiently clear as to limit the employee's common-law entitlement to damages. The judge assessed the damages on the basis of her finding that eight months' notice should have been given.

The employer successfully appealed to the Divisional Court, and that decision was successfully appealed to the Ontario Court of Appeal.

FACTS AND ANALYSIS

The contract of employment consisted of a letter offer signed by both the employer and employee. The only reference to termination related to a six month probationary period during which time either the employer or employee would be free to terminate the contact on four weeks' notice. The letter also purported to attached a copy of the employer's staff policy manual which was said to "contain the conditions of employment...."

In fact, the employee did not receive a copy of the manual with the letter offer, but she did receive a copy during her first week of employment, read it and understood it. The employer took no other steps to explain or point out the termination provisions in the manual.

The relevant provision of the manual read as follows:

*Professional and Clerical Staff: [notice] will be in writing from the Executive Director and the same ratios will apply, that is one month's notice to professional staff...and/or as established by legislation.*

Although the reference to "legislation" was not defined, the trial judge concluded that in context, it was likely intended to refer to the *Employment Standards Act*, Ontario ("ESA").

Within this context the trial judge found that the subject provision of the manual was capable of no fewer than four different interpretations:

1. The provision was meant to set a ceiling for termination pay, equal to the lesser of one months' pay or the termination pay provided for in the ESA (7 weeks). However, this interpretation would render the manual's provision void, because it would violate the deemed minimum prescribed by the ESA.

2. The provision was meant to provide for the greater of one months' pay or the notice required by the ESA - in other words 7 weeks' notice.

3. The provision was meant to provide for the aggregate of one months' notice and the notice or pay in lieu of notice required by the ESA.

4. The provision was meant to permit an action for damages for wrongful dismissal, but set a minimum of one months' notice to be given in any event.

The trial judge decided that the ambiguity in the provision must be read in such a way as to provide the greatest advantage to the employee, who took no part in the preparation of the document. Had the employer wished to limit its obligations to the notice provisions provided in the ESA, the employer should have expressed those intentions in clear and unambiguous language.

The Ontario Court of Appeal agreed, concluding that the provisions of the manual were not sufficiently clear to rebut the prevailing common-law:

"The determinative question here was not whether the termination provisions in the manual were unfair, onerous or the result of undue influence or any power imbalance. Rather, as found by the trial judge, the case turned on whether the termination provisions, if they formed part of the contract, were sufficiently clear to rebut the common-law presumption. The trial judge's conclusion that they were not was entirely reasonable and ought not to have been interfered with."

As a result of this decision, employers should consider the following:

- Employment policies and manuals that address terms and conditions of employment ought to be drafted in clear and direct language.
- Although not directly addressed by the court, it is prudent practice to ensure that policies or practices that affect the terms and conditions of employment be specifically brought to the attention of prospective employees.

Should your organization require assistance in drafting clear and unambiguous employment policies, you are encouraged to consult with counsel.

# Breakfast Seminar

Sherrard Kuzz LLP would like to thank all those who joined us at our most recent *HReview* breakfast seminar on March 5, 2002 entitled 'Recent Developments in Employment Law.'

The discussion included:

- updates on the Courts' treatment of *Wallace;*
- the deductibility of disability benefits from wrongful dismissal damages;
- termination for dishonesty, and
- how employers should be addressing these issues in the employment contract.

For those of you who attended, we invite you to leave any feedback you may have at info@sherrardkuzz.com.

Our next *HReview* seminar will be held on Wednesday, May 15, 2002 (breakfast at 7:30am, program 8:00 a.m. - 9:00am) and we look forward to seeing you. Watch for your faxed invitation the week of April 22, 2002 or contact Angela Duldhardt at 416.603.0700 to request an invitation. Topic: TBA.

HReview Seminar Series

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