

vests in the Crown in right of the province of the *Locus Quo*. This, however, it is repeated, is conjecture and, no one need be told, definitely not binding authority.

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PICKETING AND THE COURTS

It has been suggested that various areas of the law of labour relations should be defined by legislation rather than left to develop through the normal judicial process. It is perhaps in the area of picketing that the advocates of legislative initiative find the greatest amount of ammunition. It is this particular field of the law that the legislators seem most eager to avoid while at the same time the courts do not seem to appreciate the modern day context within which the picketing takes place. *Robert Williams et al v. Aristocratic Restaurants (1947) Ltd.*¹ gave a certain recognition to picketing but most judges since that decision have been able to find facts which prevent the picketing before them to be considered "peaceful" and thus be protected by the principle put forward in that case.

This judicial antipathy to picketing is even more evident in the area of secondary picketing. The judicial attitude towards this type of picketing is comprehensively discussed by Dean Carrothers in an article in the *Canadian Bar Review*² at which time he hoped for some judicial or legislative guidance in this respect.

Such guidance was soon provided by the Ontario Court of Appeal in the much discussed case of *Hersees of Woodstock Ltd. v. Goldstein*.³ The conclusion reached by Mr. Justice Aylesworth and subsequently followed, was that secondary picketing was illegal *per se*. The merits of this decision is not the purpose of this comment; suffice it to say that the result was not unexpected in view of the indicated judicial reaction to the use of secondary pressure.⁴ The application of this principle, especially in the case of *Heather Hill Appliances Ltd. et al v. McCormack*,⁵ would strengthen Professor H. W. Arthurs call for legislative discussion.⁶ However, before we accept legislative interference in this field and thus sacrifice the flexibility which should be available through the courts it appears that there is a possibility that the *Hersees* decision may not be the blindly followed precedent that first

1. (1951) S.C.R. 762.

2. *Secondary Picketing* (1962) 40 C.B.R. 57.

3. (1963) 38 D.L.R. 449.

4. *Op. Cit.* footnote 2.

5. (1966) 1 O.R. 12.

6. (1962) 41 C.B.R. 573, 585, 586.

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glance would have indicated. In the recent High Court of Ontario case, *Tennen Investments Limited v. Weuller et al.*,⁷ Mr. Justice McDermot distinguished *Hersees* and the cases that followed it. He said in part:

"In my opinion these cases are distinguishable from the facts of the present situation as, in the last mentioned, the work being done was of a most essential character involving a hospital and later embodied by Provincial Statute as one reason for granting an injunction. As to the Heather Hill Appliance case, this was a retailer whose business was being badly affected, miles away from the employer of the strikers who were lawfully on strike, and with respect to the *Hersees* case, this was a case where again there was a strike many miles away, a lawful strike, and *Hersees* was being badly affected by picketing where they had done nothing but purchase goods from the employer against whom the picketers were on strike.

The present situation is entirely different where the pickets being four of the defendants, were employees of N.A.P.C.O. which was doing the installation of the windows on this job."⁸

and further indicating his support at least for the facts of this particular picketing by saying:

"The Court does not seek to take away the last weapon strikers have for endeavouring to obtain fair treatment from employers."⁹

It would seem that even with the prohibition given by the Court of Appeal in the *Hersees* Case some judges may look at this matter in another light. In this case the plaintiff had a contract with Prime Windows of Canada, a division of R.M.P. Industries Limited, for the supply and installation of aluminum windows and doors. The contract contained a proviso that the Plaintiff had the right to cancel the contract for delays but also that R.M.P. would not be responsible for delays caused by labor troubles. N.A.P.C.O., whose employees were on a lawful strike and were 4 out of the 5 defendants, was the installing agent of the doors and windows for R.M.P. Industries Ltd. N.A.P.C.O. and R.M.P. Industries Ltd. are both subsidiaries of Reynolds Aluminum.

It was this close connection between the plaintiff and the defendants as opposed to the distances involved in the *Hersees* & *Heather Hill* cases that enabled Mr. Justice McDermott to find that there was no secondary picketing and therefore that the picketing would not be enjoined.

It is possible that in the future more fact situations that could easily fall prey to the prohibition on secondary picketing will be distinguished from the *Hersees* principle in this manner and it may eventually be considered by the courts as authority

7. C.L.L.C. 14151.

8. *Supra*, footnote 7 at page 578.

9. *Supra*, footnote 7 at page 578.

only for its individual facts. It is still too early to say that the courts will evolve a flexible attitude towards secondary picketing and therefore legislative action may be necessary to properly treat this sensitive area.

As in all labour problems, the prime question is "Is there enough time for the remedy to evolve?"

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CERTIORARI AND PROHIBITION AND THE EXERCISE OF STATUTORY JURISDICTION

It is clear that, for better or worse, certiorari and prohibition are available only in connection with the exercise of an authority or a jurisdiction which is derived from statute.

In the recent case of *Hudson Bay Mining and Smelting Co. Ltd. v. Flin Flon Base Metal Workers' Federal Union No. 172 et al.*,¹ which involved an award made by a board of arbitration constituted pursuant to a collective bargaining agreement, Mr. Justice Dickson in *obiter*, indicated in effect that certiorari would not have lain against the board because it was not exercising a statutory jurisdiction; the learned judge cited the case of *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada) Local 663*,² as his authority.

Such a board of arbitration, that is to say the jurisdiction of such a board of arbitration, has been characterized as being non-statutory or private in nature as a result of the interpretation of legislation such as the Industrial Relations and Disputes Investigation Act³ (which was the relevant legislation in the *Hudson Bay Mining and Smelting Co. Ltd.* case, *supra*) and other similar provisions to be found in the statutes governing labour relations in other provinces.⁴ Generally speaking, this legislation requires that every collective bargaining agreement contain a provision for final settlement without stoppage of work, *by arbitration or otherwise*, of all differences between the parties to the agreement.

The key issue in the interpretation of this legislation has been the determination of the degree of compulsion which this legislation places upon the parties to a collective bargaining agreement to submit their differences or disputes to a board of arbi-

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1. (1966) 58 W.W.R. 165 (Man. Q.B.).

2. (1962) S.C.R. 318.

3. R.S.C. 1952, c. 152, s. 19(1).

4. British Columbia, R.S.B.C. 1960, s. 22, as amended by S.B.C. 1963, c. 20, s. 3; Alberta R.S.A. 1955, c. 167, s. 73(5) as amended by S.A. 1964, c. 41 s. 12; Manitoba, R.S.M. 1954, c. 132, s. 19; New Brunswick, R.S.N.B. 1952, c. 124, s. 18(1); Nova Scotia, R.S.N.S. 1954, c. 295, s. 19(1); Prince Edward Island, S.P.E.I. 1962, c. 18, s. 23(1); and Newfoundland, R.S.N. 1952, c. 258, 19(1).