Spring 2004

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Before the Supreme Court of Canada's decision in Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola, *the law on secondary picketing was a murky and often inconsistent area of jurisprudence. Yet the Court's attempt to clarify the issue by declaring the per se legality of secondary picketing may have muddied the waters even more. Specifically, the authors argue, the Court's reliance on the U.S. Supreme Court's* Tree Fruits *decision and the distinction it draws between general and struck product picketing may have made the law even more difficult to apply.*

The authors contend that such a distinction ignores the economic realities of labour disputes. In an effort to deal with these issues, The U.S. Supreme Court set out an important exception to Tree Fruits *in its* Safeco *decision, stating that any picketing which threatens neutral parties with "ruin or substantial loss" should be restrained, even it falls within the struck product category. In light of these decisions, American courts have found themselves grappling with the difficulties inherent in quantifying the economic harm of secondary picketing, a challenge Canadian courts may well find themselves facing in the post-*Pepsi *context. The authors also argue that the distinction between general and struck product picketing is inadequate in dealing with so-called "merged products" where the struck product is so integrated into the product of the neutral party that it is no longer identifiable to the public at large.*

Finally, the authors contend that by focusing on the literal content of the picketers' message, instead of its effects, both courts underestimate the powerful psychological or "signalling" effect picketing creates, which deters consumers, regardless of the picketers' stated target.

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Introduction

Over the course of half a century, questions about the legality of secondary picketing in Canada resulted in the development of a nebulous and often inconsistent body of jurisprudence. In the absence of legislative intervention, Canadian courts struggled to balance conflicting labour relations and free market principles when otherwise lawful disputes between employers and unions escalated to include "secondary"[1] parties and locations. For the most part, judges navigated these waters without meaningful guidance from our country's highest court. In its 2002 decision, *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,[2] the Supreme Court of Canada made what many considered a long overdue attempt to clarify whether, or under what circumstances, secondary picketing is legal (or illegal) at common law. However, while the *per se* legality of secondary picketing may no longer be in dispute, the Supreme Court's reliance on the 1964 decision of the United States Supreme Court in *National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen, Local 760*[3] signals anything but a clearer path for those embroiled in industrial conflict arising from labour disputes.

I. Secondary Picketing: the Rise and Fall of the Illegal *per se* Doctrine

To properly understand the Supreme Court's decision in *Pepsi*, it is necessary to consider the "unsettled and inconsistent"[4] body of jurisprudence which preceded it. This begins with the decision of the

1. For clarity, the terms "secondary" and "secondary party" are employed interchangeably in this article with the terms "neutral" and "neutral party."

2. *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 146 [*Pepsi*].

3. *National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen, Local 760 et al.*, 377 U.S. 58 (1964) [*Tree Fruits*].

4. *Pepsi*, *supra* note 2 at para. 16.

Ontario Court of Appeal in *Hersees of Woodstock Ltd. v. Goldstein,*[5] in which may be found the genesis of the view that secondary picketing is illegal *per se*. In *Hersees,* the union representing Deacon Brothers' employees approached Hersees, a purveyor of the Deacon Brothers goods, and asked it to refrain from ordering merchandise from Deacon Brothers for the duration of the dispute. When Hersees refused, the union organized a two-person picket outside the Hersees retail outlet. Each picketer carried a sign notifying potential customers that Hersees was selling Deacon Brothers products that were made using non-union labour. Hersees applied for an injunction to restrain the picketing.

On appeal, the Ontario Court of Appeal overturned the decision of the lower court and held that the signs carried by the pickets tortiously misrepresented that Hersees itself was involved in a labour dispute and were designed to induce breach of contract. In addition, the Court found that the picketing constituted "besetting" contrary to the *Criminal Code.* However, Aylesworth J.A. made the following statements in *obiter* at page 86:

> But even assuming that the 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 the appellant's premises must give way to appellant's right to trade*; the former, assuming it to be a legal right, is exercised for 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.[6]

These brief remarks provided the foundation for the view that peaceful, non-tortious picketing at a location other than that of the primary employer is illegal *per se* at common law.

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5. *Hersees of Woodstock Ltd. v. Goldstein,* [1963] 2 O.R. 81 [*Hersees*].
6. *Ibid.* at 86 [emphasis added].

As the Supreme Court acknowledged in *Pepsi*, the decision in *Hersees* "has had an enduring—and heavily contested—influence on labour law."[7] While Canadian courts—especially in Ontario—have been compelled to comply with the illegal *per se* rule enunciated in *Hersees*,[8] many courts have gone to remarkable lengths to avoid its strict application. Indeed, almost before the ink was dry on Aylesworth's dictum in *Hersees*, exceptions to the illegal *per se* doctrine began to appear. Courts in subsequent decisions refused to restrict picketing directed at secondary parties who were found to be effectively assisting the struck employer (the so-called "ally" doctrine). Under the ally doctrine, the courts permitted picketing against secondary parties who, for example, rented hotel rooms from which the struck employer could carry on its business,[9] fulfilled the contractual obligations of the struck employer during the course of a labour dispute[10] or permitted a struck employer to stockpile products or continue its operations with the use of the secondary party's warehouse facilities.[11] Many courts elected to bypass the issue altogether by lifting the corporate veil to characterize the picketing in question as essentially "primary" rather than "secondary" in nature and, therefore, not enjoinable.[12]

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7. *Pepsi*, *supra* note 2 at para. 52.

8. See *e.g. Maple Leaf Sports & Entertainment Ltd. v. Pomeroy* (1999), 49 C.L.R.B.R. (2d) 285 (Ont. Gen. Div.); *Moase Siding and Insulation Ltd. v. United Food and Commercial Workers International Union, Local 1288P* (1997), 157 Nfld. & P.E.I.R. 216 (S.C.); *PCL Construction Management Inc. v. Mills* (1994), 124 Sask. R. 127 (Q.B.); *J.S. Ellis & Co. v. Willis* (1972), 30 D.L.R. (3d) 397 (Ont. H.C.); *Toronto Harbour Commissioners v. Sninsky* (1967), 64 D.L.R. (2d) 276 (Ont. H.C.); *Heather Hill Appliances Ltd. v. McCormack* (1965), 52 D.L.R. (2d) 292 (Ont. H.C.) aff'g [1965] O.J. No. 504 (C.A.) [*Heather Hill*].

9. *Commonwealth Holiday Inns of Canada Ltd. v. Sundy* (1974), 2 O.R. (2d) 601 (Ont. H.C.) [*Commonwealth*].

10. *Air Canada v. C.A.L.P.A.* (1997), 28 B.C.L.R. (3d) 159 (S.C.) [*Air Canada*].

11. See *e.g. Peter Kiewit & Sons Co. v. Public Service Alliance of Canada, Local 20221*, [1998] B.C.J. No. 1494 (S.C.) [*Peter Kiewit*]; *Alex Henry & Son Ltd. v. Gale* (1976), 14 O.R. (2d) 311 (Ont. H.C.) [*Alex Henry*].

12. See *e.g. Inglis Ltd. v. Rao* (1974), 2 O.R. (2d) 311 (Ont. H.C); *Nedco Ltd. v. Clark* (1973), 43 D.L.R. (3d) 714 (Sask. C.A.); *Nedco v. Nichols* (1973), 38 D.L.R. (3d) 664 (Ont. H.C.); *Refrigeration Supplies Co. v. Ellis*, [1971] 1 O.R. 190 (Ont. H.C.); *Lescar Construction Co. v. Wigman*, [1969] 2 O.R. 846 (Ont. H.C.).

Accordingly, while the illegal *per se* doctrine continued to exist (at least in Ontario if not elsewhere), sporadic and often overlapping exceptions left the rule peppered with loopholes. This did little to promote the establishment of a consistent and predictable body of jurisprudence. As stated by Chief Justice McLachlin in *Pepsi*, "[t]hese 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."[13] Courts were often driven to make subtle and highly subjective findings of fact relating to, for example, whether the picketing was directed primarily at the struck employer,[14] whether the struck employer and secondary party had co-operated to such an extent that they should be considered to be allies under the "ally" doctrine[15] and whether the nature and extent of the economic injury suffered by the secondary party warranted judicial intervention.[16] The elimination of these value-laden factual inquires appears to have been as much at the heart of the Supreme Court's reasoning as its drive to impose constitutional norms.

II. The Supreme Court Decision in *Pepsi*

Almost four decades after Justice Aylesworth's controversial ruling in *Hersees*, the Supreme Court seized upon the opportunity in *Pepsi* to clarify whether, and under what circumstances, secondary picketing is legal at common law.

The picketing at issue in *Pepsi* arose in the context of a lockout and strike involving Pepsi-Cola Canada Beverages (West) Ltd. and certain unionized workers employed at a bottling plant and delivery facility in Saskatoon, Saskatchewan. While both the lockout and the resulting

13. *Supra* note 2 at para. 60.

14. See *e.g. Peter Kiewit, supra* note 11; *McLean Trucking Co. v. Public Service Alliance of Canada*, [1983] B.C.J. No. 47 (S.C.).

15. See *e.g. Air Canada, supra* note 10; *Alex Henry, supra* note 11; *Commonwealth, supra* note 9; *Falconbridge Nickel Mines Ltd. v. Tye* (1971), 71 C.L.L.C. 100 (S.C.).

16. *Tenen Investments Ltd. v. Wueller* (1966), 66 C.L.L.C. 151 (Ont. H.C.).

strike were legal under the Saskatchewan *Trade Union Act*,[17] the animosity between the parties was evident and the situation rapidly escalated. A number of union members reacted to news of the lockout by taking physical control of the employer's premises, blocking access and egress, destroying the employer's property and threatening management personnel on site. In response, Pepsi was granted an interim injunction prohibiting the union and its membership from engaging in further acts of trespass, intimidation and nuisance. Pepsi subsequently regained control of its facilities and continued its operations with the assistance of management personnel and replacement workers.

Upon resuming deliveries to its customers, Pepsi continued to encounter resistance. Union members attempted to prevent the movement of delivery trucks, interfered with the delivery of the employer's products and dissuaded customers from carrying on business with the employer. The union's tactics quickly spread to "secondary" locations including retail outlets serviced by the employer, a hotel where members of the substitute labour force were staying and the private residences of several management personnel. While the activities at the retail outlets and hotel were generally peaceful, the conduct of union members at the residences of Pepsi employees included chanting slogans, screaming insults and uttering threats. Pepsi was granted a second interlocutory injunction, restraining the union from engaging in such conduct.

Shortly thereafter, this second interim injunction was dissolved and a new order instituted. As part of the new order, the union was effectively prohibited from engaging in picketing activities anywhere other than the employer's premises. The union appealed the provisions of the order prohibiting secondary picketing arguing that it violated the striking workers' rights to freedom of expression and association enshrined by sections 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms*.[18] Explaining that picketing constitutes an exercise of the fundamental

17. R.S.S. 1978, c. T-17, ss. 27 and 28.

18. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

freedom of expression which can only be circumscribed by laws that accord with the constitutional norms of the *Charter*, a majority of the Saskatchewan Court of Appeal quashed the offending provisions of the order.[19]

In a unanimous decision by Chief Justice McLachlin and Justice LeBel, the Supreme Court upheld the ruling of the Court of Appeal. Rejecting the *Hersees* approach, even as modified by its various exceptions, the Supreme Court concluded that secondary picketing is *prima facie* lawful unless it involves wrongful action such as tortious or criminal conduct. In the highest Court's view, this wrongful action model best balanced the interests at stake in a manner consistent with the fundamental values of the *Charter*.[20] In this regard, the Court recognized that freedom of expression is particularly significant in a labour relations context. The Court opined that the wrongful action model provided a flexible and rational framework that avoided reliance on artificial distinctions between primary and secondary or labour versus non-labour picketing. The Court asserted that while third parties should be protected from undue economic suffering at the hands of striking unions, they should not be insulated entirely from the repercussions of labour conflict. In the Supreme Court's opinion, struck parties would receive adequate protection against the most coercive forms of picketing from the torts of nuisance, trespass, defamation and inducing breach of contract and expressed its optimism that these torts would "grow and be adapted to current needs."[21]

In the context of discussing the extent to which the common law should protect the economic rights of neutral third parties, the Supreme

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19. *Retail, Wholesale and Department Store Union Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd* (1998), 167 D.L.R. (4th) 220. The Saskatchewan Court of Appeal upheld the portion of the injunction that prevented the union from congregating at the private residences of Pepsi employees on the basis that this was tortious conduct.

20. While the *Charter* does not apply directly to disputes between private litigants, the Court in *Pepsi* reaffirmed its holding in *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, that 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: *Pepsi, supra* note 2 at para. 19.

21. *Pepsi, supra* note 2 at para. 73.

Court turned its attention to what has been called the "signalling" or "electric fence"[22] effect of picketing. Broadly speaking, the signalling effect refers to the physical and psychological barrier created by a picket line, the effect of which is to signal to potential customers that they should refrain from doing business with the picketed party. The appellant in *Pepsi* argued that the coercive nature of the signalling effect removed picketing from the realm of protected expression. However, while the Court admitted that there may be "a kernel of truth"[23] to the concept, it cautioned that the signalling effect will only be relevant in a limited number of circumstances. As explained by the Court:

> [T]he 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 . . . 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.[24]

Continuing along this vein, the Supreme Court drew a distinction between picketing directed at disrupting the business operations of the neutral party and picketing that is aimed merely at persuading customers not to purchase the products of the struck employer sold by the neutral party. In the Court's view, the coercive potential of the picket line would be greatly diminished where the secondary picketing in question is directed specifically at the products of the struck employer.

In support of this analysis, the Supreme Court relied on the following statement by the United States Supreme Court in *Tree Fruits*:

> 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

22. See the comments of Stewart J. in *Heather Hill, supra* note 8 at 13.
23. *Pepsi, supra* note 2 at para. 95.
24. *Ibid.* at para. 95.

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.[25]

Armed with these statements, the Supreme Court in *Pepsi* concluded that "we should therefore be mindful not to extend the application of the signal effect to all forms of union expression."[26] It is the Supreme Court's reliance upon *Tree Fruits*—and more importantly the Court's adoption of the questionable distinction between general and struck product picketing—that constitutes the primary focus of this comment.

III. Secondary Picketing in the U.S.: *Tree Fruits* and Its Progeny

As illustrated above, the observations of the United States Supreme Court in *Tree Fruits* figure prominently in the judgment of Justices McLachlin and LeBel in *Pepsi*. However, a closer review of *Tree Fruits* reveals a decision that is rife with analytical and practical shortcomings which have contributed to the development of a remarkably unprincipled and convoluted body of American jurisprudence.

The dispute in *Tree Fruits* arose following the expiration of a collective agreement between the Tree Fruits Labor Relations Committee, a multi-employer bargaining agent representing several produce distributors, and the Fruit & Vegetable Packers and Warehousemen's Union, Local 760. In response to certain proposed contract modifications which it

25. *Tree Fruits, supra* note 3 at 63-64 and 70.
26. *Ibid.* at para. 100.

deemed unacceptable, Local 760 called a strike against the members of the committee and two independent employers. To further its bargaining objectives, Local 760 subsequently decided to promote a consumer boycott of Washington State apples. This boycott entailed picketing and the distribution of handbills at 46 Safeway stores in and around Seattle, Washington which sold apples distributed by the struck employers. The pickets carried placards that stated: "To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples." The handbills contained similar language and outlined in more detail the nature and background of the dispute. The picketing at each of the Safeway locations remained peaceful and at no time interfered with the movement of store employees, customers or suppliers. In response to the union's tactics, an application was brought under, *inter alia*, section 8(b)(4)(ii)(B) of the *National Labor Relations Act* which states that it is an unfair labour practice for a union "to threaten, coerce, or restrain any person" with the object of "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person. . . ."[27]

In a six to two decision by Justice Brennan, the U.S. Supreme Court held that section 8(b)(4)(ii)(B) did not prohibit peaceful consumer picketing of neutral parties directed solely at persuading customers not to purchase the products of the struck employer. As previously noted, the majority drew a hard and fast distinction between struck product picketing and picketing designed to shut off all trade with the neutral party. In support of its conclusion, the majority in *Tree Fruits* observed that Congress had historically refused to prohibit peaceful picketing except in order to restrain "clearly identified abuses."[28]

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27. 29 U.S.C. § § 151-168. The *National Labor Relations Act* (Wagner Act) was enacted in 1935 (29 U.S.C. § § 141-169), as amended by the *Labor Management Relations Act* (Taft-Hartley Act) in 1947 (29 U.S.C. § § 141-197). The *National Labor Relations Act* was amended to include section 8(b)(4)(ii)(B) by the *Labor-Management Reporting and Disclosure Act* (Landrum-Griffin Act) in 1959 (29 U.S.C. § § 401-531) [*NLRA*].

28. *Supra* note 3 at 67. The majority in *Tree Fruits* held that while the distinction was not explicitly recognized by Congress in its debates regarding the enactment of section

In addition, the majority expressed its concern that a "broad ban against peaceful picketing might collide with the guarantees of the First Amendment."[29] Accordingly, as the picketing in *Tree Fruits* was ostensibly confined to persuading customers not to purchase the products of the struck employer, the majority held that it did not fall within the scope of section 8(b)(4)(ii)(B).

In their dissent, Justices Harlan and Stewart asserted that, given the very nature of picketing, many consumers would refrain from doing business with a neutral party "out of economic or social conviction or because they prefer to shop where they need not brave a picket line."[30] Moreover, Justice Harlan argued that many consumers, not comprehending the precise scope of the picketing, would not confine their boycott to the products of the struck employer.[31] In either instance, and regardless of the intended effect of the picketing, the net result would be a *de facto* boycott of trade with the neutral party. As a result, the minority in *Tree Fruits* was of the opinion that the distinction created by the majority was "too refined in the context of reality,"[32] potentially becoming "even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product."[33] While the views of Justices Harlan and Stewart did not win the day, their criticisms of the majority opinion foreshadowed many of the practical difficulties subsequently experienced by courts and the National Labor Relations Board (NLRB) in attempting to apply the *Tree Fruits* doctrine.

The analytical and practical shortcomings of the *Tree Fruits* doctrine, many of which were almost immediately identified in academic circles,[34] are painfully evident upon a review of the subsequent jurisprudence. Most of these problems can be attributed to the fact that, as recognized

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8(b)(4)(ii)(B), their silence in this respect was "pregnant with significance"—indicating that legislators did not manifest any intention of banning all forms of consumer picketing.

29. *Ibid* at 63.

30. *Ibid.* at 82-83.

31. *Ibid.* at 83.

32. *Ibid.* at 82.

33. *Ibid.* at 83.

34. See *e.g.* Thomas P. Lewis, "Consumer Picketing and the Court—The Questionable Yield of Tree Fruits" (1965) 49 Minn. L. Rev. 479.

by Justice Harlan in his dissent in *Tree Fruits*, the Supreme Court failed to fully comprehend the unique economic dynamics intrinsic to labour disputes, the underlying motives of unions engaging in secondary picketing, and the psychological effects of picketing on members of the public. As one observer stated:

> . . . the confusion surrounding existing board and court interpretations of section 8(b)(4)(ii)(B) stems from the Supreme Court's failure to assess realistically the impact that consumer picketing has on secondary businesses, as well as the Court's refusal to examine the objectives of unions that resort to secondary picketing.[35]

This problem was compounded by the courts' inability—in both *Tree Fruits* and subsequent decisions—to articulate a clear and consistent approach to the application of section 8(b)(4)(ii)(B). Indeed, at least one member of the NLRB observed that the Supreme Court's failure to formulate a principled basis for its decisions in the area of secondary consumer picketing has produced a "convoluted statute that has been muddied and distorted by judicial interpretation."[36] These flaws in the Court's analysis have subsequently manifested themselves in myriad of different factual circumstances and resulted in the development of a number of modifications to the *Tree Fruits* doctrine.

One of the most obvious criticisms of the ruling in *Tree Fruits* has been that the distinction between general and struck product picketing becomes impractical and yields unduly oppressive results where the neutral party is economically dependent on the struck employer. This will be of particular concern where the neutral party is engaged exclusively or primarily in the sale of the products of the struck employer. As former NLRB Chairman William B. Gould IV explained, where the neutral party is dependent in this respect, "[i]t is impossible

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35. Author unknown, "Secondary Consumer Picketing, Statutory Interpretation and the First Amendment" (1983) 81 Mich. L. Rev. 1817.

36. Zimmerman, "The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), the Board and the Courts", (1982) 34 Proc. N.Y.U. Conf. on Lab. 79, 80 at 94, cited in Author unknown, "Secondary Consumer Picketing, Statutory Interpretation and the First Amendment" (1983) 81 Mich. L. Rev. 1817 at 1817.

for the union to confine its appeal to the primary employer in a way that will not be aimed at the entire structure of the secondary employer."[37] This problem led to an attempt by the Supreme Court to reassess the parameters of the *Tree Fruits* doctrine in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance Corporation).*[38]

In *Safeco*, the union targeted several neutral parties that each derived approximately 90 percent of their business from the struck employer. While the Supreme Court acknowledged that the union's picketing was directed exclusively at Safeco's insurance products, it nevertheless held that the picketing of the neutral parties constituted an unfair labour practice contrary to section 8(b)(4)(ii)(B). In the Court's view, given that the sale of the struck employer's products accounted for substantially all of the neutral parties' business, it could be inferred that the picketing was reasonably calculated to induce customers to withhold their patronage of the neutral parties. In so holding, the Supreme Court articulated an important exception to the *Tree Fruits* doctrine: picketing that can be expected to threaten neutral parties with "ruin or substantial loss"[39] should be restrained. However, as noted by Justice Brennan in his dissent in *Safeco*, the decision left unanswered the question of how to approach the infinite number of situations that reside somewhere in between *Tree Fruits* and *Safeco* on the spectrum of economic dependence.[40] To this day, neither the U.S. courts nor the NLRB have articulated an acceptably clear or consistent approach to this important question.

Safeco is particularly illuminating from a Canadian post-*Pepsi* perspective in that it requires U.S. courts to measure the quantum of economic harm inflicted on targets of secondary picketing activities in determining both the level of economic dependence and whether the target was threatened with "ruin or substantial loss." Canadian courts

37. William B. Gould IV, *A Primer on American Labor Law*, 3d ed. (Cambridge, Mass.: MIT Press, 1993) at 81.

38. *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance Corporation)* 447 U.S. 607 (1980) [*Safeco*].

39. *Safeco, supra* note 38 at 614-615.

40. *Ibid.* at 623-624.

will almost certainly have to address such issues when forced to reconcile complex labour relations and constitutional issues within the stunted rubric of nominate and industrial torts. Given the inability of U.S. courts after *Safeco* to articulate a clear approach to these issues, not to mention Justice Brennan's observation that *Safeco* provides an inadequate analytical framework for cases that fall somewhere between *Tree Fruits* and *Safeco*, the decision represents a shining example of why the *Tree Fruits* approach should be viewed with a healthy dose of scepticism.

Another commonly cited shortcoming of the decision in *Tree Fruits* is that the Supreme Court failed to take into account situations where the struck product has somehow been integrated or merged with a product offered for sale by the neutral party. In an attempt to address this deficiency, courts and the NLRB have subsequently developed what is known as the "merged product doctrine." The essence of the merged product doctrine is that secondary picketing is illegal where the struck product has become so integrated or merged with the product of the neutral party as to be no longer identifiable to the public at large. The assumption underlying this rule is that, in order to boycott the product of the struck employer, the consumer would simultaneously be required to reject the product of the neutral party and, potentially, any number of component products produced by other neutral parties.[41] The merged product doctrine is intended to insulate neutral third parties who would otherwise be drawn into the primary dispute. However, while the merged product doctrine may possess a certain ethereal appeal, it has proved difficult to apply. Examples of struck products which have proven problematic include bread used by a restaurant;[42] raw materials, tools and components used in the construction of buildings;[43] and paper bags used by a grocer to pack groceries.[44]

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41. See Ashton Phelps Jr., "Secondary Consumer Picketing: Some Grafts on Tree Fruits" (April 1970) 44 Tul. L. Rev. 537 at 543.

42. *Teamsters, Local 327 (American Bread Co.)*, 170 N.L.R.B. 91 (1968).

43. See *e.g. K&K Construction Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979); *Twin City Carpenters*, 167 N.L.R.B. No. 151 (1967).

44. *Paperworkers, Local 832 (Duro Paper Bag Mfg. Co.)*, 236 N.L.R.B. 525 (1978).

The practical limits of the merged product doctrine together with the inherent limitations of the distinction between general and struck product picketing, are particularly evident in *Raywood Corp. v. Radio Broadcast Technicians, Local 1264.*[45] In *Raywood*, a striking union picketed a television station that aired advertisements featuring the products of the struck retailers. The Court in this case, which ultimately held that the picketing was not protected under the *Tree Fruits* doctrine, clearly struggled to distinguish between the advertisements themselves and the struck products described and depicted therein. Problems can also arise where the struck employer provides *services*—as opposed to *products*—to neutral third parties. In such cases, the distinction between general and struck product picketing predictably breaks down because there is no identifiable product capable of being the target of a boycott.[46]

Yet another concern emanating from the decision in *Tree Fruits* stems from the significance that the Supreme Court attached to the union's apparent motives in determining whether the picketing of the Safeway stores should have been restrained. Specifically, the majority in *Tree Fruits* held that section 8(b)(4)(ii)(B) will only be violated where it can be established that any reduction in the sales of the struck employer's products to the neutral party was precipitated by the neutral party's submission to the union's coercive tactics, and not merely as the result of lessened consumer demand.[47] Aside from the challenging cause-and-effect evidentiary issues that arise, the shortcoming of this view is that it fails to acknowledge that the interference with business between the struck employer and the neutral party is almost always one of the underlying motives of secondary picketing. Secondary picketing is *designed* to be coercive. The Supreme Court's holding in this respect thus implicitly discounts the impact of secondary picketing on the day-to-day operations, reputation and bottom line of the neutral parties. In

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45. *Raywood Corp. v. Radio Broadcast Technicians, Local 1264* 290 F. Supp. 1008 (S.D. Ala. 1968) [*Raywood.*].

46. See *e.g. Local 254, Building Service Employees (University Cleaning Co.)*, 151 N.L.R.B. 341 (1965), 376 F. 2d 131 (1st Cir. 1967), cert. denied, 389 U.S. 856 (1967); *Local 105, Building Service Employees*, 151 N.L.R.B. 1424 (1965), 367 F. 2d 227 (10th Cir. 1966).

47. *Tree Fruits, supra* note 3 at 72-73.

an effort to properly recognize and protect the economic rights of neutral third parties, U.S. courts have struggled to create exceptions to the *Tree Fruits* doctrine.

Underlying the many practical shortcomings of the decision in *Tree Fruits* is the Supreme Court's singular focus on the literal content of the message disseminated by striking unions to members of the public. Indeed, the distinction between general and struck product picketing—and thus the distinction between permissible and impermissible picketing under section 8(b)(4)(ii)(B)—rests on the wording of the placards, handbills and other means used by unions to reach their intended audience. Where, as in *Tree Fruits*, the union's message to consumers is restricted to the products of the struck employer, the picketing will be deemed permissible. However, where the union's message is not circumscribed in this manner, the picketing will constitute an unfair labour practice. As observed by Justice Black in his concurring opinion in *Tree Fruits*:

> In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which all picketing is, for reasons of public order, banned. Instead, *we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views.*[48]

As Justice Harlan asserts, the most significant side effect of the Supreme Court's reasoning in this respect is that the *Tree Fruits* doctrine failed to give due consideration to the inherent expressive elements of the physical act of picketing and its psychological and economic consequences. Somewhat ironically, the Court's focus in *Tree Fruits* on the wording of the placards appears to have distracted it from the message that the placards themselves sent to potential consumers. Perhaps recognizing this, the Supreme Court in *Safeco* subsequently acknowledged the potential impact of the signalling effect of picketing. As Justice Stevens states in his concurring opinion in *Safeco*, "[i]n the labor context, it is the conduct element rather than the particular idea

48. *Ibid.* at 79 [emphasis added].

being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment."[49]

While the judicial and academic debate surrounding the decision of the U.S. Supreme Court in *Tree Fruits* has abated somewhat in recent years, the ratio in *Tree Fruits* has never expressly been overridden. To this day, it presents the American judiciary with practical obstacles primarily in the form of the numerous difficult-to-apply exceptions which developed in its wake.[50] Although the controversy has subsided somewhat, the lessons learned in the aftermath of *Tree Fruits* are equally as relevant and important today as they were four decades ago. Nevertheless, the Supreme Court of Canada in *Pepsi* relied heavily on this dubious decision to restrict the potential import of the signalling effect and, indirectly, to bolster its own argument in support of the wrongful action model. In doing so, the Court gave short shrift to the practical and analytical shortcomings of the *Tree Fruits* doctrine as exposed by subsequent academic and judicial criticism of the decision.

IV. Thoughts for the Pepsi generation: Secondary Picketing in the Wake of *Pepsi*

Similarities between *Tree Fruits* and *Pepsi* exist on a number of levels. In both cases, the highest court rejected a doctrine which held secondary

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49. *Safeco, supra* note 38 at 619.

50. In addition, it should be noted that the U.S. jurisprudence on secondary picketing manifests a number of important distinctions which continue to be litigated. Notable distinctions include those relating to picketing versus handbilling and secondary picketing designed to induce employees of the target to take job action versus secondary picketing designed to dissuade customers from patronizing the target or from purchasing products of the primary employer (*i.e.*, consumer picketing): see *e.g. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) and *Warshawsky & Company v. N.L.R.B.*, 182 F.3d 948 (D.C. Cir. 1999). While these distinctions raise several important and interesting questions (*i.e.*, at what point does handbilling become picketing? On what basis is a court supposed to make this distinction?), these issues are largely irrelevant in the context of the present article both because they were not recognized by the Supreme Court in *Pepsi* and because, in the case of handbilling, the issue has arguably been settled in Canada: see *U.F.C.W., Local 1518, v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083.

picketing illegal *per se* in favour of a less restrictive approach. In addition, both decisions were clearly influenced by underlying constitutional considerations and the desire to protect a striking union's right to freedom of expression. However, while there are numerous lessons to be learned from *Tree Fruits* and its progeny, the American experience is not so much a precedent as a cautionary tale.

As illustrated by subsequent U.S. jurisprudence, the distinction between general and struck product picketing set out in *Tree Fruits* and embraced by the Supreme Court of Canada in *Pepsi* has proven difficult to apply in practice. It has resulted in a struggle to establish exceptions to the general rule that can be applied to the practical realities of industrial conflict. In this respect, the Supreme Court's unexamined reliance on *Tree Fruits* stands in stark contrast to its stated objectives of avoiding "difficult and arbitrary"[51] distinctions and the *ad hoc* exceptions which typified the modified *Hersees* doctrine. Furthermore, as in *Tree Fruits*, the Court in *Pepsi* underestimates the coercive potential of the signalling effect. In so doing Justices McLachlin and LeBel effectively disregarded the statements of Justice Stevens in *Safeco* in which he acknowledges the signalling effect as "the most persuasive deterrent" to the public from doing business with a struck party.

The obvious and concerning question which arises is whether the decision in *Pepsi* has sent the Canadian judiciary down the same kind of path that caused its U.S. counterparts such difficulties in the aftermath of *Tree Fruits*. The answer to this question is still unclear, but what can be said is that the Supreme Court of Canada has done little in its decision in *Pepsi* to guide decision-makers down a more certain path. Indeed, the judgement of Justices McLachlin and LeBel manifests its own potential shortcomings. Principal amongst these is the Supreme Court's apparent optimism respecting the capacity of nominate and industrial torts to "grow and be adapted" to provide adequate protection to the economic and property rights of neutral parties. In so doing, the Court is counting a great deal on what one observer has characterized as "a disreputable old body of caselaw that has persistently defied clear

51. *Pepsi, supra* note 2 at paras. 79-80.

analysis and predictable, even-handed application."[52] As the Nova Scotia Court of Appeal recently stated, "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 trusted primarily, if not exclusively, to specialized labour relations tribunals."[53]

Should the nominate and industrial torts identified in *Pepsi* prove ineffective in regulating secondary picketing, the Supreme Court has arguably left open the possibility that injunctive relief may be granted where the signalling effect of the conduct in question is deemed excessive. It is not entirely clear, however, whether the Supreme Court envisioned "excessive signalling" as a stand alone basis for relief under the wrongful action model, or simply an analytical tool designed to assist courts in determining whether an independent tort has been committed. Regardless of its intention in this respect, the Supreme Court has attempted to define the circumstances in which the signalling effect will cross the line from acceptable persuasion to enjoinable coercion. In drawing this distinction, however, the Court suggests that judges must take into account a myriad of factors including the size of the community in which the dispute occurs, the diversity and *per capita* unionization rate of its population and union strength in the affected industry.[54] This will require judges to make highly subjective findings from which to draw questionable inferences which may or may not be corroborated by empirical evidence. As a result, not only does *Pepsi* leave subsequent courts to speculate as to the precise relevance of the signalling effect within the Court's "wrongful action" framework, the decision articulates a test for determining its relevance that may itself be deceptive.

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52. Bernard Adell, "Secondary Picketing after Pepsi-Cola: What's Clear and What Isn't" (2003) 10 C.L.E.L.J. 135 at 146.

53. *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 (C.A.) at paras. 38-39.

54. *Pepsi, supra* note 2 at para. 95.

Conclusion

As once observed by Oliver Wendell Holmes, "the life of the law has not been logic: it has been experience."[55] While it is perhaps premature to render a verdict on the wisdom of the Supreme Court of Canada's decision in *Pepsi*, the Court appears to have been blind to the lessons of the American jurisprudential history that followed the U.S. Court's pronouncement in *Tree Fruits*. With its wholesale condemnation of the illegal *per se* doctrine and the experience of the courts that followed, the Supreme Court has effectively denied itself the benefit of a practical labour relations perspective on secondary picketing, a perspective that is conspicuously absent from the wrongful action model. The Court has not established a clearer doctrine. Rather, it has established a new point of departure from which those involved in labour disputes will set sail on a voyage of exceptions, value judgements and unpredictability. Fifteen years from now those engaged in this voyage may well find themselves at a destination that is strikingly similar to where they were just prior to the Court's decision in *Pepsi*.

55. "Oliver Wendell Holmes, *The Common Law*, (Boston: Little, Brown and Co., 1923) at 1.