

# “EVERYBODY KNOWS WHAT A PICKET LINE MEANS”:

## *Picketing before the British Columbia Court of Appeal*

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IN 1951, IT WAS OBVIOUS TO Justice Cornelius O’Halloran, one of the most outspoken members of the British Columbia Court of Appeal (BCCA), that picketing was unlawful. According to him, “in a unionized city like Vancouver everybody knows what a picket line means. Many neutral individuals are afraid of patronizing places where labour picketers none too subtly convey by their organized and militant presence and patrol the unspoken threat ‘you better not patronize this place.’”<sup>1</sup> O’Halloran’s statement was made in a judgment that held that two trade unionists who paraded peacefully in front of a restaurant with signs that stated that the restaurant did not have collective agreements with the union were acting illegally.<sup>2</sup> His equation of picketing with coercion was not idiosyncratic. In its first one hundred years, despite several changes in the legal regime governing labour relations in the province and numerous changes in court membership, unions won only eight out of the thirty-eight decisions on the legality of picketing and obtained partial victories in another two (See Table 1 for a numerical breakdown and Appendix 1 for a complete list of cases).<sup>3</sup> However, the one-sided results obscure the extent of the debate within the BCCA, especially in its early years, over whether there was any room at all for

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<sup>1</sup> *Aristocratic Restaurants (1947) Ltd. v. Williams et al.*, [1951] 1 D.L.R. 360, 368.

<sup>2</sup> For more detailed discussion of the case and the holding, see below.

<sup>3</sup> We have not examined the record of the British Columbia Supreme Court, which heard injunction applications in the first instance. However, we suspect it was similarly hostile to labour picketing based on the fact that unions were the appellants in twenty-eight of the thirty-eight decisions to reach the BCCA. In identifying the universe of picketing cases decided by the BCCA, we have focused on the activity of picketing and consumer leafleting to the exclusion of boycott (hot) declarations and other forms of industrial action. We have also excluded purely technical and procedural cases that deal with questions of evidence and contempt cases that address whether union leaders and picketers complied with injunctions previously issued by the court. All of the cases were located by conducting Quicklaw searches and following up on cases cited within those cases. No archival searches were conducted. *Arsens*, the one unreported case we have, was referred to in one of the reported cases.

lawful picketing as well as over the greater success achieved by unions in cases heard in the post-*Charter* era.

TABLE 1  
*BCCA Picketing Cases, 1908-2008*

	1908-48	1949-58	1959-73	1973-82	1982-2008	Total
Employer wins	4	4	8	5	7	28
Union wins	0	1	2	0	5	8
Split	0	0	0	2	0	2
Total	4	5	10	7	12	38

This article documents the one-sidedness of the BCCA's picketing jurisprudence, highlights the legal reasons given by the judges to support their conclusions, and examines the extent of disagreement over picketing within the court. We have grouped the BCCA's picketing decisions into five periods, with each period representing a different mix of how collective bargaining and picketing were regulated. The first period, from 1908 to 1948, was marked by a combination of common law and ineffective statutory immunities. In the second period, from the passage of statutory collective bargaining in 1947 to the *Trade Union Act* in 1959, the court used breaches of labour statutes to perfect common law causes of action. In the middle period, which lasted through the 1960s until the early 1970s, the court interpreted the statutory code of picketing contained in the 1959 legislation very narrowly. With the introduction of the *Labour Code*, in 1973, which sought to severely limit the courts' regulation of picketing, the BCCA whittled away at the labour board's authority over picketing. Since 1982, the court has refused every attempt to use the *Charter's* guarantee of fundamental rights to create a protected space for picketing, but it has become more willing to accept the labour board's jurisdiction over picketing and to tolerate peaceful picketing in cases that do not involve the Constitution. In the conclusion, we suggest some possible explanations for the BCCA's consistent hostility towards picketing.

## IN THE BEGINNING

Between 1908 and 1948, picketing was governed by a messy amalgam of common law, civil statute, and criminal law. Its legality could be challenged most effectively through injunctions or the *Criminal Code*. An injunction is a particularly effective means of stopping picketing since it is a judicial order to stop specified conduct, the breach of which amounts to contempt of court. Between 1908 and 1948, there were three cases that reached the BCCA, and each involved peaceful picketing in front of a movie theatre, although the issues in dispute and the causes of action differed. These cases led to a great deal of judicial disagreement. However, the result in each was the same; the court upheld the restrictions on picketing.

The *Schuberg* case arose out of a strike in 1926 by unionized projectionists against the Empress Theatre in Vancouver after it laid off two union members. The striking workers distributed handbills to patrons, stating that the theatre was unfair to organized labour, while trade union members drove automobiles back and forth in front of the theatre with banners declaring the same. The employer obtained an injunction and the union appealed.<sup>4</sup> The fundamental question before the BCCA was whether workers enjoyed a common law privilege to peacefully picket their employer in order to advance their collective interests and, if not, to what extent the 1902 BC *Trades-Union Act*<sup>5</sup> (*TUA*) provided statutory immunity from the common law.

The panel of four judges hearing the case split evenly. Chief Justice James Alexander Macdonald and Justice Albert McPhillips were of the view that the picketing was unlawful at common law, although they had different reasons for their shared finding.<sup>6</sup> They also narrowly interpreted the scope of the immunity granted by British Columbia's 1902 statute. Section 2 of the *TUA* provided that trade unions were not subject to injunctions or liable for communicating facts or persuading

<sup>4</sup> *Schuberg v. Local Internat. Alliance Theatrical Stage Employees et al.*, [1926] 3 D.L.R. 166. Mary F. Southin discussed this case in an article published in the Vancouver Bar Association's magazine, *The Advocate*, before she joined the BCCA in 1988. See Mary F. Southin, "The Courts and Labour Injunctions," *The Advocate* 28 (1970): 74-84. In practice, Southin represented the Plumbers' Union in their successful appeal of the *Becker* case, discussed below. She was the first woman elected as a bencher (in 1971) and was widely known as an outspoken judge who issued a series of controversial decisions in a range of cases. We thank Hamar Foster for bringing this article to our attention.

<sup>5</sup> S.B.C. 1902, c. 66. A.W.R. Carrothers, "A Legislative History of the BC Trade-Unions Act: The Rossland Miners' Case," *UBC Legal Notes* 2, 4 (1956): 339-46. British Columbia was the only province that provided some statutory immunity to trade unionists from common law liability. As we shall see, however, its scope was narrowly interpreted by judges.

<sup>6</sup> *Schuberg v. Local Internat. Alliance Theatrical Stage Employees et al.*, [1927] 2 D.L.R. 20 at 21.

by fair or reasonable argument, while s. 3 granted similar immunity for publishing information about the strike or urging persons not to purchase or consume the struck employer's products. In the judges' view, the statute did not provide immunity for civil conspiracies to injure trade and, moreover, the picketing in this case was not communicating facts, persuading by argument, or publishing information but, rather, expressing a conclusion.<sup>7</sup>

In contrast, Justices Archer Martin and Malcolm Archibald Macdonald took a much broader view of both the common law privilege to picket and the scope of statutory immunity granted. With respect to the protected communication under the *TUA*, both held that the expression "unfair to labour" was permissible and that s. 3 clearly permitted a union to urge members of the public not to patronize an employer.<sup>8</sup> However, because of the equal division, the judgment of the lower court stood.<sup>9</sup>

The sharply contrasting views of the judges in *Schuberg* were replayed in the BCCA's two other picketing judgments during this period. *Rex v. Richards & Woolridge* involved an appeal from a conviction for criminal watching and besetting for picketing in front of the Edison Theatre in New Westminster. The same panel of judges that decided *Schuberg* heard this appeal, and again it split evenly over the issue. The question was whether the watching and besetting provision in the *Criminal Code* made all picketing, including peaceful picketing, criminal.<sup>10</sup> The stipulation in the *Code* that the section applied to persons who watched and beset "wrongfully and without lawful authority" seemed to make no difference to Chief Justice Macdonald or Justice McPhillips.<sup>11</sup> McPhillips took it as accepted law that picketing of all kinds wrongfully interfered with the right to do business. The picketing here, therefore, was wrongful and so the watching and besetting was criminal.<sup>12</sup>

Once again, Justices Martin and M.A. Macdonald dissented. Martin was of the view that the activity in question clearly came within the sphere of activity protected by the *TUA* and, therefore, that the union

<sup>7</sup> *Ibid.* at 22, 31. McPhillips did not deal with the part of s. 3 that permits trade unionists to urge persons not to purchase the employer's products.

<sup>8</sup> *Ibid.* at 22-29, 38-41.

<sup>9</sup> For a critique of the judgment, see Bora Laskin, "Picketing: A Comparison of Certain Canadian and American Doctrines," *Canadian Bar Review* 15 (1937): 10 at 16, 19. The resolution of the dispute is unknown, but whatever it was, it did not deter the Communist Party from subsequently holding the Lenin Memorial Concert at the Empress Theatre on 21 January 1937 (Glenbow Museum, Image No. NA-3634-16).

<sup>10</sup> *Rex v. Richards & Woolridge*, [1934] 3 D.L.R. 332.

<sup>11</sup> *Ibid.* at 334.

<sup>12</sup> *Ibid.* at 340-45.

had lawful authority to watch and beset; Macdonald held that, without wrongful behaviour, such as creating a nuisance or engaging in violence or intimidation, watching and besetting was not criminal. Thus, the peaceful picketing that occurred here was clearly permitted.<sup>13</sup> Again, an equal split allowed the conviction to stand.

The third case involved a dispute that arose when the owner of the Hollywood Theatre in Vancouver fired the one unionized projectionist on staff in order to hire his own son, who was not a union member, allegedly in violation of the agreement he signed with the union.<sup>14</sup> Initially, the picketing was confined to two people carrying signs to the effect that the theatre did not employ union projectionists. However, a larger solidarity picket involving some sixty to seventy people was organized by the district labour council, and the theatre was also placed on a "we do not patronize" list. An interim (temporary) injunction was issued and upheld by a unanimous BCCA.<sup>15</sup>

The case went to trial and the trial judge awarded a permanent injunction and damages. On appeal, Martin, who was now the chief justice, would have allowed the initial picketing on the basis of his earlier reading of the *TUA* but, for reasons not stated, found that the mass picketing was unprotected by statute.<sup>16</sup> However, the two more recently appointed justices, William McQuarrie and O'Halloran, perhaps offended by the union's interference with the "natural" desire of a father to train his son to enter the family business, hewed to a much tougher line, and they found all of the picketing to be wrongful.

Justice O'Halloran's decision merits consideration as one of the most anti-union judgments written at the appellate level in Canadian history. He declared: "[T]he term 'peaceful picketing' has no place in the law of this Province. It is a negation in terms ... Without intimidation, obstruction and moral coercion [picketing] was useless for the purposes employed; with them it was provocative."<sup>17</sup> He concluded that the picketing received no protection from the *Trade Union Act*: "By no straining of the language may such terms as 'communicating,' 'persuading,' 'recommending,' 'advising,' 'warning,' and 'urging' be extended to include marching backwards and forward in an organized manner in

<sup>13</sup> Ibid. at 334-40, 345-47.

<sup>14</sup> At the time of writing the Hollywood Theatre was still in operation. At the top of its web page it proudly states: "FAMILY OWNED & OPERATED FOR 73 YEARS," <http://www.hollywoodtheatre.ca> (viewed 20 May 2009).

<sup>15</sup> *Hollywood Theatres Ltd. v. Tenney et al.*, [1939] 2 D.L.R. 745. (*Hollywood Theatres* (1)). See Southin's discussion of this case, *supra* note 4, 77.

<sup>16</sup> *Hollywood Theatres v. Tenney*, [1940] 1 D.L.R. 452. (*Hollywood Theatres* (2)).

<sup>17</sup> Ibid. at 459.

front of the employer's premises, let alone include the organized mass demonstration of June 11.<sup>18</sup> By taking action to enforce its interpretation of the contract, O'Halloran claimed that the union sought to "override the 'rule of law' ... Any attempt to place labour or business controversies outside of organized society and refuse to subject them to social controls is repugnant equally to our common law and our statute law."<sup>19</sup> The irony is that the union had to resort to self-help to enforce its collective agreement because English and Canadian courts had previously ruled that collective agreements could not be enforced in courts. Moreover, O'Halloran failed to acknowledge that the employer had engaged in self-help; instead of taking the dispute over the closed shop in the collective agreement to court, the employer simply fired the unionized worker over the union's objection that this was a breach of their agreement.<sup>20</sup>

It is striking that all the picketing cases that reached the BCCA during this period arose in the context of disputes between movie projectionists and theatre owners. This was hardly the work setting most prone to violent labour confrontations, which were far more common in the primary resource sector, on the waterfront, and with the unemployed. However, in those contexts injunctions were not the legal instrument of choice; rather, employers relied on the police and the criminal law to control disruptive worker collective action.<sup>21</sup> Picketing in front of theatres in urban locations may have seemed particularly problematic to judges because it targeted consumers as much as owners and, therefore, may have been seen as adversely affecting the rights of "innocent" third parties.<sup>22</sup> Moreover, movie-going was connected with the growth of mass consumption in the twentieth century, which itself required the creation of common orderly spaces where middle-class patrons could safely mix with working-class viewers.<sup>23</sup>

<sup>18</sup> Ibid. at 464.

<sup>19</sup> Ibid. at 471.

<sup>20</sup> See also Bora Laskin, "Labour Law: 1923-1947," *Canadian Bar Review* 26 (1948): 286, 295-96 (referring to O'Halloran's judgment as a "complete emasculation" of the TUA).

<sup>21</sup> Stuart Marshall Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-66* (Ottawa: Task Force on Labour Relations, Study 22 1968) 202-06, 227-70; Judy Fudge and Eric Tucker, *Labour before the Law* (Oxford: Toronto, 2001) 153-262.

<sup>22</sup> In that regard, it is interesting to speculate about the relation between O'Halloran's hostility towards consumer picketing and his dissent, less than one year later in *Rogers v. Clarence Hotel Ltd*, [1940] 3 D.L.R. 583, in which he would have allowed a Black man to sue a hotel for refusing to serve him on the basis of his race. Perhaps it was a belief that the common law ought to protect the freedom of the individual consumer that connected these positions. For a discussion of the *Rogers* case and O'Halloran's dissent, see James W. St. G. Walker, "Race," *Rights and the Law in the Supreme Court of Canada* (Toronto: Osgoode Society, 1997) 174-76.

<sup>23</sup> Paul S. Moore, "Movie Palaces on Canadian Downtown Main Streets: Montreal, Toronto, and Vancouver," *Urban History Review* 32, 2 (2004): 3.

In any event, notwithstanding significant dissent, by the end of the Second World War the BCCA had distinguished itself by having one of the most restrictive views of picketing in Canada, despite the fact that British Columbia was the only province with legislation granting trade unions a modicum of immunity from civil liability. The *TUA* had been "reduced to impotence by courts whose fixed idea about the nature of legitimate business conflict allowed little sympathy for effective trade union activity."<sup>24</sup>

#### COMMON LAW CONTROLS IN A STATUTORY COLLECTIVE BARGAINING REGIME 1947-58

Along with the other provinces, British Columbia enacted a statutory collective bargaining scheme after the Second World War. The 1947 *Industrial Conciliation and Arbitration Act (ICAA)* provided unions with protection against unfair employer practices and gave them the right to become certified as the bargaining agent of a defined group of workers if the union could demonstrate majority support. It also imposed controls on the right to engage in industrial action by prohibiting strikes during the life of the collective agreement and requiring the parties to undergo conciliation before resorting to strikes or lockouts. The legal regulation of picketing, however, remained a matter for the courts. In this period the courts continued to address the scope for picketing permitted under the criminal and common law and the scope of immunity granted by the *Trade Union Act*. But now they also had to deal with the implications of the *ICAA* for the law of picketing.

The second case to reach the BCCA under the new regime was *Aristocratic Restaurants*.<sup>25</sup> The employer operated a chain of restaurants, but the union had only succeeded in organizing and becoming certified under the *ICAA* as bargaining agent for the employees at one of the plaintiff's restaurants. The union had been unable to negotiate a collective agreement for that restaurant, and the employees there quit the union.

<sup>24</sup> I.M. Christie, *The Liability of Strikers in the Law of Tort* (Kingston, ON: Queen's University Industrial Relations Centre, 1967) 55. For another lengthy parsing of the *TUA* 1906 and the court's interpretation, see A.W.R. Carrothers, "The Right to Picket in British Columbia: A Study in Statutory Interpretation," *University of Toronto Law Journal* 9 (1951): 250, 263-75.

<sup>25</sup> [1951] 1 D.L.R. 360. The first case, *Arsens v. Hotel and Restaurant Employees Union, Local 459*, was unreported and no written decision has been located. However, there is an entry in the order book, dated 14 June 1950, reversing the decision of Wood, J., who had dissolved the interlocutory injunction issued by Macfarlane, J. The BCCA panel consisted of O'Halloran, Robertson, and Bird. See British Columbia Archives (BCA), GR-1572, vol. 16, no. 2. See also Southin's discussion of this case, *supra* note 4 at 78.



Despite its lack of members, the union remained the certified bargaining agent for the employees at the restaurant it had organized. In an attempt to get a collective agreement for that restaurant, it hired picketers, who, two at a time, paraded peacefully in front of the restaurant for which it had bargaining rights as well as in front of the employer's other restaurants, for which it did not have bargaining rights. The picket signs stated the fact that these restaurants did not have union agreements. At trial, Justice John Owen Wilson held that, while it would be unlawful intimidation to accost prospective patrons and warn them that "this is a picket line" or to obstruct the entrance to the restaurant, there was nothing unlawful about what the picketers had done in this case, which was silently to hold up signs that made truthful statements, even if that caused damage to the employer.<sup>26</sup>

Once again, the three justices who heard the employer's appeal disagreed on the result, although the majority, consisting of Justices O'Halloran and Sidney Smith, allowed the appeal.<sup>27</sup> O'Halloran wrote another lengthy judgment dealing with the legality of picketing under the pre-existing law as well as with the effect of the *ICAA*. He was clearly not pleased with Wilson's attempt to treat some parts of his judgment in *Hollywood Theatres* as non-binding (*obiter*).<sup>28</sup> In his view, all picketing was wrongful even if conducted in silence. O'Halloran supported his claim with the comments quoted in the opening paragraph of this article.

O'Halloran also addressed the question of whether labour picketing was permissible other than when the prerequisites for a lawful strike had been fulfilled. He was firmly of the view that it was not; the *ICAA* was to be read as a complete code that gave unions certain rights in exchange for a restriction on the privilege to resort to economic pressure until the machinery of conciliation had been exhausted. As a result, picketing that occurred without strict compliance with the requirements of the *ICAA*

<sup>26</sup> [1950] 4 D.L.R. 548. Wilson was a small-town lawyer prior to his first judicial appointment to the Cariboo County Bench in the 1930s. According to John Stanton, a union-side lawyer, Wilson was a well respected member of the establishment, but his practical experience in the North and his common sense informed his judgments. See John Stanton, *Never Say Die! The Life and Times of a Pioneer Labour Lawyer* (Ottawa: Steel Rail Publishing, 1987) 112. In a 1979 interview, Justice Wilson stated that he was involved in labour disputes as a conciliator early in his career and that as a young practicing lawyer in Prince George he felt very sorry for the workmen, because they were getting the worst of it. However, he also went on to say that he no longer felt that way at the time of the interview. See Transcript of Interview with the Honourable J.O. Wilson (Aural History Programme, British Columbia Legal History Collection Project, Faculty of Law, University of British Columbia, June/September 1979), 28-29.

<sup>27</sup> *Supra* note 25 at 374-81. Justice Robertson disagreed with the view that a strike that violated the *ICAA* lost the immunities granted by the *TUA*. Moreover, he held that picketing was not per se tortious or criminal.

<sup>28</sup> *Ibid.* at 366.



for a lawful strike was itself unlawful.<sup>29</sup>

The case was appealed to the Supreme Court of Canada (scc), the first BCCA picketing case to come before that court. A majority of the scc allowed the appeal, Charles H. Locke J. and Thibaudeau Rinfret C.J.C. dissenting.<sup>30</sup> The multiplicity of judgments that created the majority make it difficult to state a clear holding, but the important points of agreement were that peaceful picketing was neither criminal watching and besetting nor per se tortious. Moreover, the failure to comply with the requirements of the *ICAA* was not relevant to the legality of the picketing. For the first time, the scc clearly affirmed the legality of peaceful picketing. But the limits of the judgment, and especially of the courts' commitment to it, soon became apparent, and the BC courts played a leading role in the process of eroding its impact.<sup>31</sup>

The first BCCA judgment on picketing after *Aristocratic* was *Hammer v. Kemmis et al.*<sup>32</sup> The case arose out of an organizing drive at a small bakery. The employer terminated two bakery employees, and the union picketed with the aim of pressuring the employer to sign the standard agreement it had with other wholesale bakeries. The bakery obtained an injunction, and the union appealed. Justice Frederik Sheppard, writing for himself and Henry Bird, denied the appeal.<sup>33</sup> Once again, however, the BCCA was split as Justice Herbert William Davey dissented. The majority upheld the trial judge's finding that the object of the union was not to advance its own interests but, rather, to punish the bakery for dismissing the two employees and not signing its agreement. As well, the means used were unlawful since the pickets "accosted intended customers, stared in their faces so as to cause the customers to become frightened and leave without entering the store," a finding based entirely on affidavit evidence (which is not subject to cross-examination by the

<sup>29</sup> Ibid. at 368-74. This aspect of the judgment was endorsed by T.R. Wilcox, "Labour Relations-Picketing-Illegal Strike-Injunction," *Canadian Bar Review* 29 (1951): 531 at 535-36 ("the interests of the community demand that the provisions of the statute designed to promote industrial peace be exhausted before the parties are free to resort to their own devices"). For a more critical view, see A.W.R. Carrothers, "The Right to Picket in British Columbia: A Study in Statute Interpretation," *University of Toronto Law Journal* 9 (1952): 250, 283-87.

<sup>30</sup> [1951] 3 D.L.R. 769.

<sup>31</sup> Earl E. Palmer, "The Short, Unhappy Life of the 'Aristocratic' Doctrine," *University of Toronto Law Journal* 13 (1960): 166.

<sup>32</sup> (1956), 3 D.L.R. (2d) 684.

<sup>33</sup> Henry Bird had been counsel to Pacific Lime Ltd. during a bitterly fought and violent strike in Blubber Bay in 1938. The company invoked its common law rights to evict workers from company housing and to limit their mobility in a company town. On the strike, see Andrew Parnaby, "What's Law Got to Do with It? The IWA and the Politics of State Power in British Columbia, 1935-1939," *Labour/Le Travail* 44 (Fall 1999): 9. For a brief discussion of Bird's role, see Stanton, *supra* note 26 at 19.

other party) submitted by the employer. According to the majority, none of this behaviour was protected under the *TUA* since these activities went beyond communicating or persuading by fair or reasonable argument. And finally, they distinguished this case from *Aristocratic* because, in this instance, the defendants committed wrongful acts that went beyond the fair and reasonable actions of the picketers in the former case.<sup>34</sup>

The majority decision in *Hammer* seemed to signal the unwillingness of the BCCA to accept the SCC's more liberal view of the scope of lawful picketing. Thus, it was somewhat surprising when, two years later, in *Becker*, the next picketing case to reach it, a unanimous panel of the BCCA, which included O'Halloran and Smith, allowed an appeal and set aside an injunction. This was the first time a union won a picketing case in the BCCA.<sup>35</sup>

The case arose when unionized plumbers who were lawfully locked out by their employer responded by peacefully picketing the construction site where they had been employed. As a result of the picketing, other construction workers on the same site refused to cross. O'Halloran accepted that the SCC had rejected his view that all picketing was intimidation, and he also found no evidence that the picketing at the construction site was otherwise wrongful. The picket signs simply stated that the workers were locked out, and there was no evidence of a civil conspiracy to injure trade. The union's appeal was successful and the injunction was lifted.

While *Becker* indicated the court's acceptance of that part of the SCC's holding in *Aristocratic* that picketing was not per se wrongful intimidation, it remained an open question whether the BCCA would also embrace the SCC's holding that the failure to comply with the requirements of collective bargaining legislation did not make picketing wrongful for that reason alone. The answer came three months later in the *Therien* case,<sup>36</sup> which arose when the Teamsters' union threatened to picket the employer unless it complied with the union's interpretation of the collective agreement and terminated its contract with an independent contractor, Therien, who was not a member of the union. Despite some points of divergence among the three judgments, they agree on one key issue: a breach of the labour relations statute constituted the unlawful means that made picketing or other collective action tortious under

<sup>34</sup> Supra note 32 at 702-07.

<sup>35</sup> *Becker Construction Co. Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry et al.* (1958), 15 D.L.R. (2d) 354.

<sup>36</sup> *Therien v. International Brotherhood of Teamsters* (1959), 16 D.L.R. (2d) 646 (Davey dissenting in part).

common law. All three judges expressed concern that the threat to picket violated the statutory requirement to resolve disputes over the interpretation and application of a collective agreement through arbitration.

The case was appealed to the SCC, which unanimously upheld the BCCA. Charles Locke J., who had dissented from the SCC's judgment in *Aristocratic Restaurant*, wrote the main opinion. It is noteworthy that Locke, who was appointed to the SCC in 1947 directly from his BC law practice, had represented lumber companies resisting the International Woodworkers' efforts to organize their employees in the early 1940s, arguing that the union was opposed to the war effort.<sup>37</sup> In his *Therien* opinion, Locke J. agreed with the BCCA that breach of statute could constitute the unlawful means requirement of a common law tort. He also agreed that the threat to strike violated the arbitration provision and, therefore, made the union liable for interfering with another man's method of gaining his living by illegal means.<sup>38</sup>

By the end of the second period, the BCCA continued to take a very narrow view of the scope for lawful picketing. Although the court accepted the SCC's rebuke that not all peaceful picketing was either criminal, watching or besetting or tortious, it was still prone to find that the union either had an unlawful purpose or had used unlawful means and, thus, had exceeded the narrow limits available for lawful picketing.

#### INTERPRETING THE FIRST LEGISLATIVE PICKETING CODE: 1959-73

In 1959, the BC legislature passed a new trade union act, which codified the law of picketing and union liability.<sup>39</sup> The legislation was prompted by a spate of controversial injunctions that precipitated a study of the *Trade-Unions Act*.<sup>40</sup> The new *Trade-Unions Act* provided a very restrictive definition of lawful picketing. Lawful picketing could not involve acts that were otherwise unlawful; it could take place only during a legal strike or lockout; it was restricted to the employer's place of business; and it was limited to persuading or endeavouring to persuade someone

<sup>37</sup> Stanton, *supra* note 26 at 61-67.

<sup>38</sup> *International Brotherhood of Teamsters et al. v. Therien* (1960), 22 D.L.R. (2d) 1, at 13.

<sup>39</sup> *Trade-Unions Act*, S.B.C. 1959, c. 90. For a detailed analysis of the statute and its relation to previous law, see A.W.R. Carrothers, "The British Columbia Trade-Unions Act, 1959," *Canadian Bar Review* 38 (1960): 295. For a brief note on the statute published under the same title by the same author, see *University of Toronto Law Journal* 13 (1960): 278.

<sup>40</sup> Carrothers, *Labour Injunction*. For background on the legislation, see Jamieson, *Times of Trouble*, 374-86.

not to enter into the employer's place of business, handle the employer's products, or do business with the employer. The 1959 *Trade-Unions Act* also created a statutory right of action against trade unions that violated the labour relations statute or picketed illegally. All that the unions gained from the legislation was limited immunity against liability for civil conspiracies to injure.<sup>41</sup>

The BCCA's approach to labour relations conflict after 1959 was best summed up by Mary F. Southin in an article she published in *The Advocate* before she joined the BCCA: "While the Court of Appeal may no longer think that strikes and picketing are the 8th and 9th deadly sins, it nevertheless[,] with all deference[,] still does not understand the dynamics of labour disputes."<sup>42</sup> As in the earlier periods, and as Southin indicates, the BCCA interpreted the law in the manner that most restricted the scope for legal picketing, although, once again, strong dissents were frequent.

The issue of picketing at a site at which employees of other employers were employed, known as a common site of employment, arose in the first case to reach the BCCA in this period, *Pacific Coast Terminals*.<sup>43</sup> The longshoremen's union was on a lawful strike against the BC Shipping Federation and placed pickets at the entrances to the docks, which were also the entrances to the Pacific Coast Terminal warehouses. Although there was no dispute with Pacific Coast Terminal, the union refused to issue passes to its unionized employees, and, as a result, they refused to cross. The application by Pacific Coast Terminal to prohibit picketing at these entrances was granted in the first instance on the basis that the object of the union was to interfere with the plaintiff employer's operations to bring pressure on the struck employer. A unanimous BCCA upheld the decision.

The desire to narrowly limit the impact of strikes to the immediate parties, even in the context of common site employment, manifested itself again in *Koss v. Konn et al.*,<sup>44</sup> in which a representative of the carpenters' union informed a contractor that all of the carpenters on a job would have to be union members. When the contractor continued to hire non-union carpenters, the defendant appeared outside the job site

<sup>41</sup> Union members would not be liable for actions that would not be wrongful if committed by an individual. The statute also limited the availability of interim injunctions against lawful strikes under the labour relations act to situations where they were necessary to safeguard the public order or prevent substantial and irreparable injury to property – a provision that largely codified the existing common law.

<sup>42</sup> *Supra* note 4 at 78.

<sup>43</sup> (1959), 21 D.L.R. (2d) 249.

<sup>44</sup> (1961), 30 D.L.R. (2d) 242.

with a sign stating that non-union men were working, which resulted in some suppliers refusing to deliver material to the construction site. The plaintiff obtained an injunction on the basis that the picketing violated the 1959 *TUA*. The union appealed on the ground that it was not attempting to persuade but merely to provide information and that, to the extent the *TUA* prohibited such communication, the legislation was ultra vires the province's jurisdiction since restrictions on freedom of speech were a matter of federal jurisdiction. Writing for the majority, Justice Charles Tysoe rejected the union's claim that it was not attempting to persuade. He drew an analogy between picketing and torture to make the point that persuasion could take place without words: "I am sure the unfortunate victims of the rack or the thumbscrew required no words from their torturers to make them understand the purpose behind and the results expected of the ordeal they were undergoing ... I mention these things to illustrate the wide significance of the word 'persuade' and to show how conduct can be as powerful a means of persuasion as words."<sup>45</sup>

Turning to the activity in question, Tysoe continued: "The defendant was not giving out this information in the abstract ... He must have hoped for some result from his conduct and I think every girl and boy of high school age would know his hope, his intention and his purpose was to persuade persons not to do any or some of the things set out [in the statute]."<sup>46</sup> Moreover, according to him, this restriction was properly a matter within the provincial power to legislate with respect to property and civil rights since its "true object ... is ... protection of the liberty of a person to carry on his legitimate business ... and to the use of his premises without interference, except when he is an employer who is himself involved in a legal strike or a lock-out."<sup>47</sup>

Justice Thomas Norris disagreed strongly. He noted that a penal statute should be constructed narrowly to limit the scope of its prohibitions and that there was a legitimate distinction between merely conveying information and persuading. On the basis of a narrow interpretation of the meaning of persuasion, Norris would have upheld the jurisdiction of the province. However, if the limitation on expressive activities was to be read more broadly, then he doubted that the province had the authority to legislate.<sup>48</sup>

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<sup>45</sup> Ibid. at 259-60.

<sup>46</sup> Ibid. at 261.

<sup>47</sup> Ibid. at 265.

<sup>48</sup> Ibid. at 243-57.

The 1959 statute clearly prohibited secondary picketing (picketing other than at the site of the employer's place of business), and the BCCA indicated its strong support for this position in *Bartle & Gibson*, where an injunction had been issued to prohibit picketing in front of stores selling the struck employer's products. The union challenged the injunction on a variety of technical grounds, but the court would have none of it. Justice Tysoe, writing for a unanimous bench, dismissed all three grounds of appeal and, in conclusion, stated: "We all know, unfortunately, persons who have no interest whatsoever in a labour dispute will insert themselves into that dispute and they will cause no end of trouble. The fact that there is a restraining order against a union does not seem to affect them. They will pay no attention."<sup>49</sup>

The BCCA was also called upon to address the legality of primary site picketing during a lawful strike on shopping centre property. In *Zeller's (Western)*, the court was faced with an application for an injunction from the employer, a tenant in the shopping centre, based on the claim that the picketing interfered with access to its premises and therefore constituted a nuisance, which made it "otherwise unlawful" and so in violation of the 1959 TUA. The end result was truly bizarre, reflecting the continuing conflict within the BCCA over the scope for workers' collective action. In the first round of litigation, the majority opinion, again written by Tysoe, and endorsed by Sheppard, took a very restrictive approach, suggesting that picketing on a right of way without the consent of the owner would almost inevitably constitute a nuisance because it would interfere with employees' and potential customers' access to the employer's property. Tysoe concluded, "I cannot conceive that any picketing of the nature which I suspect the appellant desires to engage in would not constitute such unlawful interference. If, however, it would not, the restraining order does not stand in the appellant's way."<sup>50</sup> Justice John Owen Wilson, who it will be recalled as a BC Supreme Court judge incurred the displeasure of Justice O'Halloran by attempting to narrow O'Halloran's anti-picketing holding in *Hollywood Theatres*, dissented. In his view, unlike in trespass cases, which involve actual entry onto the employer's property, not every unauthorized entry onto a common area of a shopping centre that was used to gain access to the employer's

<sup>49</sup> *Bartle & Gibson Co. Ltd. v. Retail, Wholesale and Department Store Union, Local 580* (1971), 18 D.L.R. (3d) 232 at 238.

<sup>50</sup> *Zeller's (Western) Ltd. v. Retail Food and Drug Clerks Union, Local 1518* (1962), 36 D.L.R. (2d) 581 (hereinafter *Zeller's*).

property amounted to a nuisance; rather, he argued, there must be proof of injury from the legal picketing, and, since none was offered, the injunction ought to have been refused.

Despite the clear implication of Tysoe's judgment, the union decided to test the waters and continued to picket peacefully. On the employer's application, the picketers were convicted of contempt for violating the injunction. The union appealed and the matter came before a differently constituted panel of the BCCA, consisting of Justices Sherwood Lett, Davey, and Sheppard. This time the court upheld the right of striking workers to picket. Writing for the BCCA, Davey expressed the view that the picketing clearly would have been lawful if conducted on a public street. The question, then, was whether otherwise lawful behaviour became unlawful when performed on a private easement in the context of a shopping centre to which the public was invited. For Davey, the answer was clear: "No significant distinction can be drawn in this case between picketing on a public sidewalk and on the privately owned right of way."<sup>51</sup> Rather than confront the clear difference between this view and the earlier view expressed in *Zellers 1*, Davey squared the circle citing the factual differences but did not attempt to identify the legally relevant ways in which the picketers' conduct differed in the two cases. As a result, the right of shopping centre tenants to enjoin picketing activity on mall property seemed to depend on the luck of the judicial draw. Davey, however, raised the possibility that the landlord could base an application for an injunction on trespass,<sup>52</sup> which was the path followed in future shopping-centre picketing litigation and was embraced by the scc in *Harrison v. Carswell*, a case from Manitoba.<sup>53</sup>

Five other picketing cases were heard by the BCCA in this period, four of which went against the union, although in two of the cases that the union lost there was a dissent. Two cases were about procedure and cut in different directions. In the first, the BCCA relaxed the standard an employer had to meet regarding presenting a fair question of law and

<sup>51</sup> *Zeller's (Western) Ltd. v. Retail Food and Drug Clerks Union, Local 1578* (1963), 42 D.L.R. (2d) 582 at 586 (hereinafter *Zeller's 2*).

<sup>52</sup> *Ibid.* at 586-87.

<sup>53</sup> [1976] 2 S.C.R. 200. For a discussion of the *Zeller's* decisions, see H.W. Arthurs, "Labour Law: Picketing on Shopping Centres," *Canadian Bar Review* 43 (1965): 357. The unionization drive at *Zeller's* was defeated, a fact noted by R.C. Haynes, "The Labour Movement and the Injunction in British Columbia," in BC Federation of Labour Injunction Conference (7 January 1967, mimeo). On the history of shopping centre picketing and *Harrison v. Carswell*, see Philip Girard and Jim Phillips, "A Certain Malaise: *Harrison v. Carswell*, Shopping Centre Picketing, and the Limits of the Postwar Settlement," in Judy Fudge and Eric Tucker, eds., *Work on Trial: Cases in Legal Context* (Toronto: Irwin and The Osgoode Society, forthcoming 2010).



establishing irreparable damage as a condition of obtaining an injunction, while, in the second, the court dissolved an injunction on the ground that the employer failed to meet the onus of proving irreparable loss.<sup>54</sup> In two other judgments, the BCCA narrowly interpreted what constituted an employer's place of business and respected corporate divisions within a large, functionally integrated enterprise,<sup>55</sup> while in a third it strictly interpreted the requirement to conduct a strike vote by the affected employees.<sup>56</sup> Overall, with the exception of *Zellers 2* and *Goloff*, the BCCA continued its tradition of narrowly interpreting the scope for legal picketing.<sup>57</sup> According to Southin, "faced with this social struggle [between employers and unions] the Courts have a choice. They can look at the words of the legislature and grant injunctions with abandon or they can attempt to understand the struggle and to apply existing equitable doctrines to these new problems."<sup>58</sup>

#### PRESERVING JUDICIAL POWER UNDER THE BC LABOUR CODE: 1973-82

In 1973, the newly elected NDP government enacted the *Labour Code of British Columbia*.<sup>59</sup> Although the *Code* made modest substantive changes to the law, it struck a blow to the courts' historic role of regulating picketing through the use of damages and injunctions by conferring exclusive jurisdiction on the labour board to deal with these matters, except in situations where there was an immediate and serious danger to life and health.<sup>60</sup> This restriction was a response to the BC Federation

<sup>54</sup> *Flanders Installations Ltd. v. International Woodworkers of America, Local 1-450 et al.* (1968) 66 D.L.R. (2d) 438 (Davey dissenting) (injunction upheld); *Goloff v. International Woodworkers of America Local 1-405* (1959), 29 W.W.R. 511 (injunction dissolved). Southin was very critical of the court's analysis in *Flanders*. She noted that the court simply failed to appreciate the damage that the union suffered when the injunction was issued. See *supra* note 4, 78-80.

<sup>55</sup> *Imperial Oil Limited v. Oil, Chemical and Atomic Workers International Union, Local 9-601 et al.* (1969), 69 W.W.R. 702; *Canada Safeway Limited v. Allied Workers, Local 373*, [1974] B.C.J. No. 51.

<sup>56</sup> *Terra Nova Motor Inn Ltd. v. Beverage Dispensers & Culinary Workers Union, Local 835 et al.* (1973), 42 D.L.R. (3d) 693 (Justice Nathan Nemetz dissenting).

<sup>57</sup> Thomas Berger, "The Use of Injunctions in Labour Disputes" (BC Federation of Labour Injunction Conference, 7 January 1967, mimeo), argued that the 1959 *Act* and its interpretation drastically curtailed the right to peacefully picket and to disseminate information and that it was responsible for the increased use of injunctions in BC labour disputes.

<sup>58</sup> *Supra* note 4, 81.

<sup>59</sup> *Labour Code of British Columbia Act*, S.B.C. 1973, c. 122.

<sup>60</sup> The exception to exclusive provincial jurisdiction was subsequently expanded by the NDP government to allow courts to act where "a wrongful act or omission ... causes an immediate danger or serious injury to any individual or causes an actual obstruction or physical damage to property." See S.B.C. 1974-75, c. 33, s. 8. This is the wording of the current exception.

of Labour's demand for the elimination of courts' injunctive powers in labour disputes. However, as Professor Harry Arthurs predicted, depriving courts of jurisdiction, rather than abolishing common law causes of action or immunizing the parties to an industrial dispute from their application, left the door open for the courts to assert an ongoing role in defining the permissible limits of economic conflict.<sup>61</sup>

Exclusive board jurisdiction over picketing could be limited in two ways. First, if the labour conflict was under federal jurisdiction, then the provincial *Code* did not apply and courts could continue to regulate the picketing on the basis of the common law. Two of the seven picketing cases heard by the BCCA during this period successfully challenged provincial jurisdiction on this basis.<sup>62</sup> The other way for the court to maintain its direct involvement in the regulation of industrial conflict was to interpret narrowly the statutory grant of exclusive jurisdiction to the labour board. This was the tack taken in two cases. In one the BCCA held that the *Code* did not apply to the picketing of provincially regulated employers by a federally certified union.<sup>63</sup> In the other, it held that the statutory grant of exclusive jurisdiction over picketing did not extend to actions brought by third parties who had not been declared to be involved in the labour dispute.<sup>64</sup>

Unsurprisingly, every time the BCCA found it had jurisdiction, it also upheld or granted an injunction.<sup>65</sup> In two cases, however, it modified terms of the injunction to make it less restrictive. In one case, it limited

<sup>61</sup> H.W. Arthurs, "Dullest Bill: Reflections on the Labour Code of British Columbia," *University of British Columbia Law Review* 9 (1974): 280 at 301-13.

<sup>62</sup> *Western Stevedoring Co. Ltd. et al. v. Pulp Paper & Woodworkers of Canada* (1975), 61 D.L.R. (3d) 701; *Jebens (U.K.) Ltd. v. Lambert et al.* (1975), 64 D.L.R. (3d) 564.

<sup>63</sup> *British Columbia Ferry Corp. v. Telecommunications Workers Union et al.* (1981), 128 D.L.R. (3d) 307; affirmed (1984), 13 D.L.R. (4th) 159 (scc).

<sup>64</sup> *Better Value Furniture (CHWK) Ltd. v. Vancouver Distribution Centre Ltd. et al.* (1981) 122 D.L.R. (3d) 12. For a critique of this decision and, more generally, of the reassertion of judicial jurisdiction in labour disputes, see Ian Donald, "The Return of the Injunction," in Joseph Weiler and Peter Gall, eds., *The Labour Code of British Columbia in the 1980s* (Calgary and Vancouver: Carswell, 1984) 147-58. Donald was subsequently appointed to the BC Supreme Court in 1989 and the BCCA in 1994. See below, 73-74.

<sup>65</sup> In *Jebens*, the BCCA found that: the picketing caused and aimed to cause damage to an innocent third party; there was interference with contractual relations between the plaintiff and its employees; there was an arguable case for conspiracy to interrupt contractual relations and procure a breach of contract; there were serious and irreparable damages to the plaintiff; and the balance of convenience heavily favoured the innocent third party. In *Western Stevedoring*, the BCCA granted the injunction on the ground that the picketing interfered with contractual relations, although no breach had occurred. In *Better Value Furniture*, the BCCA upheld the injunction on the ground that the threat to picket a non-allied employer constituted tortious inducement of a breach of contract. On this point, Hutcheon dissented; he interpreted the statute as granting unions immunity from actions for interference with contractual relations arising out of lawful strikes. In *British Columbia Ferry*, the court remitted the matter to the lower court. See also

the number of pickets to six instead of banning picketing altogether, while in the other it prohibited unlawful obstruction instead of limiting the number of pickets as the trial judge had done on the basis that the large number of pickets was itself a form of intimidation.<sup>66</sup> These cases suggest that a slightly more liberal attitude towards picketing was gaining some traction in the BCCA, although, as we shall see, it did not predominate.

#### THE CHARTER ERA: 1982-2008

The advent of the *Charter* raised unions' hopes that constitutional protection of freedom of expression and freedom of association would create more scope for trade union activity than was previously allowed. However, the BCCA did everything it could to dash these hopes. The BCCA considered picketing less as a form of constitutionally protected speech and more as a signal for action. Within the labour context, it considered even peaceful consumer leafleting to be coercive. Despite its negative view of picketing in *Charter* cases, of the five cases decided on non-*Charter* grounds, unions won four, more than doubling the labour movement's victories before the BCCA.

In the first *Charter* challenge to restrictions on picketing to reach the BCCA, *Dolphin Delivery*, Justice William Esson, writing for himself and Justice John Taggart, rejected the argument that picketing was a constitutionally protected expression because the picketing in question (even though no picketing had yet occurred) "was not of a kind which had as its purpose or object the conveying of information or opinion, or of persuading anyone to a point of view, or any purpose or object which could reasonably come within the term 'expression.'"<sup>67</sup> In support of this conclusion, Esson drew on the work of Paul Weiler, a respected former chair of the British Columbia Labour Relations Board and labour law scholar, who, in 1980, characterized union members' response to picket lines as "almost Pavlovian,"<sup>68</sup> making picketing, in Esson's view, not the kind of rational expressive activity that deserved much in the way

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*Holland America Cruises N.V. v. Galewicz* [1975] B.C.J. No. 5, upholding an injunction issued to restrain threatened picketing against a cruise ship with a non-union crew.

<sup>66</sup> *Muckamuck Restaurant Ltd. v. Service, Office and Retail Workers Union of Canada Local No. 1 et al.* (1979), 14 B.C.L.R. 97; *Vancouver Museums and Planetarium Assn. v. Vancouver Municipal and Regional Employees' Union* (1981), 27 B.C.L.R. 73. The basis for judicial jurisdiction in these cases is not stated and, presumably, was not contested on appeal.

<sup>67</sup> *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580 et al.* (1984), 10 D.L.R. (4th) 198, 212. He dismissed the claim that freedom of association protected picketing on the ground that the freedom protected the right of individuals to join a union but did not protect the purposes of the association or the means that it used to achieve its purposes.

<sup>68</sup> Paul Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) 79.

of constitutional protection.<sup>69</sup> In a concurring judgment, Justice H.E. Hutcheon held that all peaceful picketing is constitutionally protected expression. However, he upheld the injunction on the basis that the limitation of expressive activities that interfered with contractual relations was demonstrably justifiable.<sup>70</sup> The BCCA also rejected the claim that freedom of association protected picketing on the ground that freedom of association protected the rights of individuals to join associations but not the purposes or means used by associations to achieve their purposes.<sup>71</sup>

*Dolphin* was appealed to the SCC, where Justice William McIntyre, a graduate of the BCCA,<sup>72</sup> writing for the majority, agreed with Hutcheon both that picketing was protected expression and that restrictions placed upon it were demonstrably justified. Like Esson, however, McIntyre also quoted with approval Weiler's characterization of picketing's signal effect.<sup>73</sup>

The next *Charter* case involved picketing before the court houses of the province, and the BC judiciary acted with righteous indignation to ensure that unions got the justice the judiciary believed they deserved. During a strike by government workers, Chief Justice Allan McEachern, of the British Columbia Supreme Court, arrived at work one day to find court workers on lawful strike picketing the court house. He issued an injunction on his own initiative ordering the union and its members to stop picketing at courts across the province and, subsequently, refused the union's application to dissolve the injunction.<sup>74</sup>

On appeal, the BCCA, in the first picketing judgment signed by the court instead of identifying the author, found it obvious that access to the courts would be inhibited by the presence of peaceful picketers, despite the fact that there was not a shred of evidence that anyone had been deterred from entering the court house. The court also rejected the argument that it lacked jurisdiction to issue the injunction on its own motion since the *Labour Code* gave the labour board exclusive jurisdiction

<sup>69</sup> Supra note 67 at 213.

<sup>70</sup> Ibid. at 203-05. It has previously been determined by the British Columbia labour board that *Dolphin Delivery* was not an ally of Purolator, the company that was in a labour dispute with the union. Therefore, the proposed picketing was viewed by court as tortious because it aimed to induce a breach of contract between *Dolphin Delivery* and Purolator.

<sup>71</sup> Ibid. at 208.

<sup>72</sup> While on the BCCA, McIntyre sat on three picketing cases, *Canada Safeway*, *Western Stevedoring*, and *Jebsons*. In all three, the BCCA unanimously overruled lower court judgments refusing to grant an injunction. McIntyre was the author of the *Jebsons* judgment and wrote one of three concurring judgments in *Canada Safeway*.

<sup>73</sup> *Retail, Wholesale & Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd.* (1987), 33 D.L.R. (4th) 174 (SCC).

<sup>74</sup> (1984), 2 D.L.R. (4th) 705.

over picketing. Citing one of its earlier decisions,<sup>75</sup> the BCCA held that the *Code* did not oust the jurisdiction of the court to control picketing that violated the general and civil law. The picketing in this case was clearly in violation of the general law – the law relating to contempt of court: “It would be a monstrous situation, indeed, if a citizen were forced to delay or lose his *Charter* rights due to picketing or any other interference with his or her access to the courts.”<sup>76</sup> The BCCA was equally dismissive of the claim that the injunction infringed the very *Charter* rights that it was acting to preserve. It had “no doubt that the right of access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens”<sup>77</sup> and, thus, amply justified restricting picketers’ freedom of expression. On appeal, the SCC affirmed the BCCA’s decision and was just as vociferous in denouncing court house picketing.<sup>78</sup>

The BCCA was also dismissive of the claim that the *Charter* protected consumer leafleting in support of a strike. In *Kmart*, employees on a lawful strike at two stores leafleted consumers at two other non-unionized Kmart stores. The Industrial Relations Council, the renamed administrative tribunal administering the *Labour Relations Code*, restrained the leafleting as unlawful picketing. The union challenged the decision on the basis that it violated the striking workers’ freedom of expression. Writing for a unanimous BCCA, Justice D.B. Hinds accepted that the activities in question were protected expressive activity but found the restriction was justified under s. 1 of the *Charter*. The consumer leafleting was equivalent to traditional picketing in terms of its purpose and effect, and, as such, the analysis of the SCC in *Dolphin Delivery*, which set a low standard for justifying the restriction, applied.<sup>79</sup> On appeal, a unanimous SCC reversed the BCCA, drawing a very sharp distinction between consumer leafleting, which it associated with “informed and rational discourse,” and picketing, which, in the court’s view, had a coercive element.<sup>80</sup>

<sup>75</sup> *Better Value Furniture (CHWK)*, supra note 64.

<sup>76</sup> *Re British Columbia Government Employees’ Union and Attorney-General of British Columbia et al.* (1985), 20 D.L.R. (4th) 399, 404.

<sup>77</sup> *Ibid.*, 406.

<sup>78</sup> (1988), 53 D.L.R. (4th) 1. For a biting and insightful critique, see H.J. Glasbeek, “Contempt for Workers,” *Osgoode Hall Law Journal* 28 (1990): 1.

<sup>79</sup> *United Food and Commercial Workers Local 1518 v. Kmart Canada* (1997), 149 D.L.R. (4th) 119.

<sup>80</sup> *U.F.C.W. Local 1518 v. Kmart Canada* (1999), 176 D.L.R. (4th) 607, 630 (Cory). In the other *Charter* case, the BCCA did not accept the union’s invitation to revisit *Harrison v. Carswell* in light of the *Charter*. See 281856 *B.C. Ltd. v. Kamloops Revelstoke Okanagan Building Trades Union et al.* (1987), 37 C.C.L.T. 262.

During this period, the BCCA has also resolved eight non-*Charter* picketing cases based on the law regulating picketing discussed in the previous section, and unions were successful in five. Three cases dealt with disputes over whether the picketing was federally or provincially regulated. In one case, *Hecate Logging*,<sup>81</sup> the BCCA upheld a lower court decision that the matter fell within federal jurisdiction and affirmed the injunction that had been issued; however, in two other cases, it found that the dispute came under the exclusive jurisdiction of the provincial labour board and therefore dismissed applications for injunctions.<sup>82</sup> In another case, challenging the scope of the *Labour Code's* limitation of judicial jurisdiction over picketing, a unanimous court held that statutory bar against legal actions in relation to "petty trespass to land to which a member of the public ordinarily has access" did not preclude an action for trespass. Thus, it was up to the BCCA to determine whether the trespass in question was petty or not. The effect of this interpretation is that the court retains the jurisdiction to determine the nature of the trespass that was committed and, hence, whether an action can be brought in court.<sup>83</sup>

In its decisions on the scope of lawful picketing, the BCCA also seems more pluralistic now than in the past. In one case, it upheld an injunction requiring pickets to maintain a minimum distance from the employer's premises.<sup>84</sup> However, three others, especially two recent decisions authored by Justice Ian T. Donald, represent a clearer break with the BCCA's traditional hostility to picketing.<sup>85</sup> In the first decision, Donald started from "the principle that the courts intervene in labour disputes as little as possible,"<sup>86</sup> a principle to which the BCCA had never even paid lip service. He also regarded picketing as a legitimate tactic during a labour dispute: "[t]he parties are engaged in an economic struggle. The Union and its members have only two lawful weapons, the withdrawal of labour and picketing. Having exercised their right to picket peacefully, they should not have to operate with the sword of contempt over their

<sup>81</sup> *Hecate Logging Ltd. v. I.W.A., Local I-85* (1988), 29 B.C.L.R. (2nd) 318.

<sup>82</sup> *A.T.M. Automatic Teller Machines, Services, Ltd. v. Teamsters Local Union No. 213* (1985), 22 D.L.R. (4th) 282; *Maz Tudor Inns Ltd. v. Canadian Assn. of Smelter and Allied Workers* (1985), 24 D.L.R. (4th) 317.

<sup>83</sup> *Gateway Casinos LP v. BCGEU*, (2007), 67 B.C.L.R. (4th) 225.

<sup>84</sup> *Rogers Cable T.V. Ltd. v. I.B.E.W., Local 230* (1994), 111 D.L.R. (4th) 535.

<sup>85</sup> The other case, not discussed in detail, is *McLean Trucking Co. v. Canadian Freightways Ltd.* (1985), 64 B.C.L.R. 20, in which the court unanimously dismissed an employer's appeal from a lower court decision refusing an injunction on the grounds that the picketing was lawful.

<sup>86</sup> *Fletcher Challenge Canada Ltd. (MacKenzie Pulp Division) v. C.E.P., Local 1092* (1998), 155 D.L.R. (4th) 638, 641. In this case, the BCCA dissolved an injunction that was granted after the plaintiff's employee, who was not on strike, did not attempt to cross the union's picket line after being informed that he did not have the union's permission to do so.



heads.”<sup>87</sup> The two other judges on the panel agreed that the court should be especially careful not to go farther than necessary when deciding to enjoin picketing during a legal strike.<sup>88</sup>

In the second case, Donald reversed a lower court decision granting an injunction against picketing at Prince Rupert grain terminals by a union that was locked out by its employer at the Port of Vancouver terminals.<sup>89</sup> In reversing the lower court, Donald held that the judge had erroneously relied on the categorical distinction between primary picketing and secondary picketing, recently abolished by the scc.<sup>90</sup> Moreover, he held that the signalling effect of picketing did not make it wrongful.<sup>91</sup>

It remains to be seen whether Donald’s more liberal attitude towards picketing becomes the predominant one. As a practitioner, Donald frequently appeared as counsel for a variety of unions, including the Canadian Association of Industrial, Mechanical, and Allied Workers; the Canadian Association of Smelter and Allied Workers; and the BC Council of Carpenters. He also wrote a critique of the court’s reassertion of its power to issue injunctions despite the 1973 *Labour Code*’s grant of exclusive jurisdiction to the labour board.<sup>92</sup> But, he is clearly not alone in his more pro-labour views since four different judges joined him in the two opinions.<sup>93</sup> In the context of her decision in a case involving picketing before an abortion clinic, Justice Mary Southin’s characterization of the BCCA’s older labour picketing jurisprudence reflected her earlier opinion, written while she was still a practitioner:

<sup>87</sup> Ibid. at 641.

<sup>88</sup> Ibid. at 645 (Esson); 646 (Hall).

<sup>89</sup> *Prince Rupert Grain Ltd. v. Grain Workers’ Union, Local 333* (2002), 8 B.C.L.R. (4th) 91.

<sup>90</sup> *R.W.D.S.U., Local 558 v. Pepsi-Cola Beverages (West) Ltd.* (2002), 208 D.L.R. (4th) 385.

<sup>91</sup> *Prince Rupert Grain*, para. 55. Mackenzie J.A. wrote a brief concurring judgment in which he also embraced the wrongful action model but cautioned against unnecessarily saying anything that might impede the development of economic torts to protect third-party interests. In a subsequent judgment, the BCCA rejected an argument based on *Pepsi* that a conviction for contempt arising out of the violation of a labour injunction violated workers’ free speech rights. Apart from drawing a distinction between the injunction itself and its breach, the court also was of the view that the behaviour in question clearly went beyond the realm of protected speech. See *Telus Communications Inc. v. Telecommunications Workers Union*, 2007 BCCA 413.

<sup>92</sup> Donald, “Return of the Injunction,” supra note 64.

<sup>93</sup> Justices Esson, Hall, Mackenzie and Smith. Hall, however, was the author of the court’s opinion in *Gateway Casinos* (joined by Smith), which drew a dubious distinction between “trespass” and “pretty trespass” to narrow the scope of the labour board’s exclusive jurisdiction over picketing.



I think it is not unfair or unkind to say that by the 1950's, the courts of British Columbia were thought by some to be anti-labour because of the number of injunctions granted in labour disputes ... There is much to be said for the proposition that [precedents developed during the course of labour disputes] should be put permanently away and the court should give, in these cases where citizens take to the streets and an injunction is sought, a fresh consideration to the extent to which the court should go.<sup>94</sup>

## CONCLUSION

In its first hundred years, the BCCA considered thirty-eight picketing cases. These resulted in eight union victories and two split decisions. In twenty-eight cases the union was the appellant, and it lost outright 70 percent of the time. Employers were the appellants in ten cases and won eight, an 80 percent success rate. In some ways, the numbers speak for themselves and reflect the strength and consistency of the beliefs of a large majority of the BCCA judges who sat on such cases that picketing was inherently coercive – it had a signalling effect – and that the privilege to trade was of significantly greater social value than the privilege of workers to act collectively. However, what the numbers do not reveal is (1) the internal opposition of a minority of judges, particularly in the first sixty years of the court's history, to the restrictive approach adopted by the majority and (2) the signs of a possible shift in recent years. As well, the numbers do not reveal the reasons for the BCCA's remarkable record, so here we offer some explanations for it. Typically, attempts to explain judicial decision making offer some combination of internal and external reasons. We can partially account for the BCCA's record by pointing to strictures of precedent and traditional common law values reflected in precedent, such as individual autonomy, freedom of contract, and the fundamental importance of property rights. While clearly this is part of the explanation, it fails to account for the fact that most BCCA judges were generally less willing than were judges in other Canadian jurisdictions, including the SCC, to acknowledge that workers also enjoyed recognized legal privileges to engage in associational and expressive activities that advance their legitimate self-interest in obtaining improved terms and conditions of employment and that the accommodation of those privileges required some limitation on the rights that employers claimed. The so-called "taught tradition of the

<sup>94</sup> *R. v. Bridges* (1990), 78 D.L.R. (4th) 529 at 541-2. See *supra* note 4.

common law”<sup>95</sup> neither dictated nor fully explains the BCCA’s consistent hostility to picketing.

So we must also turn to external or contextual factors to explain the BCCA’s record on picketing. When studying individual decisions or judges it is possible to turn to judicial biography to understand how the background of a judge affected a judgment. We provided this kind of information about a few of the BCCA justices who participated in the picketing cases, but it is beyond the scope of this article to investigate the backgrounds of the more than forty justices involved in the thirty-seven judgments we discussed, to construct a collective portrait of the BCCA, or to look at institutional factors such as recruitment processes or patterns that may have shaped the court over its one-hundred-year history. Indeed, while the articles in this special issue of *BC Studies* contribute towards a better understanding of the BCCA, there is not yet a book-length history of the court that provides this kind of biographical or institutional information.<sup>96</sup> That said, in their introduction to this special issue, Hamar Foster and John McLaren point to the “corporate mindset” that characterized the judges who were appointed to the BCCA for much of its history, while also acknowledging that, in recent decades, there has been greater diversity in the backgrounds of appointees.<sup>97</sup> While this pattern may not be unique to British Columbia, it provides a partial explanation for the pattern of decision making we found.

We are also of the view that the BCCA’s jurisprudence is related to the social context of labour relations and features unique to British Columbia. Historically, British Columbia has been more densely unionized – as high as 51 percent in the 1950s – compared to other provinces. Class relations also have been more polarized and turbulent on the west coast than they have been elsewhere in Canada. This is because for much of British Columbia’s history unions in the province tended to be politically radical and organizationally militant, while key employers were closely aligned to the provincial government. Moreover, the resource-based economy was vulnerable to swings in the world economy, resulting in an unstable and conflict-prone labour market.<sup>98</sup> In this context, it is not surprising

<sup>95</sup> Roscoe Pound, “The Economic Interpretation and the Law of Tort,” *Harvard Law Review* 53 (1940): 365 at 367.

<sup>96</sup> Histories have been produced for some courts. For example, see Dale Brawn, *The Court of Queen’s Bench of Manitoba, 1870–1959: A Biographical History* (Toronto: University of Toronto Press, 2006). And there will soon be a book-length history of the BCCA. See Hamar Foster and John McLaren, “For the Better Administration of Justice” in this issue at 24.

<sup>97</sup> Foster and McLaren, *ibid.* at 16.

<sup>98</sup> British Columbia had larger and longer strikes than the other provinces because of the degree of centralization in the key resource sectors (i.e., forestry, mining, and fishing). It also had

that the majority of the BC judicial elite would treat with suspicion and at times hostility *the* union tactic – picketing – that most clearly called upon class solidarity and that demonstrated the potential for organized workers to disrupt not only their immediate employer’s operations but also the wider economy.<sup>99</sup>

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a vibrant socialist party and was the Canadian heartland of the Industrial Workers of the World. See Jean Barman, *The West beyond the West: A History of British Columbia*, 3rd ed. (Toronto: University of Toronto Press, 2007); Fudge and Tucker, *Labour before the Law*; Paul Phillips, *No Power Greater* (Vancouver: BC Federation of Labour, Boag Foundation, 1967).

<sup>99</sup> Most picketing cases that reached the BCCA, especially in the early years, did not arise from strikes in the resource sector but, rather, from urban picketing aimed at persuading consumers to refrain from patronizing struck businesses. Perhaps heightened class tensions and more solidaristic labour traditions made this kind of picketing all the more threatening to elites, including judges.

APPENDIX 1  
*Picketing cases, BCCA, 1908-2007*

	DATE	WINNER (UNION OR EMPLOYER)	UNANIMOUS OR DISSENT	ISSUE	APPELLANT (UNION/ EMPLOYER)	WHETHER LEAVE TO APPEAL TO SCC SOUGHT, GRANTED, OR DENIED, DECISION UPHeld, OVERTURNED
<i>Schuberg v. International Alliance Theatrical Stage Employees, Local 118</i>	4 January 1927	Employer	Dissent: 2:2	Scope of privilege to peacefully picket	Union	No leave sought
<i>R. v. Richards</i>	3 October 1933	Employer	Dissent: 2:2	Scope of privilege to picket under criminal law	Union	No leave sought
<i>Hollywood Theatres Ltd. v. Tenney (1)</i>	19 September 1938	Employer	Unanimous	Amount of evidence needed to issue interim injunction	Union	No leave sought
<i>Hollywood Theatres v. Tenney</i>	19 September 1939	Employer	Dissent: 2:1	Scope of privilege to peacefully picket	Union	No leave sought
<i>Arsens v. Hotel and Restaurant Employees Union, Local 459</i>	15 June 1950	Employer	Unanimous	Picketing - Civil (?)	Employer	No leave sought
<i>Aristocratic Restaurants (1947) Ltd. v. Williams et al.</i>	17 November 1950	Employer	Dissent: 2:1	Scope of privilege to peacefully picket; effect of breach of statute on privilege to picket	Union	Leave granted, overturned
<i>Hammer v. Kemmis et al.</i>	7 December 1956	Employer	Dissent: 2:1	Legality of picketing of non-union shop	Union	No leave sought
<i>Becker Construction Co. Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry et al.</i>	2 June 1958	Union	Unanimous	Legality of common site picketing after lock-out	Union	No leave sought
<i>Therien v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen &amp; Helpers, Building Material, Construction &amp; Fuel Truck Drivers, Local No. 23</i>	9 September 1958	Employer	Unanimous	Legality of picketing in breach of <i>Labour Relations Act</i>	Union	Leave granted, upheld
<i>International Longshoremen's &amp; Warehousemen's Union, Local 592 et al. v. Pacific Coast Terminals</i>	8 September 1959	Employer	Unanimous	Legality of common site picketing during strike	Union	No leave sought
<i>Goleff v. International Woodworkers of America Local 1-405</i>	18 September 1959	Union	Unanimous	Necessity of evidence of irreparable harm	Union	No leave sought
<i>Koss v. Konn et al.</i>	17 August 1961	Employer	Dissent: 4:1	Legality of common site picketing	Union	No leave sought
<i>Zeller's (Western) Ltd. v. Retail Food and Drug Clerks Union, Local 1518 (1)</i>	13 November 1962	Employer	Dissent: 2:1	Whether picketing on mall property constitutes a nuisance to tenant	Union	No leave sought
<i>Zeller's (Western) Ltd. v. Retail Food and Drug Clerks Union, Local 1518 (2)</i>	24 October 1963	Union	Unanimous	Whether picketing on mall property constitutes a nuisance to tenant	Union	No leave sought
<i>Flanders Installations Ltd. v. International Wood-Workers of America, Local 1-450 et al.</i>	15 December 1967	Employer	Dissent: 2:1	Definition of employer's place of business for secondary picketing	Employer	Leave denied
<i>Imperial Oil Limited v. Oil, Chemical and Atomic Workers International Union, Local 9-601</i>	14 July 1969	Employer	Unanimous	Whether subsidiary is employer's place of business	Union	No leave sought
<i>Bartle &amp; Gibson Co. Ltd. v. Retail, Wholesale and Department Store Union, Local 580</i>	18 January 1971	Employer	Unanimous	Technical requirements of affidavits supporting injunction application	Union	No leave sought
<i>Terra Nova Motor Inn Ltd. v. Beverage Dispensers &amp; Culinary Workers Union, Local 835 et al.</i>	29 October 1973	Employer	Dissent: 2:1	Picketing: Lawfulness of strike	Union	Leave granted, upheld

<i>Canada Safeway Ltd. v. Canadian Food and Allied Workers, Local 373</i>	5 April 1974	Employer	Unanimous	Legality of picketing the subsidiary of the struck parent	Employer	No leave sought
<i>Holland America Cruises N.V. v. Gratewitz</i>	27 May 1975	Employer	Unanimous	Legality of picketing cruise ship with non-union crew	Union	No leave sought
<i>Jobens (U.K.) Ltd. v. Lambert et al.</i>	6 August 1975	Employer	Unanimous	Scope of federal shipping & navigation jurisdiction	Employer	No leave sought
<i>Western Stevedoring Co. Ltd. et al. v. Pulp Paper &amp; Woodworkers of Canada</i>	14 August 1975	Employer	Unanimous	Picketing scope of federal shipping & navigation jurisdiction	Employer	No leave sought
<i>Muckamuck Restaurant Ltd. v. Services, Office and Retail Workers Union of Canada Local No. 1 et al.</i>	6 June 1979	Split	Unanimous	Scope of interim injunction re unlawful picket line activity	Union	No leave sought
<i>Better Value Furniture (CHWK) Ltd. v. Vancouver Distribution Centre Ltd. Et al.</i>	5 March 1981	Employer	Dissent: 21	Scope of labour board's exclusive jurisdiction, threats to picket	Union	No leave sought
<i>Vancouver Museums and Planetarium Assn. v. Vancouver Municipal and Regional Employees' Union</i>	3 April 1981	Split	Unanimous	Scope of interim injunction alleged involving intimidation	Union	No leave sought
<i>British Columbia Ferry Corp. v. Telecommunications Workers' Union et al.</i>	28 September 1981	Employer	Unanimous	Scope of federal jurisdiction	Employer	Leave granted, upheld
<i>Dolphin Delivery Ltd. v. Retail, Wholesale &amp; Department Store Union, Local 580 et al.</i>	5 March 1984	Employer	Unanimous	Application of <i>Charter</i> , freedom of association & expression, secondary picketing	Employer	Leave granted, upheld
<i>McLean Trucking Co. v. Canadian Freightways Ltd.</i>	4 June 1985	Union	Unanimous	Legality of common site picketing	Employer	No leave sought
<i>Re British Columbia Government Employees' Union and Attorney General of British Columbia et al.</i>	27 June 1985	Employer/ Judge (Injunction issued by judge on own motion)	Unanimous	Application of <i>Charter</i> , freedom of expression, picketing of court house	Union	Leave granted, upheld
<i>A.T.M. Automatic Teller Machines, Services, Ltd. v. Teamsters Local Union No. 213</i>	18 September 1985	Union	Unanimous	Scope of federal jurisdiction	Employer	No leave sought
<i>Maz Tudor Inns Ltd. v. Canadian Assn. of Smelter and Allied Workers</i>	23 December 1985	Union	Unanimous	Scope of labour board's exclusive jurisdiction, no recognized union	Union	No leave sought
<i>2886 B.C. Ltd. v. K.R.O.B.T.U. (B.C.C.A.)</i>	14 April 1986	Employer	Unanimous	Implications of <i>Charter</i> for common law trespass on mall property	Union	No leave sought
<i>Heate Logging Ltd. v. I.W.A., Local 1-85 (B.C.C.A.)</i>	5 July 1988	Employer	Unanimous	Scope of federal jurisdiction	Union	No leave sought
<i>Rogers Cable TV Ltd. v. International Brotherhood of Electrical Workers (IBEW)</i>	17 January 1994	Employer	Unanimous	Scope of interim injunction allegedly involving intimidation, etc.	Union	No leave sought
<i>United Food and Commercial Workers Local 158 v. Knart Canada Ltd.</i>	7 July 1997	Employer	Unanimous	Whether consumer leafletting in support of strike is protected by the <i>Charter</i>	Union	Leave granted, SCC reversed
<i>Fletcher Challenge Canada Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local Union 1092</i>	7 January 1998	Union	Unanimous	Availability of injunction to limit peaceful primary site picketing	Union	No leave sought
<i>Prime Rupert Grain Ltd. v. Grain Workers' Union, Local 333</i>	25 November 2002	Union	Unanimous	Grounds for issuing an injunction – primary/secondary distinction	Union	No leave sought
<i>Gateway Casinos LP v. British Columbia Government and Service Employees' Union</i>	16 March 2007	Employer	Unanimous	Scope of exclusive provincial jurisdiction – trespass v. petty trespass	Employer	No leave sought