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Labour Law – Picketing on Shopping Centres

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LABOUR LAW—PICKETING ON SHOPPING CENTRES.—The ancient market place was more than a private commercial complex: it was the hub of social intercourse and the forum for public debate and controversy. The modern shopping centre, seeking to emulate the commercial and social functions of the market place, has become as well the reluctant host of controversy.

Picketing by labour unions on shopping centre premises has recently been reviewed in three cases in the courts of British Columbia and Saskatchewan.¹ These cases throw into bold relief both the conflict between the public and private functions of the shopping centre and the difficulty of forcing public law pegs into private law pigeonholes.

The conflict between the public and private functions of the shopping centre stems from the fact that private ownership of side-

⁸⁵ *Supra*, footnote 1, at p. 329.

⁸⁶ *Ibid.*, at p. 330.

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¹ *Zeller's (Western) Ltd. v. Retail Clerks Union, Local 1518* (1962), 36 D.L.R. (2d) 581 (B.C.C.A.); *Zeller's (Western) Ltd. v. Retail Clerks Union, Local 1518* (1963), 42 D.L.R. (2d) 583 (B.C.C.A.); *Grosvenor Park Shopping Centre Ltd. v. Cave* (1963), 40 D.L.R. (2d) 1006 (Sask. Q.B.); *rev'd.* (1964), 49 W.W.R. 237 (Sask. C.A.).

walks, driveways, parking lots, and other areas is retained by the shopping centre operator, subject to the right of merchants to have access for themselves, their employees, their customers and their suppliers to the leased premises. Yet the success of the shopping centre for both operator and merchant, depends on the presence of the public in these very areas. When members of the community grow accustomed to coming to the shopping centre for their recreation, for social contact or to patronize a particular store, they are more likely to patronize all of the stores in the complex. Thus no attempt is made to ensure that persons entering the centre are prospective patrons of a particular merchant; rather all are welcome whether they come to shop or to stroll.

When a labour dispute arises between a merchant and his employees, it is natural that they will wish to picket near the locus of the dispute, their employer's business premises. There they can reach fellow-employees, customers and suppliers, and appeal for sympathy and support. Traditionally, this type of industrial warfare takes place on public sidewalks and streets, but in the shopping centre such areas are privately owned. May the pickets, then, reach the public where the public congregates, despite their intrusion on the private property interests of the operator and the merchant? The recent cases give an affirmative answer.

The *Zeller's* litigation² arose from the suit of a tenant to enjoin all picketing by his striking employees on a sidewalk in front of his store, on the ground that such picketing constituted illegal interference with his easement. The court of first instance granted an injunction against all picketing, but expressly refrained from enjoining conduct permitted by the British Columbia Trade-unions Act.³ That Act allows picketing during the course of a legal strike, and "without acts that are otherwise unlawful". The union argued that shopping centre picketing, otherwise unobjectionable, was within the protection of the statute. With this contention the appellate court disagreed. Tysoe J.A. held:

The difficulty in the way of this objection of the appellant is that substantial interruption of passage along a right-of-way is an unlawful act. The appellant has no more right to enter upon the lands over which the respondent has easement rights and to so interfere with those rights as to injure the respondent than it has to enter upon lands without the consent of the owner of those lands. The very purpose of picketing in the passageway and on any of the several lands over which the respondent has easement rights must be to hinder and deter employees of the respondent and its customers and prospective customers and other

² *Ibid.*

³ R.S.B.C., 1960, c. 384, s. 3(1).

persons who may have business with it from going to and from the respondent's store premises by the means available to them, namely, by using the passageway. As I have earlier said this constitutes, in my opinion, an unlawful interference with the easement rights. I cannot conceive that any picketing of the nature which I suspect the appellant desires to engage in would not constitute such an unlawful interference. If, however, it would not, the restraining order does not stand in the appellant's way.⁴

On the narrow ground that "a right of action in respect of obstruction of an easement . . . will only lie where the entry amounts to an obstruction causing injury to the plaintiff",⁵ Wilson J.A. dissented. As he noted:

. . . if we are to support that part of the injunction which prohibits any picketing on the area covered by the easement, we must surmise that legal picketing there will cause injury or damage. This may well be true, but we are not, I think, entitled to act on this sort of prophecy.⁶

Apparently determined to test the point, the union continued to picket on the sidewalk. The tenant moved to have the pickets committed for contempt of the injunction, and the trial judge made a finding that there had been a violation of the order forbidding picketing ". . . upon the lands and premises . . . over which . . . the plaintiff has an easement . . . or from doing any act amounting to a nuisance". From this finding, the union appealed.

Davey J.A., speaking for a unanimous court,⁷ set aside the conviction for contempt. Citing *Williams v. Aristocratic Restaurants*⁸ as authority for the proposition that peaceful picketing does not, *per se*, constitute a nuisance, he refused to vindicate the private property interests of the plaintiff.

I have difficulty in understanding how, on the material before us, conduct that would have been lawful upon a public sidewalk and so within the saving clause of the injunction became unlawful and in breach of the injunction because it occurred on a private sidewalk over which the respondent had an easement appurtenant to the store that was being picketed. I can see no essential difference between a public road and respondent's private easement that could produce that change in legal result.⁹

That the case depended on recognition of the public character of a shopping centre, despite private ownership, is evidenced by an *obiter dictum* to the effect that the pickets were stationed in an area

⁴ (1962), 36 D.L.R. (2d) 581, at p. 584 (Sheppard, J.A. concurring).

⁵ *Ibid.*, at p. 585.

⁶ *Ibid.*, at p. 586.

⁷ (1963), 42 D.L.R. (2d) 583. The court included Sheppard J.A., who had concurred in the majority decision of Tysoe J.A. in the original litigation.

⁸ [1951] S.C.R. 762.

⁹ (1963), 42 D.L.R. (2d) 583, at pp. 585-586.

"to which the public are invited" and that there was no evidence that the pickets "were exceeding the terms of the invitation to use the sidewalk held out to the public by the owner of the fee".¹⁰

The court's holding in the contempt proceeding, in effect, thus reversed the holding on the original injunction application by permitting picketing where it had formerly been forbidden. However, Davey J.A. did leave open the legality of the picketing when viewed as trespass in the context of an action by the shopping centre owner. Such an action, of course, would present squarely for decision the choice between the public and private character of a shopping centre.

This very issue arose in the Saskatchewan courts in *Grosvenor Park Shopping Centre v. Cave*.¹¹ Here a shopping centre owner sued to restrain picketing by a tenant's striking employees on the parking area and sidewalks. In answer to the owner's complaint of trespass, the union pleaded that the parking area and sidewalks should be treated as "quasi-public in nature" and as having "lost their identity as private property".¹² Rejecting an American case cited in support of this legally difficult proposition, Bence C.J.Q.B. held:

I am of the opinion that in this Province there is no such thing as quasi-public property. It is either public or private, and in this instance it is indisputably private. The plaintiff has the right to refuse access by persons to any property owned by it over which it has retained control. This would be all of the unleased portion of the shopping centre.¹³

Accordingly, an injunction was granted against trespass upon the plaintiff's land.

At this juncture, the first *Zeller's* case had decided that shopping centre picketing was enjoined at the suit of the tenant; the second *Zeller's* decision had not yet reversed this position. The trial decision in *Grosvenor Park* thus merely extended to the owner the right possessed by his tenant to have shopping centre picketing enjoined. However, with the second *Zeller's* decision, the anomalous situation arose that such picketing was either permitted or forbidden, depending on the identity of the plaintiff—permitted at the suit of the tenant, forbidden at the suit of the owner.

On appeal, the anomaly was erased. In a rather surprising judgment, the Saskatchewan Court of Appeal held that the owner could not maintain an action in trespass.¹⁴ Culliton C.J.S. held:

The area upon which it is alleged the appellants have trespassed is part

¹⁰ *Ibid.*, at p. 586.

¹² *Ibid.*, at pp. 1008-1009.

¹⁴ *Supra*, footnote 1.

¹¹ *Supra*, footnote 1.

¹³ *Ibid.*, at pp. 1009-1010.

of what is well known as a shopping centre. While legal title to the area is in the respondent, it admits in its pleadings that it has granted easements to the many tenants. The evidence also establishes that the respondent has extended an unrestricted invitation to the public to enter upon the premises. The very nature of the operation is one in which the respondent, both in its own interests and in the interests of its tenants, could not do otherwise. Under these circumstances it cannot be said that the respondent is in actual possession. The most that can be said is that the respondent exercises control over the premises but does not exercise that control to the exclusion of other persons. For that reason, therefore, the respondent cannot maintain an action in trespass against the appellants.¹⁵

Whereas Davey J.A. in the second *Zeller's* case had indicated that an action might be framed not in nuisance but in trespass, Culliton C.J.S. suggested, *obiter dictum*, that the proper remedy was not trespass but nuisance. But the combined effect of the second *Zeller's* case and *Grosvenor Park* is that peaceful picketing during a lawful strike on the public areas of a shopping centre is enjoined by neither landlord nor tenant. Implicit, indeed explicit, in this result is a recognition of the public nature of the shopping centre. Disputes, controversies, public appeals, may be conducted there as well as commerce. The market place of wares has become again the market place of ideas.

Yet neither those who applaud nor those who decry the results of these two cases can be entirely happy with the technique of analysis that produced them. In the second *Zeller's* case, the language of the court was that of "invitation to the public . . . by the owner of the fee";¹⁶ in *Grosvenor Park* the court found that the owner "did not have that degree of possession essential to an action in trespass".¹⁷ With respect, the attempt to shackle the analysis of labour relations problems with the ancient bonds of real property law is inappropriate—whatever the results of the cases. Much to be preferred is the approach of the Supreme Court of California in *Schwartz-Torrance Investment Corp. v. Bakery Workers' Union Local No. 31*.¹⁸ The facts of this case were almost identical with those of *Grosvenor Park*: a suit by the owner of a shopping centre to enjoin otherwise lawful, peaceful, picketing of a tenant's premises. Tobriner J., for a unanimous court, declined to grant the injunction:

We conclude that the picketing in the present case cannot be adjudged in the terms of absolute property rights; it must be considered as part of the law of labor relations, and a balance cast between the opposing

¹⁵ *Ibid.*, at p. 242.

¹⁶ (1963), 42 D.L.R. (2d) 583, at p. 586.

¹⁷ *Supra*, footnote 1, at p. 242. ¹⁸ (1964), 394 P. 2d 921.

interests of the union and the lessor of the shopping center. The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion; the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage.¹⁹

There remains, then, the task of weighing up the competing interests of the labour union and the picketed tenant or landowner in the special context of shopping centre picketing. In the ordinary industrial dispute, of course, public policy acknowledges the union's interest in peacefully advertising the existence of a labour dispute through picketing. Such picketing is lawful even though it interferes with the use and enjoyment of the picketed property. To this extent, shopping centre picketing presents no special problem. Likewise, minor, casual, impediments to pedestrian and vehicular traffic may accompany both ordinary and shopping centre picketing, and are not wrongful where they are not deliberate. Even the risk of accidentally (but not purposely) causing inconvenience to adjacent shopowners is common to both situations, and can be handled by requiring the pickets to confine their activities to the immediate vicinity of the dispute.

The special factor in shopping centre picketing is the landlord, a neutral in the labour dispute. First, he is responsible for the maintenance of orderly traffic movement in the public areas of the shopping centre. Whereas the expenditure of tax funds on public roads and sidewalks may justify a little interference with traffic flow to serve the greater public good of publicizing labour controversies, no such justification exists in the shopping centre. The landlord spends his own money on the public areas of the shopping centre, and does so for the sole purpose of making a profit. Second, while public authorities may, on behalf of the community, strike a reasonable balance between traffic and picketing on public sidewalks and streets, the shopping centre owner can hardly be expected to make such a choice: he has no authority to speak for the community; to grant picketing or parading privileges to all would invite chaos, while to do so selectively would invite commercial reprisals. He is thus driven to adopt a highly restrictive approach to granting permission to groups who wish to parade or picket in the shopping centre.

Set against these two legitimate concerns of the landlord is the union's contention that unless picketing is allowed on the public

¹⁹ *Ibid.*, at p. 926.

areas of the shopping centre, it cannot take place at all. The theoretical alternative, of course, is picketing on the adjacent public highways. To such picketing there are both legal and practical obstacles. Legally, the risk is that picketing on the perimeter of the shopping centre will be construed as illegal pressure against all of its tenants, no matter how explicit the picket signs.²⁰ Practically, the difficulty is that many more pickets are required to patrol the perimeter of the entire shopping centre than the immediate vicinity of the tenant's store.

Weighing these considerations in the scales of public policy, it is hard to say that peaceful informational picketing should be forbidden in shopping centres. The flow of traffic may be protected by requiring that the pickets remain few in number, well-behaved, and in a confined area; both the landlord and the union are better served by the legal rationale adopted in California, which does not depend on the owner's permission or invitation to picket; the union is not exposed to the legal and practical disadvantages of perimeter picketing. Happily the appellate courts of Saskatchewan and British Columbia appear to have struck this balance, whether consciously or otherwise.