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Robertson Yates Corp. Ltd. V. Fitzgerald, [1965] 2 O.R. 347

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ROBERTSON YATES CORP. LTD. v. FITZGERALD, [1965] 2 O.R. 347 (Ont. H.C.); HEATHER HILL APPLIANCES v. MCCORMACK ET AL., [1966] 1 O.R. 12 (Ont. H.C.)—LABOUR RELATIONS—SECONDARY PICKETING—UNLAWFUL ALTHOUGH PEACEFUL—PUBLIC POLICY—In two recent cases, *Robertson Yates Corp. Ltd. v. Fitzgerald*[1] and *Heather Hill Appliances v. McCormack et al.*,[2] the High Court of Ontario has prohibited any attempt at "secondary picketing". In doing so they purported to follow *Hersees v. Goldstein*[3] which declared that such secondary picketing was "illegal *per se*". Leave to appeal to the Supreme Court has been granted in the *Heather Hill* case and it is hoped that the court will reconsider the whole matter of secondary picketing. Both these cases illustrate the harsh line that Ontario courts have taken since peaceful picketing was declared legal in *Williams v. Aristocratic Restaurants*.[4] In *Robertson Yates v. Fitzgerald*, operating engineers, members of a trade union, were on strike against the Wellesley Hospital. At the time an addition was being constructed to the hospital by an independent contractor. Although the employees of this contractor had no dispute with him, they honoured the picket line so that work was effectively halted. It was found as a fact in the case that there had been no violence on the picket line and "it could be described as peaceful picketing."[5] However the court decided that *Hersees* specifically covered the situation and that the secondary picketing was illegal as it interfered with the business activity of a neutral contractor. A similar approach was taken in the *Heather Hill* case. There, printers on strike against the Toronto newspapers decided to picket *Heather Hill* appliances because it advertised in the Telegram. It was again found as a fact that the picketing was peaceful and that there had been no attempt to cause a breach of any specific contract between the plaintiff and anybody else. The court then stated: "In other words, it appears clear that had the picketers been engaged in a legal strike against Heather Hill Appliances Ltd. their behaviour in picketing would have been lawful."[6] However the court went on to say that *Hersees* had decided that secondary picketing was illegal *per se* and that therefore this picketing was illegal.

Before considering these two cases more closely it is necessary to review briefly the history of picketing in Ontario since *Williams v. Aristocratic Restaurants*.[7] In this case a union had been certified as bargaining agent for the employees of the restaurant. When the union failed to negotiate a collective agreement, conciliation proceedings resulted. The union refused to accept the report and although it had lost its members in the bargaining unit, it was still certified and hired picketers to parade in front of the restaurant. The majority

1 [1965] 2 O.R. 347 (Ont. H.C.).
2 [1966] 1 O.R. 12 (Ont. H.C.).
3 [1963] 2 O.R. 81 (C.A.).
4 [1951] S.C.R. 762.
5 *Supra*, footnote 1, at p. 348.
6 *Supra*, footnote 2, at p. 14.
7 *Supra*, footnote 4.

of the Supreme Court held that this picketing did not constitute a nuisance and did not contravene the prohibitions against watching and besetting in the Criminal Code.[8]

Rand J., in his judgment squarely presented the main consideration:

> The question, then, is whether the mode of persecution followed was authorized. How could information be effectively communicated to a prospective customer of such a business otherwise than by such means? The appeal through newspapers or at a distance might and probably would be utterly futile. The persons to be persuaded can, with any degree of certainty be reached only in the immediate locality, and I must take the Legislature to have intended to deal with the matter in a realistic manner. What was attempted was to persuade rationally rather than to coerce by insolence, there was no nuisance of a public nature, and the only annoyance would be the resentment felt almost at any act in the competitive conflict by the person whose interested is assailed.[9]

Rand J. recognises that such picketing could economically injure an employer but he concludes:

> But even if they should not extend to public appeal, I should hold the act innocent where it is done for such an object: *the public is obviously and substantially interested in the fair settlement of such contests.*[10]

From this judgment it would seem that the courts could have easily gone one step further to hold that secondary picketing, if done peacefully, could also be legal.

The Ontario courts, however, have shrunk from the full implication of the *Williams* judgment.[11] As will be seen, in the field of secondary picketing, they have set up the criteria that interference with a trader who is not involved in the strike, is contrary to his economic rights and of greater harm to the public interest than the benefits that would arise from such picketing. Since the *Williams* judgment this attitude has been reflected in Ontario decisions dealing even with primary picketing. Thus, in *General Dry Batteries of Canada Ltd. v. Brigenshaw,*[12] where employee members of the union had in breach of their collective bargaining agreement gone on strike before resort was had to the compulsory conciliation procedure provided by The Ontario Labour Relations Act, McRuer C.J.H.C. held that the resulting picketing could not be enjoined as long as it was peaceful; but he then went on to state:

> I am not at all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so he may capitulate in the dispute.[13]

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8 S. 366 of the Criminal Code.
9 *Supra,* footnote 4, at p. 785.
10 *Ibid.,* at p. 786 (my emphasis).
11 For an extremely informative essay on this issue see: Earl E. Palmer, The Short, Unhappy Life of the 'Aristocratic Doctrine', (1959), 13 U. of Toronto L.J. 166.
12 [1951] 4 D.L.R. 414 (Ont. H.C.).
13 *Ibid.,* at p. 419.

In the later case of *Nipissing Hotel v. Hotel and Restaurant Employees etc. Union*,[14] where the union again had broken off negotiations with the employer before compulsory conciliation, the court went even further and had no trouble enjoining the picketing that resulted. Here they easily distinguished the *Williams* case by stating that in that case the union had attempted to bargain in good faith, while, in this case, the union employees had arbitrarily broken off negotiations and thus were guilty of bad faith. The picketing was found to be an attempt to coerce the employer, and the court held that at this stage of the negotiations "the use of pressure or coercion even in the mildest form, destroys the freedom and the equality both parties must have at the bargaining table so they cannot 'bargain in good faith and make every reasonable effort to make a collective agreement' as stated in s. 12 of The Labour Relations Act."[15]

In *Smith Brothers v. Jones*[16] the union, though having no collective agreement with the employer, was trying to force that employer to pay union wages and thus picketed any job where he was working. McLennan J. after finding "no evidence of any violation, disturbance or persuasion of any kind other than the mere fact of their presence with signs" went on to hold:

> [I]n my opinion, if the development of the trade union movement has reached the point where workers will not cross a picket-line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be. Loyalty to the rule that I have mentioned having been developed, the rule should not be abused for a wrongful purpose and where there is no justification.[17]

The door was open for the Ontario courts to apply the same reasoning to secondary picketing. Thus in the case of *Har-A-Mac Construction Co. Ltd. v. Harkness*,[18] where defendant members of a union had failed to become bargaining agents of the plaintiff's employees, and had set up a picket line so the subcontractors would not enter the job, the court granted an injunction. Here the *Williams* case had specifically been pleaded, but the court had no trouble distinguishing the case, to follow the *Smith* case and *Bennett & White v. Van Reeder*[19] (a case of similar facts in the Alberta Supreme Court that had refused to follow the *Williams* case). Considering the *Williams* case, Aylen J. said:

> The question of breach of contract did not arise. . . . In the *Williams* case a dispute had arisen in connection with labor negotiations of a *bona fide* nature and the union was attempting to protect its *legitimate* interests.[20]

In any event Aylen J. had no hesitation in following *Smith Bros. v. Jones*.[21]

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14 [1963] 1 O.R. 81, [1963] 2 O.R. 169 (Ont. H.C.).
15 [1963] 1 O.R. 81, at p. 83.
16 [1955] O.R. 362 (Ont. H.C.).
17 *Ibid.*, at p. 371.
18 [1958] O.W.N. 366 (Ont. H.C.).
19 [1957] 6 D.L.R. (2d) 326 (Alta. S.C.).
20 *Supra*, footnote 18, at p. 367.
21 *Supra*, footnote 16.

This brings us to a consideration of *Hersees of Woodstock Ltd. v. Goldstein*[22] where secondary picketing was held to be illegal *per se*. In this case the union was in a dispute with Deacon Sportswear Co., who supplied Hersees with goods for his store. When Hersees refused the union's request not to deal with Deacon, the union picketed outside Hersees' store. The picketing was peaceful and the placards only stated that Deacon sportswear was sold by Hersees and that such sportswear was made by non-union Labour. Presumably one could argue that this picketing was peaceful, to provide the public with information and was therefore lawful by the *Williams* case test. This, however, was far from the result; the judges in righteous anger raised their voices against any attempt to interfere with free enterprise. Aylesworth J.A. states:

> In the City of Woodstock where that business is being carried on, the picketing . . . has caused or is likely to cause damage to the appellant. Therefore, the right, if there be such a right of the respondents to engage in secondary picketing of the appellant's premises must give way to the appellant's right to trade; the former assuming it to be a legal right, is exercised for the benefit of a particular class only, while the latter is a right far more fundamental and of greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.[23]

This statement seems to be in direct contradiction to Mr. Justice Rand's view, in the *Williams* case, that a fair settlement of the strike was more in the public interest.[24] Aylesworth J.A. then goes on to declare that secondary picketing is illegal *per se*.[25] In holding this, the judge quotes a long line of cases, particularly relying on the Supreme Court decision in *Patchett v. Pacific Great Eastern Railroad Company*.[26] However, as Prof. Arthurs has pointed out,[27] the court in the *Patchett* case would have equally held primary picketing illegal because of the tortious nature of the picketing. It is thus impossible to say that this decision squarely declares secondary picketing illegal *per se*. MacKay J.A. in the same tone declares: "In the present case the right of the Union to advance the interests of the employees of Deacon Brothers in the manner in which they have attempted is in conflict with the right of the plaintiff to carry on its business without undue interference and, in my view, the benefit to employees of Deacon Brothers would be negligible compared to the harm that would be done to the plaintiff in its business."[28]

In the light of these Ontario decisions, the results in *Yates* and *Heather Hill* could hardly be called surprising. Again the prime concern of the court is that the economic interest of an innocent trader might be damaged. In the *Yates* case Lieff J. found "it was obvious that in so far as the defendants are concerned their desire is more than the conveying of information to the general public but rather

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22 *Supra*, footnote 3. For a criticism and commentary on this important case see H. W. Arthurs, Comment on *Hersees of Woodstock v. Goldstein* (1963), 41 Can. Bar Rev. 573.

23 *Supra*, footnote 3, at p. 86.

24 *Supra*, footnote 4, at p. 786.

25 *Supra*, footnote 3, at p. 88.

26 [1959] S.C.R. 271.

27 *Supra*, footnote 22, at p. 582.

28 *Supra*, footnote 3, at p. 90.

it appears to also contain an element of boycott."[29] He concludes it is a boycott

> because the trades who are engaged in the construction of the addition to the hospital will not cross the picket line. They thus bring the plaintiff's construction job to a standstill.[30]

Stewart J. in *Heather Hill* seems to echo these sentiments: "The picket line has become the sign and symbol of trade union solidarity and gradually become a barrier—intangible but nonetheless real."[31] He goes on to consider secondary picketing:

> But what about 'secondary picketing'? That is, the watching and besetting of a place occupied by a person or a company having no dispute with the picketers or its employees. On the surface, the presence of a few amiable sandwich-men bearing non-libellous statements strolling discreetly apart seems harmless enough. But so does an electric fence. . . .It frequently prevents a wholly innocent party from earning his living and creates a situation in the locality, which, to me, seems clearly unfair to the person picketed.[32]

It would be unrealistic to believe that primary picketing is carried on merely to convey information to the public. It is equally clear that secondary picketing also has an economic motive. In both cases the union is attempting to exert economic pressure to force collective bargaining. This, at first blush, seems to contravene the exception granted by s. 366(2) that, "[a] person who attends at or near or approaches a dwelling house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of the section". The Code thereby implies that picketing done for any other purpose than to convey information is illegal within the ambit of s. 366(1)(f). Yet the Supreme Court in the *Williams* case considered this very section and found there was a difference between an attempt to coerce the employer and an attempt to persuade by rational appeal.[33] The latter, the court held, did not amount to "watching and besetting" within the meaning of the section. It is, then, difficult to understand how "rational appeal" is accepted in primary picketing but suddenly becomes sinister in secondary picketing.

Basically the main criticism the courts have against secondary picketing is that it is successful. Lieff J. in the *Yates* case found a boycott because the other unions respected the picket line.[34] The inference is that had the other unions not respected the picket line, the picketing would have been legal. In other words the union is being punished because it is successful. Similarly, Stewart J. in the *Heather Hill* case finds that secondary picketing is like an "electric fence" and because it hurts the trade of a party not involved in the dispute, it is therefore illegal. Thus both judges are deciding on

29 *Supra*, footnote 1, at p. 348.
30 *Ibid.*
31 *Supra*, footnote 2, at p. 13.
32 *Ibid.*
33 *Supra*, footnote 4, at p. 784.
34 *Supra*, footnote 1, at p. 348. Space does not permit a discussion of the common *situs* problem. It hardly seems, however, that *Hersees* had the situation of *Yates* in mind. For an American discussion see: L. T. Zimmerman, Secondary Picketing and the Reserved Gate (1961), 47 Va. Law Rev. 1164.

principles completely different from that laid down in the *Williams* case. That case made it clear that the issue to consider was the picketing itself. If the picketing was peaceful and non-libellous then it was legal, even if the economic interest of the trader, who was picketed, was hurt. In the *Yates* and *Heather Hill* cases there is a complete reversal of this reasoning. Here the issue considered is not the picketing itself but the *result* of that picketing. Thus if the secondary picketing damages the economic interest of a trader it is illegal, no matter if the picketing is peaceful and non-libellous. The union is therefore penalized only if the secondary picketing creates the desired pressure to bring about a collective bargaining agreement.

It seems strange that different approaches should be taken for primary picketing on the one hand and secondary picketing on the other. The courts have tried to justify these different techniques by stating that secondary picketing is for the benefit of a "particular class" only; while the innocent trader's right to trade is for the benefit of the "community at large",[35] As both Professor Arthurs[36] and Professor Carrothers[37] have pointed out, this view of secondary picketing seems contrary to the history of collective bargaining. Such bargaining, since the reign of Queen Victoria, has always been thought of "as part of the public policy of this country."[38] Rand J. in the *Williams* case asserted that the public "is obviously and substantially interested in the fair settlements of such contests".[39] In these circumstances it is hard to justify the logic that declares the right of one trader is for the benefit of the community while pressure to force settlement of a strike is simply for the benefit of a particular class.

In the light of these inconsistencies between statements in the *Williams* case and the decisions in the *Yates* and *Heather Hill* cases, the Supreme Court is confronted with a difficult problem. Do we want unions to have the additional weapon of secondary picketing to force collective bargaining? Is it more in the public interest to insure the freedom of a trader's right to trade than to protect the right to exert pressure by secondary picketing for the settlement of labour disputes? It is not the purpose of this casenote to suggest answers to these questions; rather to suggest that the Court could, following the decision in *Williams* easily justify peaceful secondary picketing. If on the other hand the court decides that the freedom of the right to trade is more in the public interest than the added pressure to bring about collective bargaining by secondary picketing, it is hoped that court will consider the *Williams* case and clearly define the limitations of that decision. Certainly, considering the case law, a definitive statement by the Supreme Court on the issue of secondary picketing is sorely needed.

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[35] *Supra*, footnote 3, at p. 86.
[36] *Supra*, footnote 22, at p. 585.
[37] For a general discussion of the topic of secondary picketing see the new book: A. W. R. Carrothers, Collective Bargaining Law in Canada (1965), pp. 458-461.
[38] *Supra*, footnote 37, at p. 462.
[39] *Supra*, footnote 4, at p. 786.

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