

# QUEEN'S BENCH FOR SASKATCHEWAN

Date: 2019 12 24  
Docket: QBG 3302 of 2019  
Judicial Centre: Regina

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BETWEEN

CONSUMER'S CO-OPERATIVE REFINERIES LIMITED

PLAINTIFF

- and -

UNIFOR CANADA, LOCAL 594, representing all members of  
Unifor Canada, Local 594

DEFENDANT

**Counsel:**

Eileen V. Libby, Q.C. and Matthew J. Klinger for the plaintiff  
Rick A. Engel, Q.C., Crystal L. Norbeck and Kevin T. Miller  
for the defendant

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DECISION ON INTERIM INJUNCTION  
December 24, 2019

McMURTRY J.

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[1] The most recent collective bargaining agreement [CBA] between the parties expired January 31, 2019. Since then the parties have bargained, so far unsuccessfully, for a new CBA.

[2] Consumers' Co-operative Refineries Limited [CCRL] served a 48-hour lock-out notice on Unifor Canada, Local 594 [Unifor] on December 3, 2019, after receiving a strike notice from the union. Effective at 5:30 p.m.,

December 5, 2019, all members of Unifor were locked out. Union members have engaged in picketing at CCRL facilities since then, while CCRL has attempted to continue its operations using non-union employees, replacement workers and contractors.

[3] CCRL applies for an interlocutory injunction against Unifor, claiming its members are engaging in “a sustained pattern of unlawful conduct”. CCRL asserts Unifor members are blockading CCRL properties and intimidating CCRL employees, contractors and suppliers.

[4] CCRL operates as an integrated petroleum products refinery. It produces and transports refined petroleum products to 170 member co-operatives and other customers in Canada and the USA.

[5] CCRL employs 1,020 permanent employees, of which 730-750 are members of Unifor. CCRL and its supporting facilities are located on 800 acres of land in northeast Regina.

[6] CCRL operates out of many locations in Regina, including the McDonald Street terminal, the Park Street administration facility, the Kress Street warehouse, the Henderson Drive warehouse, and the Victoria Plains rail servicing facility. The Co-op Refinery Complex [Complex] is the name of the CCRL’s central operations facility. Road access to the Complex is available at 9<sup>th</sup> Avenue North; McDonald Street; and Fleet Street. CCRL seeks an injunction that applies to all locations.

***Preliminary Issues***

[7] CCRL brought an application, without notice to the union, for short service of an application for contempt. That matter will be dealt with separately.

[8] Unifor seeks an order removing the local president Kevin Bittman's name from the style of cause, with regard to the CCRL's application for an injunction only. Unifor argues it is a legal person pursuant to s. 6-3 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1, thus it is unnecessary to name the local president personally. CCRL objects to the informal nature of the union's application. In any event, the company submits the usual procedure is to name an individual as well as the union.

[9] The application for an injunction relates to all members of Unifor Canada, Local 594. It is enough to name the union, only.

[10] Unifor sought an order permitting it to cross-examine the affiants of affidavits filed by CCRL. I denied the application on the grounds that the cross-examination would not aid the court in determining this matter expeditiously. Further, the evidence in conflict is peripheral to the main issues.

***Picketing***

[11] During a lawful lockout or strike, union members are entitled to communicate with members of the public, including replacement workers and out-of-scope employees, about the labour dispute. Unions are also entitled to show solidarity and strength of numbers while picketing. Thirty-one years ago,

former Chief Justice Dickson of the Supreme Court of Canada summarily described lawful picketing, as follows, in *B.C.G.E.U. v British Columbia (Attorney General)*, [1988] 2 SCR 214 [*B.C.G.E.U. v B.C.*], at 230:

Picketing is a crucial form of collective action in the arena of labour relations. A picket line is designed to publicize the labour dispute in which the striking workers are embroiled and to mount a show of solidarity of the workers to their goal. It is an essential component of a labour relations regime founded on the right to bargain collectively and to take collective action. It represents a highly important and now constitutionally recognized form of expression in all contemporary labour disputes. All of that is beyond dispute. ...

[12] More recently, the Supreme Court held as follows, in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245:

48. The recognition that strikes, while a powerful form of economic pressure, are nonetheless critical components of the promotion of industrial -- and therefore socio-economic -- peace, was also cogently summarized in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156:

Labour disputes may touch important sectors of the economy, affecting towns, regions, and sometimes the entire country. The cost to the parties and the public may be significant. Nevertheless, our society has come to see it as justified by the higher goal of achieving resolution of employer-employee disputes and the maintenance of economic and social peace. The legally limited use of economic pressure and the infliction of economic harm in a labour dispute has come to be accepted as a legitimate price to pay to encourage the parties to resolve their differences in a way that both can live with (see generally G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 1-11 to 1-15). [para. 25]

[13] CCRL alleges Unifor members are engaged in unlawful picketing by blockading access to CCRL facilities and intimidating replacement and out-of-scope workers. It relies on several incidents, including the following:

- (a) A twitter post on Unifor's Twitter account on December 7, 2019 stated: "... Unifor594 members are blocking 50 scabs and a truck load of food from entering @CoopRefinery. Trucks picking up finished petroleum product are being delayed 30 mins in and 30 mins out" "8:07 AM 7 Dec 2019". (Ex D, affidavit of Jared Koback, sworn December 13, 2019)
- (b) A twitter post two hours later said, "Incoming scab traffic at @CoopRefinery is stopped and not moving – and its going to stay that way." "10:09 AM 7 Dec 2019". (Ex B, affidavit of Jared Koback, sworn December 13, 2019)
- (c) Another two days later says, "For more than an hour @Unifor594 members on their legal picket line have peacefully delayed a non-essential supply vehicle from entering @CoopRefinery" "6:06 PM 9 Dec 2019". (Ex I, affidavit of Jared Koback, sworn December 13, 2019)
- (d) A story in the Regina Leader Post on December 9, 2019 quoted Unifor Local 594 president, Kevin Bittman saying, "For sure there are trucks that aren't getting in, but that's part of our strategy". He also is quoted in the same story saying, "If disruptions happen as a

result of a peaceful demonstration ... there is an internal structure to examine cases. But ... he hadn't heard of anyone overstepping".

(Ex L, affidavit of Jared Koback, sworn December 13, 2019)

- (e) A security guard hired by CCRL reported she began a shift at Gate 7 on Fleet Street at 9:00 p.m. on December 5. Although she saw picketers slow the passage of trucks by several minutes, she did not observe picketers stop a vehicle for longer than that until 11:00 PM, when she saw two buses carrying replacement workers approach the picket line. It appeared to her from her observations and discussions with "Rick" from Unifor that the picketers would not let the buses enter the facility. At 3:00 a.m. the next day, the buses left the scene without entering the facility. At 4:00 a.m., a small minibus approached the picket line. Whether the minibus entered is not recorded. (Affidavit of Amanda Mudrik, sworn December 10, 2019)
  
- (f) A safety consultant hired by CCRL for the duration of the labour dispute, was on one of the buses. After four hours, his bus left to go to the Flying J truck stop 20 minutes away in Balgonie. Picketers were at the Flying J and used their phones to film him. The bus he was in and another then traveled from the Flying J to White City. After several hours in White City, his bus again returned to the Complex. He noted that vehicles sped past the bus and then stopped suddenly in front of it, more than once. After waiting an hour outside the CCRL facility because picketers blocked the bus from entering,

and after trying other gates without success, his bus returned to White City.

- (g) At 6:45 PM, the bus returned to the Flying J so workers could board taxis to go to a hotel. Picketers followed the bus to Flying J. The safety consultant had a list of replacement workers in his hand. A picketer approached him, pushed him and grabbed the list. The affiant pursued the picketer, but could not convince him to return the list. (Affidavit of Jared Savage, sworn December 13, 2019)
- (h) A CCRL employee reported being on a bus with other employees on December 6, 2019 at 7:30 AM, traveling towards the Complex. Upon approaching Gate 2 at 650 E 9<sup>th</sup> Avenue N, picketers and a vehicle stopped the bus in the westbound driving lane of E 9<sup>th</sup> Avenue North. Sometime later, the bus was able to leave the area, unable to enter the Complex. (Affidavit of Paula Etienne, sworn December 13, 2019)
- (i) On December 7, 2019, a bus driven by the affiant arrived at Gate 7 at 8:55 AM. Picketers stood in front and on the sides of the bus as it waited to enter Gate 7. At 12:00, the bus had not gained entry and it returned to the marshaling area. The next morning, December 8, the affiant was again driving a bus. It was stopped by picketers on Fleet Street, while in the southbound driving lane. The bus remained blockaded by picketers between 7:00 a.m. and 3:20 PM, before leaving. (Affidavit of Laurie Cossitt, sworn December 12, 2019)

- (j) On December 7, 2019, a truck carrying parts was denied entry to the Complex, at Gate 7, for 12 hours. (Affidavit of Vitalijis Svilonoks, sworn December 12, 2019)
  
- (k) On the evening of December 11, 2019, picketers blocked a cube van from leaving the CCRL business office for one hour. After it left, the van tried for two and a half hours to enter the Complex but was blocked by picketers. (Affidavit of Jessica Bodnarchuk, sworn December 15, 2019)
  
- (l) Several affiants claimed they were verbally abused and threatened with violence: Affidavit of Jared Koback, sworn December 13, 2019; Affidavit of Paul Dawe, sworn December 10, 2019; Affidavit of Shawn Whitty, sworn December 12, 2019; Affidavit of Laurie Cossitt, sworn December 12, 2019; Affidavit of Paula Etienne, sworn December 13, 2019; Affidavit of Jared Savage, sworn December 13, 2019; Affidavit of Terry Duchcherer, sworn December 14, 2019; Affidavit of Chad Davison, sworn December 15, 2019.
  
- (m) A video posted by Unifor on December 12, 2019, shows a long line of semi trailers, parked by the side of the roadway. The post accompanying the video states, “@CoopRefinery has locked out workers to demand pension cuts. The company’s disrespect for @unifor594 extends to truckers as it continues to get trucks dispatched to a picket line where it knows they are held up”.



[14] Unifor presented the following evidence in response:

- (a) A supervisor of the picket captains deposed that the union local has organized its members into 62 groups, who alternate between day and night shifts. Each group of picketers has 10 to 15 persons. Ten picket groups are scheduled to picket, at different locations, on each shift. He has directed picket captains to maintain order and report to him any issues. (Affidavit of Thomas Milton, sworn December 20, 2019)
- (b) Both parties have employed private security companies. An officer of VP Protection Inc deposed his company has been hired by Unifor to ensure that peace and order are maintained on the picket line. He also acts as a liaison with the police and CCRL's head of security. He deposed that he speaks with members of the RPS [Regina Police Service] daily. Since December 19, at the end of each police shift, RPS has had a daily check in with him and Chad Davison, security supervisor with CCRL, "to ensure there are no issues of ... public safety." (Affidavit of Rick Benoit, sworn December 20, 2019, para 19)
- (c) The consultant deposed that he has observed the picket lines to be peaceful, orderly and lawful. He has not witnessed altercations, assaults or intimidation. In the early days of the lockout, he witnessed several Unifor members shouting across the fence into the Complex. He also acknowledged that roadways were blocked on December 5 and 6. He explained that he could not gain the co-

operation of the drivers of stopped vehicles to try to ease the blockage.

- (d) He has reported to the RPS several instances of Unifor members being struck by vehicles. The RPS has expressed concern to him about fuel trucks being unable to leave the refinery in a timely manner. He deposed Unifor took steps to “ensure there was no significant backlog of trucks inside the Refinery”. (Affidavit of Rick Benoit, sworn December 20, 2019, para 18)
- (e) The consultant noted that CCRL has changed security companies. He has witnessed employees of the new companies trying to incite the Unifor members, by swearing at them, or pushing them. He regularly meets with picket captains to tell them “to stay calm, keep the peace and not interact with the ... security officers”. He understands his role includes keeping public roadways clear. He agrees that on December 5 and 6, Fleet Street was blocked outside Gate 7. He explained that one of the drivers of a vehicle carrying replacement workers drove at a line of picketers. In response, Unifor members placed a vehicle in front of that vehicle. He deposed that pylons are temporarily placed on public roadways to protect the safety of picketers. (Affidavit of Rick Benoit, sworn December 20, 2019, para 30, 39, 40)
- (f) He suggested temporary line-ups of fuel trucks have occurred because too many fuel trucks are dispatched to the Complex at the same time.

(g) Finally, he deposed that he had difficulty communicating with CCRL's security supervisor up until December 19.

(h) An after-hours dispatcher in the petroleum distribution department of the Complex deposed that line ups of fuel trucks were commonplace before the lockout. She deposed it:

5 ... is not abnormal for there to be thirty trucks in staging, and is not abnormal for drivers to time out after fourteen hours of drive time. The refinery routinely has disruptions that cause backups of trucks, normally associated with product outages or equipment failures. Those disruptions happen several times a year. When a disruption occurs dispatch will manage the numbers of trucks being called, and usually we will call food trucks, and send out coffee and such.

6 In the last few months, wait times of twelve hours or more were not unusual. It is not a daily occurrence, but it does happen monthly or more often. ... when these delays happened I would unbook trucks or delay trips and then the next day we would dispatch light (book less trips intentionally) so the trucks would not get backed up on the road.

[Affidavit of Tammy Hayward, sworn December 19, 2019, paras 5-6]

(i) She deposed further that the dispatchers working during the lockout are experienced and are familiar with the usual practice of not dispatching trucks to create a lineup. Moreover, she deposed that December and January are typically slower months, coinciding with a drop in agriculture fuel needs. Finally, she stated that in her experience, truck owners are paid for the time the trucks are sitting,

unable to move. (Affidavit of Tammy Hayward, sworn December 19, 2019)

(j) A member of the union deposed he was picketing at Gate 2 on December 9, 2019, when he noticed two men approach the gate and engage in activity apparently designed to taunt the picketers. One of the men said, "I need to get in there ... I need to do your guys job ... I need to get paid". The other male videotaped his colleague, until picketers began filming him. The member saw the same duo at other picketing locations over the next few days. He recognized them from their vehicle, a white Dodge with Ontario licence plates. The member saw the same vehicle outside his house on December 13, at 10:30 p.m. After he followed it on foot, it left but returned shortly thereafter to photograph his house. When the member approached again, the vehicle left again. (Affidavit of Karl Dahle, sworn December 19, 2019)

(k) Another member deposed to a CCRL security guard joining the picket line to film picketers, saying "you think you're tough, tough guy". He also deposed to assisting truck drivers trying to go through the picket lines and to "doing our best to communicate the issues and reasons for delays to the truckers". (Affidavit of Derek Empringham, sworn December 20, 2019, para 4)

(l) A Unifor official from the union's national office deposed that he witnessed a shift change of CCRL security personnel on December 14, 2019, at 5:10 a.m. Ten security guards rushed at picketers, using

their hands, arms and forearms to push picketers out of the way before entering Gate 2 of the Complex. Two security guards tripped and pinned the official against the fence and held him there. (Affidavit of Gary Lynch, sworn December 18, 2019)

(m) Another national Unifor representative filmed an altercation between a motorist and Unifor members. He appeared to be angry a vehicle was blocking his way. He kept moving his pick-up truck until he hit a picketer. His foul temper did not improve, thereafter. (Affidavit of Hamid Osman, sworn December 20, 2019)

(n) A member deposed he received a text from a replacement worker crowing about using the member's clothing and saying, "I'm enjoying your job." (Affidavit of Preston Kreklewich, sworn December 20, 2019, Ex A) Two other members received similar texts. (Affidavit of Karl Dahle, sworn December 19, 2019, Ex B, Affidavit of Kris Senft, sworn December 20, 2019, Ex A)

(o) A picket captain deposed to helping "educate the truckers about the reasons for the lockout, to seek their support in whatever ways they can give it and to help maintain good relations with the truckers hauling fuel." He deposed that Unifor members give coffee and food to truckers waiting to cross the picket line, as well as allowing the truckers to use the union's bathroom facilities. He stated he has observed fuel trucks leaving the Complex empty or underloaded. (Affidavit of Dean Funke, sworn December 20, 2019)

(p) A member who attended the marshaling area for replacement workers and the Flying J truck stop, on December 6, 2019, acknowledged filming workers, but from a distance. He also acknowledged driving in front of the buses, but at a slower speed. He deposed he did not brake suddenly as alleged. He acknowledged continuing to watch the transporting of replacement workers, but at a distance.

(q) The member also acknowledged taking a list of workers from Mr. Savage. He deposed he regrets following vehicles and recording people. He explained that it was the first day of the lockout and tensions were high. He attached to his affidavit a letter and Picket Schedule from Unifor, which he understood directed all members to stop similar, unauthorized activities. (Affidavit of Daniel Kennedy, sworn December 20, 2019)

(r) A letter from Kevin Bittman, attached as Exhibit D to the affidavit of Daniel Kennedy, sworn December 20, 2019, stated in part:

- *Any recon teams or special assignments* are not permitted and need to cease immediately. There have been a few minor incidents that have bordered on illegal and I am asking for those types of activities to end. Sometimes it may feel like you are helping, but it can hurt our end goal.
- I have said repeatedly: the only people that can lose this fight is ourselves. We need to stay on the right side of the legal line.
- ... We don't need buses followed or tracked.

- Profanity or intimidation directed at Truckers, Scabs, Co-op Security etc. is detrimental to our cause. I completely understand how stressful and emotional this time can be, but we need to remain calm and professional to avoid injunctions and to keep our lines up.
- Trespassing on private or CRC property is off limits. As well as chasing buses, cabs or vans through the streets and highways. Not only can it cause criminal charges to be laid, but it can put your safety and the safety of the public at risk and no one wants that.  
...
- When a van carrying Scabs leave (*sic*) the plant, our protocol is to create a pathway on either side, wave the flags, snap a few pics, and politely ask them to never come back. Please don't track or follow these vehicles.
- Also when Emergency Response vehicles arrive trying to enter the plant please allow them access immediately. If you are approached by Police, the Picket Captain and/or National's Security Team needs to be made aware immediately. Basically, when the Police say jump, you say how high.

(s) The president of Unifor Canada, Local 594 deposed that CCRL has not asked the picketers to cease and desist any of its activities on the picket line, except to remove porta-potties. (Affidavit of Kevin Bittman, sworn December 17, 2019, para 16)

[15] In reply, CCRL filed an affidavit disputing the incident on December 14, 2019, at 5:10 a.m, alleging ten security guards rushed at picketers. The affiant states that security footage does not record an incident like that described, at the gate mentioned, or any other gate at that date and

time. The affiant also states that security cameras record continuously, a full unobstructed view of Gates 1 and 2.

### ***Restraint of Picketing***

[16] In *Retail, Wholesale and Department Store Union Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.* (1998), 172 Sask R 40 (CA) [*R.W.D.S.U. v Pepsi*], Cameron J.A. wrote:

20 Much of the framework of principle governing the restraint in this Province of picketing in the course of a lawful strike, including the legal basis for the restraint of such picketing, appears in the reasons for judgment in *Potash Corp. of Sask. Mining Ltd. v. Todd*, [1987] 2 W.W.R. 481 (Sask. C.A.) and *Garry v. Sherritt Gordon Mines Ltd.*, [1988] 1 W.W.R. 289 (Sask.C.A.). Four aspects of the subject must be borne in mind throughout: the nature and purpose of picketing; the basis in law for its restraint; the essential function of the Court of Queen's Bench in this regard; and the burden of proof upon persons seeking restraining orders.

...

24 In *B.C.G.E.U. v. British Columbia (Attorney General)* [*British Columbia Government Employees Union v British Columbia (Attorney General)*], [1988] 2 SCR 214] Dickson C.J.C. commented upon picketing and its effects, saying:

Picketing is a crucial form of collective action in the arena of labour relations. A picket line is designed to publicize the labour dispute in which the striking workers are embroiled and to mount a show of solidarity of the workers to their goal. It is an essential component of a labour relations regime founded on the right to bargain collectively and to take collective action. It represents a highly important and now constitutionally recognized form of expression in all contemporary labour disputes. All of that is beyond dispute. In *Harrison v. Carswell*, [1976] 2 S.C.R. 200, a majority of this Court stated at p. 219

Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear



upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others ....

The very purpose and intent of the picket line in a labour dispute is to discourage and dissuade individuals from entering the premises which are being picketed. This is clear from the affidavit material filed by the appellant Union. One of the great strengths of the trade union movement is the spirit of solidarity. By standing together as a collective whole, trade unionists are able to aspire to improved wages and working conditions unattainable if each individual member were left to his or her own devices. Solidarity is made manifest when one group of workers is on strike. Fellow unionists and other sympathetic members of the public are made aware of the strike by the presence of picketers. Picketing sends a strong and automatic signal: do not cross the line lest you undermine our struggle; this time we ask you to help us by not doing business with our employer; next time, when you are on strike, we will respect your picket line and refuse to conduct business with your employer. [pp.230-31]

25 Sherstobitoff J.A. made a number of similar points in *Potash Corp. v. Todd* [*Potash Corp. of Saskatchewan Mining Ltd. v Todd* [1987] 2 WWR 481] noting that the purpose of such picketing is manifold: to foster internal solidarity among the striking employees and win external support for their cause; to persuade others not to perform their work; and to persuade still others not to deal with the employer. The ultimate object, he said, lay in damaging the business of the employer:

... the purpose of communication of information on a picket line is to persuade and by means of that persuasion to inflict economic harm on the employer. As Dickson J. (as he then was) says in *C.U.P.E. Loc 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227 at p. 241:

The traditional view of the picket line is that it is simply informative. But its real purpose, as recognized by Mr. Justice Limerick, goes

beyond that. Generally, the purpose is to shut down the employer's operation, or at least to make it difficult to maintain the operation. This is done by dissuading various groups and individuals from having anything to do with the employer. In a heated confrontation, this attempt to discourage extends also to managerial personnel. The employer, by contrast, tries to maintain his operations by using managerial personnel to do the work of strikers, by hiring strike breakers, and by maintaining lines of communication for incoming supplies and services, and outgoing products. In private sector labour relations, these efforts on both sides are typically legal and an integral part of the economic conflict. [p. 526].

[Emphasis added]

[17] The expression, "strikes are not tea parties" has been used regularly to illustrate the sometimes-turbulent nature of strikes and lockouts. In *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 SCR 156, McLachlin C.J. and LeBel J. wrote:

90. A third difficulty is that the argument glosses over the fact that third parties -- producers and consumers -- are harmed even as a result of primary picketing. As Rand J. noted in *Patchett, [Patchett & Sons Ltd. v Pacific Great Eastern Railway Co., [1959] SCR 27] supra*, at p. 276: "a strike is not a tea-party and it may have consequential impacts on associated interests which cannot be met or disposed of overnight". To the extent that harm to neutrals is a rationale for restricting secondary picketing, it is also a rationale for restricting primary picketing.

[18] In *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 SCR 733 [*U.F.C.W., Local 401*], Abella J. and Cromwell J. wrote:

36. The effectiveness of picketlines is dependent on the ability of the union to try to convince the public not to cross the picketline and do business with the employer. Cory J. recognized the significance of the role of public opinion in *Kmart, [U.F.C.W., Local 1518 v KMart Canada Ltd., [1999] 2 SCR 1083]* where he observed that "it is often the weight of public opinion which will determine the outcome of the dispute": para. 46. In some cases, this goal may be achieved simply by making others aware of the labour dispute. In others, however, a union may achieve its goal by putting pressure on those who intend to cross the picketline. The imposition of public or economic pressure has come to be accepted as a legitimate price to pay to encourage the parties to resolve their dispute. As McLachlin C.J. and LeBel J. observed in *Pepsi [R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8, [2002] 1 SCR 156]* strikes are not tea parties: para. 90. This Court has acknowledged that such pressure is permissible as long as it does not rise to the level of a tortious or criminal act: *Pepsi*, at paras. 96 and 101-7.

### *Criminal Code of Canada*

[19] Section 423 of the *Criminal Code*, RSC 1985, c C-46 clarifies that it is a criminal offence to engage in certain behaviour generally and during a labour dispute:

423 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or their intimate partner or children, or injures the person's property;

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;

(c) persistently follows that person;

(d) hides any tools, clothes or other property owned or used by that person, or deprives him or her of them or hinders him or her in the use of them;

(e) with one or more other persons, follows that person, in a disorderly manner, on a highway;

(f) besets or watches the place where that person resides, works, carries on business or happens to be; or

(g) blocks or obstructs a highway.

(2) 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 this section.

[Emphasis added]

[20] CCRL asserts certain picketers have engaged in behaviour that is criminal, contrary to s. 423(1)(c), (f) and (g) of the *Criminal Code*, and not excepted under s. 423(2) of the *Criminal Code*. Unifor responds that the police are in constant contact with the company and union and have the responsibility of enforcing the criminal law.

### ***Criteria for an Injunction***

[21] The criteria for an injunction were discussed by the Court of Appeal in *Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 377 Sask R 78. Richards J.A. (as he then was) summarized the test on an application for injunctive relief, as follows:

113. In the interest of clarity, it may be useful to recapitulate the basic points which have been developed in the course of these reasons and to summarize the approach a judge should typically take

when deciding whether to grant interlocutory injunctive relief. This can be done as follows:

(a)The judge should normally begin with a preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a serious issue to be tried, i.e. the plaintiff must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.

(b) Irreparable harm is best seen as an aspect of the balance of convenience. The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.

(c)The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.

(d)The judge's ultimate focus in considering whether to grant interlocutory injunctive relief must be on the overall equities and justice of the situation at hand.

[22] CCRL acknowledges that the first part of the test, whether it has demonstrated a serious issue to be tried, is more restrictive when the

injunction application arises during a labour dispute. Following *R.W.D.S.U. v Pepsi*, CCRL agrees it has the burden of establishing a strong *prima facie* case that CCRL “has a legal right of one nature or another and [Unifor] is interfering with that right in actionable manner” (*R.W.D.S.U v Pepsi*, para 28).

[23] In *R.W.D.S.U. v Pepsi*, the Court of Appeal summarized the essential criteria for assessing whether to enjoin picketing action during a labour dispute:

31. Thus the proper determination of such applications calls not for a merged or bulk approach but a discrete and selective approach based upon the cause or causes of action relied upon and the elements of each of the torts in issue. And the determination is to be made with the following points in mind:

(i) picketing, which is a crucial form of collective action, constitutes a highly important and constitutionally recognized form of expression;

(ii) picketing includes the wholly legitimate objective of inflicting economic harm upon the employer;

(iii) inasmuch as picketing is conducted peacefully, with a view to shutting down or hobbling the employer's operation, it is typically legal;

(iv) picketing is not subject to injunctive relief unless accompanied by the commission of a tort actionable at the instance of the complaining party, and such restraint as may be put upon it should not in general extend beyond the tortious acts established by that party;

(v) the complaining party must establish a strong *prima facie* case in relation to each of the acts sought to be restrained; and

(vi) the essential function of the court is to keep the peace or prevent unlawful acts[.]

[24] *R.W.D.S.U. v Pepsi* was upheld by the Supreme Court of Canada in *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 SCR 156 [*R.W.D.S.U. v Pepsi-SCC*]. Writing on the appeal, the Supreme Court said the following about the sort of behaviour that will make picketing unlawful:

103. At this point we may usefully review what is caught by the rule that all picketing is legal absent tortious or criminal conduct. The answer is, a great deal. Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible, regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract.

[Emphasis added]

[25] In a later decision, *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 SCR 177 [*A.I. Enterprises*], the Supreme Court discussed the narrow scope of the tort of causing loss by unlawful means:

34. A final consideration supports a limited scope for this tort: the risk inherent in the economic torts generally that they will undermine legislated schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of association and expression. At one time, the common law of tort was ready - and many would say overready - to intervene to prevent economic coercion in the context of industrial disputes. ... history draws attention to the risk that expanded liability for the economic torts may be used to undermine legislative choices and perhaps even constitutionally protected rights of expression and association: see, e.g., P. Elias and K. Ewing, "*Economic Torts and Labour Law: Old Principles and New Liabilities*" (1982), 41 Cambridge L.J. 321; B.

Adell, "*Secondary Picketing after Pepsi-Cola: What's Clear, and What Isn't?*" (2003), 10 C.L.E.L.J. 135. A narrow and clear definition of the scope of liability reduces this risk.

[Emphasis added]

### ***The Function of the Court on an Application for an Injunction***

[26] In *R.W.D.S.U. v Pepsi*, Cameron J.A. reiterated that the role of the court in an application to enjoin picketing is "to intervene only to keep the peace or to prevent unlawful acts". He stated:

27. Justice Sherstobitoff took note, in *Potash Corp. v. Todd*, of the limited role of the Court of Queen's Bench when called upon to restrain picketing in support of a lawful strike, saying at p. 526:

The courts recognize that a strike or lockout is by its very nature coercive, that persuasion by picketing is lawful and that the function of the court is to keep the peace. Laycraft C.J.A. says in *U.A.W. v. Pac. West Airlines Ltd.*, [1986] 3 W.W.R. 531, 43 Alta. L.R. (2d) 289, 86 C.L.L.C. 14,041 at 12,245 and 12,245, 70 A.R. 67 (C.A.):

A strike is a blunt instrument in labour relations. By the very nature of the process, the purpose of each side is to subject the other to such economic harm and hardship that it will be forced to submit. To inflict this economic damage, employees are entitled to picket in order to induce other persons not to work for or do business with the employer so long as they use no unlawful means. Coercion or intimidation is tortious and wrongful: persuasion even in dramatic terms is not ....

I make no comment ... as to the "use of raw economic power" other than to observe that is, unfortunately, the nature of the strike weapon. Each side is entitled to employ "the use of raw economic power". The employer does so by operating if he can, replacing striking workers if he is able and so inflicting financial hardship on them and their families. The employees do so by bringing the employer's



business to a halt and so inflicting financial harm on him if they can do so. I respectfully agree with Chief Justice McEachern, however, that the function of the courts in these unfortunate contests is to keep the peace against unlawful conduct on either side ....

In sum, Sherstobitoff J.A. said this:

...the strike or lockout has an inherent element of coercion and intimidation in the sense that the parties are trying to do economic harm to each other. Given the right to picket, and the critical and final effect which a court injunction with respect to picketing can have on the degree of success or failure in a strike or lockout, the court should, in my view, intervene only to keep the peace or to prevent unlawful acts.

[p. 531]

[Emphasis added]

[27] According to the case law, I conclude that I must recognize the following principles on this particular application for an injunction:

1. That picketing is an important and constitutionally recognized form of expression; *B.C.G.E.U. v B.C.*, para 24;
2. The effectiveness of picket lines is dependent on the ability of the union to try to convince the public not to cross the picket line and do business with the employer: *U.F.C.W., Local 401*, para 36;
3. The purpose of picketing is to shut down the employer's operation, or at least to make it difficult to maintain the operation: in *C.U.P.E. v N.B. Liquor Corporation*, [1979] 2 SCR 227 at 241;

4. The court may intervene **only** to keep the peace or to prevent unlawful acts: *R.W.D.S.U. v Pepsi*, para 27;
5. Intimidation is not permitted; and
6. Free access to and the right to use one's property must be protected, while protecting also the right of union members to freedom of expression and association: *R.W.D.S.U. v Pepsi-SCC*, para 103 and *A.I. Enterprises*, para 34.

***Draft Interim Order***

[28] On December 17, 2019, I issued the following decision:

[1] This matter has proceeded to date as an application without notice because the respondents did not have enough notice of today's hearing to respond fully. Thus, as set out in Rule 6-3(3) of *The Queen's Bench Rules*, I must be satisfied that a delay in considering the application "would result in serious mischief".

[2] Unifor has filed a copy of its instructions to members, called "The Right to Picket – Picketing Guide". Members are expected to follow those instructions. Failure to follow the instructions may very well influence the result of the application to restrict picketing, scheduled for December 23, 2019.

[3] CCRL claims individual picketers have intimidated and assaulted persons attempting to cross the picket line. However, the police are responsible for enforcing breaches of the criminal law. Therefore, an interim order is not necessary to avert serious mischief.

[4] CCRL also asserts picketers are obstructing access to and exit from their facilities. The allegations, not yet challenged by Unifor, are that the picketers are going beyond conveying information and soliciting support as they are entitled to do. CCRL asserts the picketers are causing serious delays for persons attempting to enter or leave CCRL properties. Consequently, I accept that until a full hearing of the application, serious mischief would occur if I do not limit the right of picketers' to communicate

information to those wishing to receive it to a maximum of five minutes: see *Industrial Hardwood Products (1996) Ltd. v International Wood and Allied Workers of Canada, Local 2693* (2001), 52 OR (3d) 694 (Ont CA) and *Unilux Boiler Corp. v Fraser*, [2005] OJ No 2410 (Ont Sup Ct).

[5] Consequently, an order may issue, pursuant to Rule 6-41, restraining the respondents from impeding, obstructing, or interfering with the ingress or egress to or from the applicant's property, except for the purpose of conveying information and/or soliciting support, to a maximum of five minutes.

[29] CCRL continues to seek a more restrictive injunction, restricting any delay in entering or leaving its property, amongst other terms. The union argues an injunction is not warranted. However, if granted, Unifor seeks more time for communicating its message, which it argues is complex because it involves explaining the difference between the current and proposed pension plans.

[30] Both parties discussed whether the picketers should continue to be bound by the time limitation in the interim order. Unifor suggests a longer time limitation be permitted, if an injunction is granted. For instance, it notes the 12 to 15 minute delay ordered in *Vale v U.S.W.A., Local 6500*, 2010 ONSC 1774 [*Vale*]:

3. On July 13, 2009, after the breakdown of negotiations, the Union began a lawful strike at the various premises owned by Vale. There followed a flurry of litigation between Vale and the Union to establish an acceptable picket line protocol. From the outset, Vale alleged that the Union's picketing activities regularly had the effect of denying them access to their properties and operations. The Union responded by asserting its right to freedom of expression and took the position that any delays at the picket line were undertaken in legitimate pursuit of that right. What resulted was a series of orders designed to accommodate the conflicting interests of the parties. The orders can be summarized as follows:

1. On July 29, 2009, Justice J. S. Poupore issued the first order to enjoin illegal activity and to set out parameters for lawful picketing at the various Sudbury premises. This order provided that everyone who has notice of the order is prohibited from;

(a) Causing any delay whatsoever to certain vehicles (emergency and environmental) and certain employees seeking access to and exit from the Sudbury premises;

(b) Delaying any other vehicles from entering the Sudbury premises for more than 12 or 15 minutes in total (depending on the time of day); and

(c) Causing any delay or impeding or blockading any vehicles or persons exiting from the Premises.

2. On September 22, 2009, Justice P. Rivard, in response to a motion brought by Vale, issued a second order to provide greater certainty with respect to the first order of Justice Poupore. This order provides that the 12/15 minute delay on entry and the no delay on exit provisions of the order of Justice Poupore were to apply to all vehicles regardless of type, purpose or ownership and regardless of what was being transported therein. It also prohibits walking in front of moving vehicles entering or leaving the Sudbury premises and picketing on Vale's private roads.

3. On November 27, 2009, in response to a further motion brought by Vale, I issued an order to clarify that no vehicle was to be delayed for more than 12 or 15 minutes, as applicable, from the time it enters the line of vehicles at a picket line, regardless of whether the line of traffic is on or off of Vale property.

4. On December 22, 2009, Justice J.S. Poupore issued a further order establishing a protocol in relation to buses carrying passengers across the picket line which included, among other things, maximum times of delay for each bus.

[31] The decision in *Vale* followed by several years the decision in *Industrial Hardwood Products (1996) Ltd. v Industrial Wood and Allied Workers of Canada, Local 2693* (2001), 196 DLR (4<sup>th</sup>) 320 (Ont CA)

[*Industrial Hardwood*]. In *Industrial Hardwood*, the Ontario Court of Appeal upheld an injunction prohibiting “the obstruction of access to the plant and ... limits the time for the communicating of information to those wishing to receive it to a maximum of five minutes”. The Court disagreed with and found unreasonable the part of the order limiting “to four the number of picketers communicating that information” [at para. 36].

[32] CCRL submits that the notion of limiting communication by five minutes, or otherwise, is not widely practiced. On the other hand, the company filed a copy of an order granted by Rothery J. in this court, upon the consent of the parties, in *CNR v CAW – Canada, Local 1000* (March 12, 2004) Regina, QB 476/2004 (Sask QB), restraining members of the union from:

- (a) Blocking or obstructing, by parading, congregating, picketing or otherwise, in or on the entrances to the [company’s] premises ... so that there will be no denial or restriction of access to or exit from the said premises, with the exception that ingress or egress may be impeded for the purpose of providing information to people in motor vehicles if:

- (i) The motor vehicle is not stopped in a travelling lane for more than two minutes or until the driver of the motor vehicle indicates a desire to proceed, whichever comes first

...

### ***Decision***

[33] The evidence provided is in affidavit form and no affiant has been cross-examined. Bearing this limitation in mind, I conclude for the purposes of this interim application, that individuals aligned with CCRL and Unifor have attempted to intimidate those on the other side. I am also satisfied that Unifor has engaged in activity designed to impede and/or block the traffic flow in and out of CCRL premises.

[34] Unifor has explained its strategy and has acknowledged unruly behaviour in the early days of the lockout. It alleges CCRL is unnecessarily dispatching fuel trucks to increase disruptions at its facilities. Unifor also submits that CCRL has encouraged security guards and replacement workers to taunt and provoke picketers.

[35] CCRL has not acknowledged, or accounted for, the intimidating behaviour of its security personnel, other employees and contractors. Nor has it provided evidence to counter the allegation it is dispatching fuel trucks unnecessarily. However, I agree with CCRL that Unifor members are not permitting replacement workers to enter CCRL premises and are slowing fuel trucks from entry to and exit from their facilities beyond what is permitted.

[36] I find CCRL has established a strong *prima facie* case that the manner of picketing in the first week and a half of the lockout was unlawful as the apparent purpose of some of the picketing was not to disseminate information to the public, or to solicit support of the public, but to intimidate replacement workers and others from entering CCRL facilities. However, I am also satisfied, based on the evidence before me, that Unifor has taken control of the unlawful behaviour, except with regard to replacement workers.

[37] If the picketing were enjoined more strictly than it is under the current interim order, the union could lose its ability to effectively communicate its position to the public and solicit support for its position. Those losses are not compensable in damages. On the other hand, if Unifor continues to block the entry of replacement workers into CCRL facilities, the company may suffer harm. The issue is whether the harm is irreparable

because it cannot be compensated for in damages. In *Vale*, the motions judge noted that inability to access property may not be compensable in damages:

31 The Ontario Court of Appeal, in the case of *Industrial Hardwood Products (1996) Ltd. v. Industrial Wood and Allied Workers of Canada, Local 2693* [2001] O.J. No. 28, upheld a decision by a motions judge, [2000] O.J. No. 536, that an employer may suffer irreparable harm in lost business that might never be regained together with the continued unlawful obstruction of access to their property. This accords with the notion that damages are not an adequate remedy for a party who has suffered a violation of a right as fundamental as accessing property owned by it. ...

[38] A delicate balance must be maintained between the union's right to picket and the employer's right to protect its premises. On a balance of convenience test, it is clear Unifor would suffer greater harm, if its right to communicate its position in the labour dispute and/or to show support for its position were interfered with. At the same time, there is no evidence that CCRL's losses to date are irreparable.

[39] However, long delays, like those suffered by CCRL employees, replacement workers or contractors before the interim order, can cause tensions to rise to levels where unexpected incidents occur. The current order seeks to deal with that risk.

[40] In the current order, I attempted to maintain the balance between the legitimate interests of the union and CCRL. I am satisfied that order should be amended to better account for those interests.

[41] Therefore, an order may issue restraining Unifor from impeding, obstructing, or interfering with the ingress or egress to or from the applicant's

property, except for the purpose of conveying information and/or soliciting support and the restriction of access to or exit from the said premises, **shall only last as long as necessary to provide information, to a maximum of 10 minutes, or until the recipient of the information indicates a desire to proceed, whichever comes first.**

[42] I am not satisfied that CCRL is entitled to an order responding to the intimidation that has occurred, as it has occurred on both sides. Moreover, the parties are two weeks into this labour dispute, and I am confident based on the evidence before me that the parties are exerting more control over the conduct of their members, employees and/or contractors. In any event, and as stated in the interim order, the police are responsible for enforcing breaches of the criminal law.



J.E. McMURTRY