

The Supreme Court of Canada revisits the notion of freedom of expression in a labour dispute context

By Catherine Maheu



Unions are entitled to engage in consumer leafleting during a labour dispute, but subject to what limitations?

Last Fall, the Supreme Court of Canada rendered two important decisions on the issue of freedom of expression of unionized individuals involved in a labour dispute. This was the second time that the Court specifically examined the manner in which freedom of expression, a right guaranteed under the *Canadian Charter of Rights and Freedoms*, can be exercised at “secondary” or “neutral” sites or, in other words, at an employer’s other establishments or at third party establishments not involved in the particular labour dispute.

On several occasions, the Supreme Court recognized that it is essential for the well-being of employees, labour relations and society as a whole that unions and their members inform the general public of the issues at stake and the circumstances of a labour dispute, with the objective of seeking public support in their quest for better working conditions. In this context, the Supreme Court further recognized that picketing is an acceptable form of the exercise of freedom of expression.

However, if as part of the collective bargaining process it is generally acknowledged and accepted that the parties can use various forms of economic pressure against each other, such as strikes, lock-outs, picketing and leafleting, what is the position where such pressure tactics extend to the

employer’s other establishments not involved in the strike or to third parties uninvolved in the dispute between the employer and the union? In these situations are there any limits as to how far a union and its members can go in expressing themselves freely during a labour dispute?

In 1986, in the decision of *RWDSU v. Dolphin Delivery*,¹ the Supreme Court ruled that it was reasonable to limit union picketing activities so as to ensure that the conflict is confined to the parties concerned. Accordingly, in the view of the Court, “secondary” picketing of the union at establishments

¹ [1986] 2 S.C.R. 573

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belonging to another employer with the intention of adversely affecting that employer who is not directly concerned by the labour dispute, constituted abuse of the exercise of the right to freedom of expression protected under the *Canadian Charter of Rights and Freedoms*.

However what is the legal position where union members distribute leaflets or pamphlets to members of the public at secondary establishments of the employer concerned not affected by strike or lock-out, or on premises belonging to employers not directly involved in the labour dispute?

This is the very question that the Supreme Court was called upon to decide in *U.F.C.W., Local 1518, v. KMart Canada Ltd.* (“*KMart*”) and in *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P* (“*Allsco*”).²

The KMart case

KMart operated 11 establishments in British Columbia, two of which were unionized, with the certified bargaining

agent for the unionized employees being the United Food and Commercial Workers, Local 1518 (“the Union”).

During a labour dispute surrounding the negotiation of an initial collective agreement, KMart decided to lock out the employees at its two unionized establishments. In response, the members of the Union distributed leaflets in front of the nine other KMart establishments not involved in the lock-out.

Various employee Union members stood in groups of 2 to 12 at a distance of some two to 20 feet from KMart store entrances, and handed out printed leaflets to prospective customers on store sites.

Two kinds of leaflets were distributed. The first was concerned with informing customers of KMart’s allegedly unfair labour dispute practices. The second urged consumers to shop elsewhere and boycott KMart stores.

The leafleting activities did not prevent the employees of the various stores from going to work, nor did they interfere with suppliers making deliveries. Furthermore, the evidence indicated that the leafleting took place without any verbal or physical intimidation on the part of Union members. Despite this, KMart sought an order enjoining the Union to refrain from its leafleting activities.

The matter was initially heard before the British Columbia Labour Relations Board (“the Board”), which was called upon to interpret the applicable provisions of the *Labour Relations Code* of that province.

However, as one purpose of the *Labour Relations Code* is to minimize the effects of labour disputes on persons who are third parties to the conflict, the Code places certain restrictions on union picketing activities. Accordingly, unions are formally prohibited from engaging in picketing activities at “secondary sites”, i.e., at the employer’s other establishments not involved in the labour dispute and at which there are no strikes or lock-outs. Unions are also

² Judgements 26209 and 26204, both rendered on September 9, 1999

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prohibited from picketing in front of a “neutral site”, i.e., at the establishment of an employer not privy to the dispute between the primary employer and the union.

The definition of “picketing” in the *Labour Relations Code* which the Board had to examine read as follows:

“picket” or “picketing” means attending at or near a person’s place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to:

a) enter that place of business, operations or employment,

b) deal in or handle that person’s products, or

c) do business with that person,

and a similar act at such a place that has an equivalent purpose.

In applying these provisions, the Board held that the Union had engaged in secondary picketing and had

contravened the Code by distributing leaflets in front of the nine establishments not involved in the labour dispute with KMart. The Board ordered the Union’s members to refrain from the secondary picketing.

The case went to appeal, first before the British Columbia Supreme Court, then before the British Columbia Court of Appeal and finally, before the Supreme Court of Canada. In all instances, the fundamental issue was whether the prohibition against secondary picketing contained in the *Labour Relations Code* of British Columbia constituted an undue restriction on the freedom of expression guaranteed under the *Canadian Charter of Rights and Freedoms*, insofar as unionized individuals were prohibited from distributing leaflets during a labour dispute at the employer’s secondary sites.

The *Allsco* case

The facts in the *Allsco* case are similar to those in the *KMart* case, with the only difference being that the establishments affected by the Union’s leafleting activities did not belong to the employer involved in the labour dispute.

Allsco Building Products Ltd. was a New Brunswick company operating in the Moncton area, and was engaged in manufacturing vinyl windows, doors and other exterior products for homes. Allsco was also the principal supplier of four companies that sold construction supplies or used the products manufactured by Allsco in building modular homes or trailers (“the customer companies”).

The four customer companies were not bound by a collective agreement between the United Food and Commercial Workers, Local 1288P (“the Union”), and were complete strangers to the labour dispute between the Union and Allsco.

On 13 occasions over a three-month period, Union members distributed leaflets outside the four non-Allsco establishments.

Union members approached cars entering customer company premises and offered the leaflets to car occupants. The evidence indicated that the Union members had not trespassed on the private property of the customer companies. They did not picket, they did not interfere with cars entering and exiting the non-Allsco establishments, nor did they try to dissuade suppliers, employees or customers from entering customer company establishments.

The leaflets thus distributed asked consumers to think twice before purchasing products manufactured by Allsco because the company had locked out its employees. The leaflets also stated that working conditions at Allsco were harsh. In seeking the public's support, the Union hoped to force the company to return to the negotiating table.

Like the *Labour Relations Code* of British Columbia, the *Industrial Relations Act* of New Brunswick also prohibits secondary picketing and any attempt on

the part of a union to persuade any person to cease doing business with an employer not involved in a particular labour dispute.

However, the New Brunswick Act also provides that a union is entitled to express its views freely, provided that this right is not exercised in a coercive, intimidating or threatening manner.

In applying the provisions of the *Industrial Relations Act*, the New Brunswick Court of Queen's Bench granted the injunction applied for by Allsco and the customer companies and enjoined the Union to refrain from secondary picketing in front of third party establishments not involved in the labour dispute. The New Brunswick Court of Appeal upheld the judgement of the court of first instance, and the Union appealed that decision.

As in the *KMart* case, the basic legal issue before the Supreme Court of Canada was whether the prohibition contained in the *Industrial Relations Act* was an undue restriction on the freedom of expression guaranteed

under the *Canadian Charter of Rights and Freedoms*, insofar as unionized individuals were prohibited from distributing leaflets anywhere but at the place of business of the employer directly involved in the labour dispute.

Conventional picketing v. peaceful persuasion

In both the *KMart* case and the *Allsco* case, the Supreme Court of Canada held that distributing leaflets or pamphlets is an activity protected under section 2 b) of the *Canadian Charter of Rights and Freedoms* guaranteeing freedom of expression. Therefore, according to the Court, any restriction on this activity is, at first glance, an infringement of a right guaranteed under the *Charter*.

However, the Supreme Court was of the view that the issues before it could be resolved entirely in light of the basic of the distinction between conventional picketing and consumer leafleting. The Honorable Mr. Justice Cory, in rendering the opinion of the Court in the *KMart* case, explained this distinction at great length.

According to the Court, picketing as a form of economic pressure acts as a barrier. It impedes public access to the goods and services of a particular company, employee access to the workplace and supplier access to delivery sites. It is a powerful and, at times, coercive message to everyone that they should not cross the picket line and interfere with the union's struggle against the employer.

While it is widely acknowledged that conventional picketing is a form of freedom of expression, it is a pressure tactic that is not permissible if it is exercised against a neutral party by means of secondary picketing. It is worthwhile quoting the following passage from *Dolphin Delivery*:

"It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others."

But, according to the Supreme Court decision in the *KMart* case, consumer leafleting is entirely different from picketing. Mr. Justice Cory expressed the view of the Court as follows:

"Consumer leafleting is very different from a picket line (...). Consumer leafleting seeks to persuade members of the public to take a certain course of action through informed and rational discourse, which is the very essence of freedom of expression. Leafleting does not have the same coercive component as a picket line, and does not in any significant manner impede access to or egress from premises."

Specifically on the issue of financial damages that neutral establishments may suffer as a result of leafleting, Mr. Justice Cory wrote:

"Although the enterprise which is the subject of the leaflet may experience some loss of revenue, that may very well result from the public being informed and persuaded by the leaflets not to support the enterprise. (...) Significantly, the harmful effects that flow from leafleting do not differ from those which would result from a consumer boycott campaign conducted by permissible means. In fact it is well nigh impossible to distinguish between the situation whereby consumers are informed and persuaded not to buy through leafleting at the place of purchase, and the situation whereby the same consumers are informed and persuaded not to buy through leaflets delivered to the mailbox, newspaper advertising, Internet mailing or billboards and posters."

As leafleting does not prevent employees or suppliers from entering the neutral establishment, the Court therefore considers it an acceptable and peaceful means of persuasion and expression.

Not all leafleting is permissible

However, the Supreme Court is very far from recognizing that any form of leafleting by unionized individuals involved in a labour dispute is acceptable. Consumer leafleting may, on occasion, have the same coercive effect as conventional picketing in front of the establishment of a secondary employer.

Therefore, the Court held that in order for leafleting to constitute a valid, lawful and acceptable exercise of the right to freedom of expression, the following guidelines would normally apply:

- the message conveyed by the leaflet must be accurate, not defamatory or otherwise unlawful, and not entice people to commit unlawful or wrongful acts;
- the leaflet must clearly identify the primary employer involved in the labour dispute;

- the leafleting must not be conducted in a coercive, intimidating, or threatening manner or be otherwise unlawful or wrongful;
- the leafleting activity should not involve a large number of people so as to create an atmosphere of intimidation;
- the leafleting activity must not unduly impede access to, or egress from, the leafleted premises;
- the leafleting activity must not prevent employees of neutral sites from working and must not interfere with other contractual relations of suppliers to the neutral sites.

The Supreme Court ruling

Applying the above criteria, the Supreme Court held in the *KMart* case that the provision of the *Labour Relations Code* prohibiting secondary picketing is, insofar as it prohibits unionized individuals from leafleting on the employer's secondary sites during a labour dispute, an undue restriction on

the right to freedom of expression guaranteed under the *Canadian Charter of Rights and Freedoms*.

In writing the opinion for the Court in the *Allsco* case, Justice Iacobucci adopted all the statements of principle enunciated in the *KMart* case, and held that, insofar as unionized individuals would be prevented from leafleting at neutral sites, the provision of the *Industrial Relations Act* pertaining to secondary picketing constituted an unlawful infringement of the right to freedom of expression.

Furthermore, on the facts of the *Allsco* case, the *Industrial Relations Act* also provides that unions are free to express their points of view, provided that they do not do so in a coercive, intimidating or threatening manner. Accordingly, in the Court's view, the Legislator had provided for peaceful consumer leafleting on the premises of neutral employers.

Application of the *KMart* and *Allsco* cases in Quebec

The basic principles pertaining to leafleting enunciated by the Supreme Court in the *KMart* and *Allsco* cases also apply in Québec, as do the principles established in the *Dolphin Delivery* case regarding secondary picketing.

Therefore, although the *Québec Labour Code* (unlike the legislation in British Columbia and New Brunswick) does not specifically prohibit secondary picketing on neutral sites, unions and their members are nevertheless prohibited from engaging in this form of pressure because secondary picketing is an unlawful exercise of the right to freedom of expression guaranteed under the *Canadian Charter of Rights and Freedoms*.

The *KMart* and *Allsco* cases further clarify the scope of the freedom of expression of unionized individuals involved in a labour dispute. It is now accepted that union leafleting at neutral workplaces is a valid manner of disseminating information concerning a labour dispute to the general public, and that this conduct is protected under the right of freedom of expression. However, the right is not an unlimited

one: leafleting must be conducted within the parameters of validity established by the Supreme Court.

There may be some consternation at the comments of the Supreme Court regarding the issue of financial damages and inconvenience that neutral persons may suffer as a result of leafleting activities related to a labour dispute that in no way concerns them. The notion that parties should suffer the effects of pressure tactics not really intended for them may at first glance appear a shocking proposition.

However, in our view the Court's position on this issue was arrived at after due consideration of the constant evolution in the information and communication fields, and the exercise of freedom of expression in this particular context. Given that these are areas in constant flux, future Supreme Court decisions on the freedom of expression of unionized individuals involved in a labour dispute should be followed with great interest.

A question of fact ...

In light of everything that has been said, a company that is not involved in a labour dispute is not in any way obliged to tolerate the unlawful exercise of the right of unionized individuals to engage in leafleting its customers or employees.

The question of whether a specific instance of leafleting activity exceeds permissible limits and disregards the conditions laid down by the Supreme Court, is a matter for analysis and assessment of the particular facts.

If you have similar concerns, please do not hesitate to contact us; we would be pleased to help you assess any similar situation affecting your company and advise you on the various recourses available to you.

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