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Hersees of Woodstock Ltd. v. Goldstein: How a Small Town Case Made it Big

Eric Tucker

A CENTRAL PROBLEM FOR any regime of industrial legality is to define the scope for workers' collective action. One characteristic of the post-World War II regime in Canada, commonly known as industrial pluralism, is that it failed to resolve that issue definitively. Most labour relations acts imposed procedural and time constraints on strikes and lockouts, but left the courts to regulate strike activity according to the body of common law they had developed in earlier periods. This produced tension within the regime; clearly legislatures intended that there should be some space for workers' collective action, but, given its historic role as defender of private property and freedom of contract, the judiciary tended to define the boundaries of this space very narrowly.

Although this tension was constant, its salience and visibility varied greatly, depending on the level and scope of industrial conflict. In the period following the post-war strike wave of 1946–47,¹ labour-management conflict settled down throughout most of Canada, as did legal contestation over the rules of the game.² By the late 1950s and early 1960s, however, tensions were beginning to rise again. Declining rates of growth, productivity, and profit led some employers to adopt a tougher attitude toward unions, while unions that had achieved a modicum of institutional security were facing stagnating membership growth and threats to existing standards. As a result, not only did the incidence of industrial conflict begin to increase nationally and in Ontario, but so too did its intensity; strikes became more

violent and unions renewed the use of some older tactics, like consumer boycotts and picketing, that challenged the boundaries of judicially defined industrial legality.³

Harry Arthurs, writing in 1960, colourfully captured one view of the growing sense of crisis produced by this confrontation: “The lusty and forgivable infant that was trade unionism fifteen years ago has developed in public, legislative, and judicial imagery, into a churlish adolescent.”⁴ The call to make trade unions “responsible” was being revived in a number of influential arenas. From the perspective of trade unionists, however, the imagery was quite different. They perceived employers becoming more antagonistic, governments passing labour legislation hostile to union interests, and judges unfairly granting injunctions against picketing.⁵

*Hersees of Woodstock Ltd. v. Goldstein*⁶ provides an excellent prism through which to view that moment of renewed conflict and understand how and why a tiny labour dispute in small-town Ontario in 1962 created a major precedent that significantly restricted the scope for workers’ collective action over the next forty years by holding, in legal parlance, that secondary picketing was *per se* tortious, which means that any picketing at a site other than the struck employer’s place of business was unlawful and could be prohibited by law.⁷

Beginning in Belleville

OUR STORY PROPER BEGINS at Deacon Brothers Sportswear Ltd., a men’s sportswear manufacturer in Belleville, Ontario, a small regional trading town.⁸ Deacon Brothers Sportswear traced its roots to 1897 when William B. Deacon opened a menswear store. In 1903 William B. closed the retail operation to focus on the production of men’s shirts. During World War I, the Deacon Shirt Company obtained contracts to manufacture military uniforms. William B.’s brother, Fred S. Deacon, joined the company in 1914. William B.’s oldest son, Fred H. Deacon, joined the business 1923, and his younger brother John followed in 1936. The company expanded its business after the war to include men’s leisure wear, and changed its name to Deacon Brothers Ltd. During World War II the company produced shirts and outerwear for the military and in 1941 it constructed a new plant, where it remained until it closed in 1990. After the war, the company’s business expanded as it moved into outdoor wear, which it marketed chiefly through independent menswear stores across Canada.⁹ Following the deaths of William B. and Fred S.

Deacon in the 1940s, the firm was operated by William B.'s sons; John was primarily responsible for production, and Fred. H. for sales.

Up to this point, the company's employees had never been unionized, despite the strong presence of the Amalgamated Clothing Workers (ACW) in the men's clothing industry. The ACW was founded in 1913 by a group of secessionists from the United Garment Workers (UGW) who were dissatisfied with the leadership's focus on organizing native-born workers in small towns. The ACW, in contrast, concentrated its efforts on the urban immigrant workforce in the men's clothing industry, which it successfully organized in Toronto, Montreal, and Winnipeg.¹⁰ In 1960 it had forty locals and 15,000 members. The UGW survived as a minor player in the garment industry; in 1960 it had twelve locals scattered across the country and 2,000 members.¹¹

What led the ACW to Belleville in the late 1950s? According to Stanley Clair, then the Ontario director of the ACW union-label department and president of the Canadian Labour Congress trade union label department, Deacon Brothers was the only major clothing manufacturer not under union contract and their wage scale was 25 percent lower than the ACW's, a claim that Fred B. disputed.¹² In 1959 the ACW commenced an organizing drive at Deacon Brothers among the largely female, Canadian-born workforce of about ninety full-time production employees. Under Ontario labour law at the time, the union could be certified either by signing up 55 percent or more of the bargaining unit employees as members, or by winning an election, which would be held if the union could demonstrate that at least 45 percent of the employees were members.¹³ The union signed up enough employees to get an election, but not enough to be certified on the basis of membership evidence alone. The ACW lost the October 1959 election thirty-four to forty-three,¹⁴ but continued the organizing drive. Presumably as part of a union avoidance strategy, Deacon Brothers participated in the creation of the Belle-Tex Association, which applied for certification in May 1960.¹⁵ The ACW intervened and the application was dismissed by the Ontario Labour Relations Board (OLRB) on the ground of employer involvement.¹⁶

Notwithstanding this finding, Deacon Brothers entered into a collective agreement with Belle-Tex Association, dated 7 July 1960. This action proved futile. The ACW subsequently signed up more than 55 percent of Deacon Brothers employees and was certified without a vote in August 1960 for a unit consisting of seventy-two production employees. The OLRB dismissed the argument of the Belle-Tex Association that the existence of a collective

agreement between it and Deacon Brothers made the ACW's application untimely: because of the employer involvement, the 7 July agreement was found not to be a collective agreement within the meaning of the *Labour Relations Act (LRA)*.¹⁷

Some bargaining between the ACW and Deacon Brothers followed, but no agreement was reached. An unsuccessful conciliation process was completed on 19 January 1961, putting the union in a legal strike position, yet for reasons about which we can only speculate, no strike was called. The most likely explanation is that although the union enjoyed majority support, it lacked the solidarity needed to win a strike. It is also possible that the union supporters, lacking any previous union experience, were uncomfortable with the idea of strikes and picketing. Finally, the ACW itself had developed a harmonious relationship with most employers in the men's clothing industry based upon industrial standards legislation passed in the 1930s and third-party arbitration to resolve most disputes.¹⁸ According to Stanley Clair, the "Amalgamated Clothing Workers of America has a policy of avoiding strikes whenever possible . . ." ¹⁹ Indeed, it had not conducted a strike in Canada in the thirty-five years before 1962.²⁰

Meanwhile, changes were also taking place at Deacon Brothers. Fred H. died in 1958 and his son, Fred B. (hereinafter referred to as Fred), took his place in the fall of 1959 after graduating from the Ivey School of Business Administration at the University of Western Ontario. Within a short time, disagreements with his uncle John over the future of the company resulted in Fred buying out John and reorganizing the firm as Deacon Brothers Sportswear Ltd. in December 1961. Fred did not recall having any dealings with the union prior to, or at the time of taking over the company.²¹

This changed in the summer of 1962 when, according to Fred, he received a phone call from ACW representatives in New York who wished to meet with him. Fred contacted his lawyer, Hugh Gibson, in Kingston, Ontario, who advised that he should agree to meet since Deacon Brothers Sportswear Ltd. was the successor to Deacon Brothers and so the union remained the certified bargaining agent. Based on subsequent statements made by Fred in the press, however, it also seems he did not believe that the union enjoyed majority support.²² Not surprisingly, the subsequent meeting did not go well. According to Fred, the union representatives arrived at his office and demanded that he sign a collective agreement they had prepared in advance. The talks ended quickly. Then, according to Fred, the union representatives subsequently met with the employees. He does not know what transpired at

the meeting, but we can assume the union decided that a strike by Deacon Brothers Sportswear employees was not a viable option.²³

Later that summer, Fred received a phone call from William Hersee, the manager of Hersee's Men's Wear in Woodstock, Ontario, advising him that he had been requested to stop doing business with Deacon Brothers Sportswear. How and why did the locus and subject of the dispute shift from stalled negotiations with a Belleville manufacturer to a retail store in Woodstock, more than 300 kilometres away? There is no direct evidence of the chain of communication, but we can surmise that the ACW officials who failed to obtain a collective agreement at Deacon Brothers Sportswear requested the assistance of both the ACW and the Canadian Labour Congress (CLC) union label departments to promote a boycott of Deacon Brothers Sportswear clothing in order to pressure the company to sign a collective agreement. At the time, both were headed by Stanley Clair.²⁴ It is not clear whether Clair was acting in his CLC or his ACW capacity, or both, but this response went beyond the CLC union label department's normal work of promoting the purchase of clothing with the union label through displays at fairs and trade union events, or the distribution of promotional material at shopping plazas.²⁵ Instead, on 22 August, Stanley Clair traveled from his home in Windsor to Hersee's Men's Wear in Woodstock.

Hersee's was a family-owned men's and boy's clothing retail business that was started in about 1920 by William F. and L. Beverley Hersee. The Hersee family had deep roots in Woodstock, a community that was home to a number of industrial establishments, including the Gardner-Denver Co., a heavy equipment manufacturer, and York Knit, the manufacturer of Harvey Woods underwear.²⁶ There is no indication why Clair selected Woodstock or Hersee's, but what followed is fairly clear, notwithstanding some dispute over the details. Clair approached William Hersee, the proprietor of the store, identifying himself either as the CLC or the ACW union label department director.²⁷ He was accompanied by Charles E. Carson, secretary-treasurer of the local labour council. Clair asked Hersee if his store did business with Deacon Brothers Sportswear. Upon receiving a positive response, Clair asked Hersee to write or telephone Deacon Brothers Sportswear letting it know that he had been called upon by local labour representatives asking him to protest the fact that its goods were not union-made. Clair also allegedly asked Hersee to cancel outstanding orders but, in any event, according to William Hersee, there were no outstanding orders at the time. Hersee let Clair know that he had no intention of complying with his request.

Presumably it was after this first encounter that Hersee called Fred Deacon. In a newspaper interview, Hersee reported that he received a letter from Fred Deacon on 24 August stating that, in his view, the union only represented a minority of the employees and that the company would only discuss a contract with the union when it could prove to management it enjoyed majority support. Deacon's letter also stated his opinion that, if the union did represent the majority, it would close the plant by simply walking off the job.²⁸ In short, Fred dared the union to strike.

Clair and Carson returned the following day to ask Hersee whether he had given their request further thought. When Hersee again indicated he had no intention of acceding to their demands, Clair advised that he was planning an educational program to be carried out by picketing and the distribution of leaflets at the premises of some retailers for the purpose of advising members of the public that Deacon Brothers Sportswear's goods were not union-made.²⁹ Hersee told them that if that was their attitude they should go ahead. They did; on Tuesday, 28 August 1962, Clair and Peter Goldstein, a representative of the ACW, appeared outside of Hersee's dressed in suits and carrying placards advising shoppers that Deacon Brothers Sportswear, made by non-union labour, was being sold at Hersee's.

This was not the first time the ACW had picketed a retail store or been taken to court over such tactics,³⁰ but the legal consequences of this action were to have far-reaching implications for the Canadian labour movement.

Mobilizing Working-Class Purchasing Power: "The Secret Weapon Of Trade Unionism"³¹

WHILE HISTORICALLY THE LABOUR movement primarily gained bargaining leverage by withdrawing labour at the point of production, these events indicate that it also resorted to strategies that aimed to discourage suppliers, distributors, and customers from doing business with employers who failed to pay union wages or sign collective agreements. Our focus here is on consumer boycotts and the tactics used to make them effective. One of the earliest was the union label campaign, which encouraged workers and their families to purchase union-made goods by identifying them with a label that unionized manufacturers were authorized or required to put on their products. This tactic originated in the United States in the 1870s, and was used by white, unionized cigar makers to discourage consumers from buying cigars produced by Chinese immigrants. During the 1880s, the Knights of Labor and

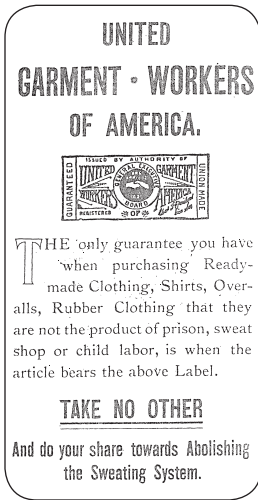


Stanley Clair and Peter Goldstein, outside Hersee's Men's Wear
Daily Sentinel Review [Woodstock] (28 August 1962) 1

craft unionists associated with the American Federation of Labor adapted the tactic to mark consumer products made by their members. In the first decades of the twentieth century, both the International Ladies Garment Workers and the UGW relied heavily on the union label as an alternative to the use of strikes.³²

The tactic also gained popularity among Canadian unions. In 1895 the Toronto Trades and Labour Council organized the Union Label League, and shortly thereafter it published a directory which included pages from the Journeymen Tailors' Union and the United Garment Workers promoting their labels.³³

The Trades and Labour Congress of Canada (TLC) also became actively involved in promoting the union label at this time, incorporating a demand into its 1898 *Platform of Principles* that the union label be placed on all manufactured goods where practicable and on all government and municipal



Union Label, United Garment Workers of America, Toronto Trades and Labour Council Directory (c. 1895)

supplies.³⁴ Although local unions and their councils continued to promote the union label, interest seems to have tailed off in the period between the world wars, but revived in the 1950s, perhaps in response to the growth of consumer spending.³⁵ The TLC re-created a union label department in 1952, which continued as a department of the (CLC) after its founding in 1956. Stanley Clair, president of the Windsor union label council and the ACW's Ontario union label director, became its president.³⁶

The mobilization of consumer spending "as the secret weapon of trade unionism" was not limited to labelling products and encouraging consumers to buy union. Unions also resorted to so-called negative boycotts that involved efforts to actively discourage vendors from carrying "unfair" products and purchasers from buying them. Tactics ranged from maintaining "we don't patronize" lists to more active measures, including the ones that occurred at

Hersee's in Woodstock. These kinds of measures were adopted in both the United States and Canada beginning in the 1880s but their legality was challenged in the courts.³⁷

By The Time We Got to Woodstock: Legal Regulation of Labour Boycotts And Picketing

THE FUNDAMENTAL LEGAL QUESTION in *Hersees* was whether and in what circumstances individuals could be held liable for intentionally inflicting economic harm on another. Although the English courts rejected the general proposition that the intentional infliction of economic harm was an unlawful act in and of itself (tortious), they were nevertheless prepared to impose liability in some circumstances and developed a number of specific torts, including inducing breach of contract and civil conspiracy to injure, for this purpose.³⁸

When picketing was added to the mix of tactics, legal issues became more complicated. At the time, the law was concerned with three aspects of picketing: its form; its purpose; and its result. In general, peaceful picketing that aimed to provide information or persuade individuals to engage in actions they were lawfully entitled to pursue was lawful. Picketing became il-

legal because of its form if it involved criminal behaviour or the commission of nominate torts such as trespass, nuisance, intimidation, and defamation, and it became illegal in its purpose or result when it aimed to or persuaded people to commit unlawful acts including breaches of statute, civil conspiracies, or breaches of contract. This meant that the legality of picketing was in part determined by what courts considered to be an inducement of a breach of contract or a civil conspiracy to injure.³⁹

A final legal consideration was the procedure governing the availability of injunctions to stop picketing. As a general matter, injunctions are an equitable remedy available to a party in a civil action on both a permanent and an interlocutory (before there has been a final determination of the merits) basis. The controversial area was with respect to the latter. In principle, interlocutory injunctions are available on the basis of three factors: the relative strength of the cases; irreparable harm; and the balance of convenience. By 1962, courts had adopted the practice of readily granting interlocutory injunctions to halt labour picketing, often doing so initially on an *ex parte* application, meaning that the union did not even get notice of the proceeding.⁴⁰

While the question of the legality of union labels, union-led consumer boycotts, and picketing in support of boycotts was formally resolved by the application of English common law, as described above, it would be a mistake to proceed on the assumption that judges were sticklers for the formal rules they themselves constructed. Rather, as we shall see, the outcome of cases depended at least as much on the attitudes of the judiciary toward workers' collective action, on the broader environment in which they operated.

The legality of having union labels attached to union-made products was not challenged in Canada or the United States.⁴¹ Indeed, Canadian courts upheld legal actions against individuals for fraudulent use of the union label and, in 1927, after nearly thirty years of trying, the TLC succeeding in getting trademark legislation amended to allow registration of union labels. The TLC promptly registered its own label the following year.⁴² As well, the legality of unions positively encouraging their members and the public to buy products bearing the union label or to patronize unionized businesses was not questioned.

The law became less clear when labour unions initiated negative campaigns, for example, urging consumers not to purchase goods of a particular producer or not to patronize listed businesses. The first challenge occurred in the United States in the 1880s when bakers in New York City were convicted

of a criminal conspiracy for calling upon consumers to boycott Mrs. Gray's bakery. Criminal prosecutions followed in other states and American judges also began to adapt the common law to hold that labour boycotts were civil conspiracies. Judges also crafted effective remedies, providing injunctive relief and holding trade union officials *and* members personally liable for damages.⁴³

Some Canadian employers were inspired by these US developments, but were not nearly as successful. As a general matter, Canadian courts relying on English precedent rejected the view that a union-led consumer boycott targeting the employer with which it was having a dispute was tortious.⁴⁴ Similarly, picketing that was otherwise lawful did not become tortious because the picketers called for a primary boycott.⁴⁵ The situation began to change, however, when secondary action was involved. Prior to 1962, secondary action was not a legal term of art; its usage in Canada seems to have originated in a 1956 study by Alfred W.R. Carrothers, a labour law professor, where he used the label, "secondary" (initially in quotation marks), to identify one of a series of factual situations in which courts were likely to find picketing unlawful because of its objects.⁴⁶ After examining a series of cases which fit this category, Carrothers concluded:

[W]here picketing occurs in a location where there is no labour dispute the picketing is not necessarily unlawful, but the further the picketing is removed from a labour dispute the more likely it will be interpreted as intimidation, as a conspiracy to injure or to induce an illegal strike, or as intended to induce a breach of contract. And the propensity of secondary picketing for illegality is increased where the picketing does not reach the public.⁴⁷

The essential feature of secondary picketing was that it occurred at a location where there was no active labour dispute, most typically at a location other than the struck employer's place of business. By the early 1960s, the issue of the legality of secondary picketing in support of a consumer boycott had been considered in several more cases. Although some judges had expressed the view that such activity was *per se* wrongful, other illegalities were also present in those cases, and so their outcome did not depend on that view.⁴⁸ Carrothers was attentive to these developments and in 1962 published an article entitled "Secondary Picketing" in which he reviewed the English and American law on the subject and then turned to Canada, where he found surprisingly little attention had been paid to secondary picketing. Nevertheless, on the basis of a small, but growing body of cases, Carrothers

concluded that Canadian judges were deciding the cases based on evaluation “as to whether the interests prejudiced by the picketing should prevail over the interests which the picketing is calculated to advance” but that this was being disguised by “invocation of the common law relating to civil conspiracy, inducing breach of contract and interference with favourable trade relationships, by the attribution of motive stemming from the invocation of pejorative adjectives, and from inferences based on tortious elements in the manner in which the picketing is carried out.”⁴⁹

The growing judicial hostility to secondary action was not isolated. Legislatures too were under pressure from employers to enact restrictive legislation. In British Columbia, employer lobbying yielded legislation in 1954 and 1959 that aimed to deter unlawful strikes and make unions more liable for illegal activities. The 1959 amendment specifically prohibited secondary action.⁵⁰ In Ontario, the government appointed a select legislative committee in 1957 to conduct a review of the operation of the *LRA*.⁵¹ In its report, issued in 1958, the committee endorsed the principles of industrial voluntarism in its broad terms, while seeking to refine its implementation.⁵² The labour movement viewed it otherwise, seeing its recommendation as tilted heavily in favour of employers who had argued that unions needed to be subject to great legal discipline to make them more responsible.⁵³ One controversial recommendation was to prohibit picketing an employer who was not a party to a labour dispute.⁵⁴ Following a provincial election in 1959 that returned another Progressive Conservative government, and after some behind-the-scenes maneuvering, in 1960 the government amended the *LRA*. Although the government did not implement the recommendations that trade unionists found most objectionable, it did seek to better deter unlawful strike activity by prohibiting persons from doing any act that as a reasonable consequence might cause an unlawful strike or act. The effect of this law would be to prohibit secondary picketing that aimed to induce the employees at the secondary site to strike unlawfully. It did not, however, go as far as the committee had recommended and prohibit secondary picketing in support of a consumer boycott.⁵⁵

Events after 1960 intensified the debate over the legal regulation of workers’ collective action. Residential construction strikes in metropolitan Toronto in 1960 and 1961, and a Teamsters’ strike in the spring of 1962 were conducted in violation of the *LRA* and were accompanied by violence.⁵⁶ The Ontario Attorney General, Kelso Roberts, issued a statement on 20 June 1961 calling for all citizens, and especially those involved in the construction dis-

pute, to obey the law and warned that instructions to enforce the law had been issued to Ontario Provincial Police, who would be assisting local police.⁵⁷ Also during the summer of 1962, inter-union conflicts on the Great Lakes were accompanied by violence and disrupted shipping.⁵⁸ The editorial writers at the *Globe and Mail* denounced the irresponsibility of union leaders and called for more stringent enforcement of the law as well as legislation to make labour leaders legally liable for the unlawful actions of their members. These editorialists also expressed alarm at the spread of disputes beyond the immediate parties. For example, in response to the secondary picketing that occurred during the construction strikes, the *Globe and Mail* warned: "What happens here in the next few years will determine whether Canada can devise an orderly and sensible system of labour relations or whether the law of the jungle is to continue until it involves the whole nation-labor, management and the public alike."⁵⁹ Finally, in late July 1962, editorialists at both the *Globe and Mail* and the more labour-friendly *Toronto Star* denounced the tactics of the Amalgamated Meat Cutters during a strike against a tannery: the strikers picketed the homes of men who continued to work, the factories that used the leather to manufacture shoes, and retail establishments where the shoes were sold.⁶⁰

A Small Town Case Makes it Big: From Woodstock to Toronto

THE PICKETING IN FRONT of Hersee's continued on the 29th and 30th of August. Fred Deacon sent a letter to the *Woodstock Sentinel Review* in support of William Hersee and denounced the ACW's actions. To further demonstrate how distant Hersee was from the dispute, Deacon wrote that the store did not have any orders with his firm. He also provided his side of the dispute with the ACW and condemned the union's tactics in language that resonated with that of the *Globe and Mail* editorialists. "The union has intimidated retail stores throughout the province. They have demanded that retailers cancel orders with this company or face the embarrassment of having their stores picketed. This is an affront to our democratic way of life."⁶¹

William Hersee clearly had Fred Deacon's moral support, but Deacon insists that was all — and that he did not help finance the litigation.⁶² In any event, Hersee was angry and upset about the picketing and on 30 August his lawyer, William E.G. Young,⁶³ filed for and obtained an *ex parte* injunction, based entirely on an affidavit by Hersee.⁶⁴ There was nothing exceptional about this; in Ontario *ex parte* injunctions were routinely being granted, even

after the minor amendments to the *Judicature Act* in 1960.⁶⁵ One indication of just how normal the practice had become is that the county court judge who issued the injunction, Eric W. Cross, was also a well-regarded labour arbitrator who heard numerous cases coming out of the large unionized industrial plants in southern Ontario.⁶⁶

After the injunction was issued, the picketing was called off, but for reasons that are not apparent, Hersee sought to have the injunction continued. An application needed to be made in the Supreme Court of Ontario and so Young called upon his firm's Toronto agent, Kimber and Dubin. The firm, and its principal lawyer, Charles Dubin, had acted in the past for both organized labour and management. Horace Krever, a member of the firm who graduated from Osgoode Hall Law School and was called to the bar in 1956, took the brief.⁶⁷

Unlike in the original application, the defendants got notice of the motion and retained John Osler to represent them. Osler was born into an upper-middle class family in Winnipeg in 1915 but was radicalized in his university years and became an active socialist and member of the Co-operative Commonwealth Federation (CCF). He graduated from Osgoode Hall Law School and was called to the bar in 1940. Following military service during World War II, Osler returned to Toronto where he joined up with fellow CCFers Ted Joliffe and Bert Carson to start what was to become the leading union-side labour law practice in Ontario.⁶⁸ For the purpose of defending the motion, Osler filed an affidavit sworn by Stanley Clair.

The motion was argued on 14 September 1962 before Mr. Justice J.C. McRuer, the Chief Justice of the High Court of Ontario. This might have seemed like a good draw for the plaintiff; although McRuer was not unsympathetic to workers, and recognized that they enjoyed a right to engage in peaceful picketing, even in support of an unlawful strike, he had expressed strong doubts about the legality of secondary action in a 1951 decision, *General Dry Batteries*:

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 that he may capitulate in the dispute. It is one thing to exercise all the lawful rights to strike and the lawful rights to picket; that is a freedom that should be preserved and its preservation has advanced the interests of the labouring man and

the community as a whole to an untold degree over the last half-century. But it is another thing to recognize a conspiracy to injure so that benefits to any particular person or class may be realized. Further, if what any person or group of persons does amounts to a common nuisance to another what is being done may be restrained by an injunction.⁶⁹

McRuer reiterated this concern about secondary action in a 1958 case involving picketing at a construction site for which there was no operative collective agreement, but, as in the previous case, he ultimately based his judgment on the ground that the picket line was inducing breaches of contract.⁷⁰ This approach was reflective of McRuer's preference to stay within, and strictly apply, well-established tort principles, rather than to stray too deeply into a field that he regarded as being "not too well settled as yet."⁷¹

No written submissions were made to McRuer and there is no record of the oral arguments, so we cannot know the strategies adopted by counsel. McRuer reserved judgment, presumably to give him time to review the evidence and reflect on the law.

While McRuer was considering the case, Stanley Clair decided to continue the Union Label Department's campaign against Deacon Brothers Sportswear. On 20 September, Clair appeared in front of Shaw's Men's Clothing Store in Belleville, the home of Deacon Brothers Sportswear, and later moved across the street to Meagher's, another men's clothing store. Clair, however, had learned something from his experience in Woodstock. At no point did he speak directly to the owner of either store and at the bottom of the picket sign, printed in smaller lettering, it was stated that the picketing was not directed against the merchants. In an interview with the local reporter, Clair emphasized that he was not asking people to boycott the stores or asking the merchants being picketed to boycott Deacon Brothers Sportswear. Rather, he said, the pickets were "just to educate the consumer." Fred Deacon was not pleased. He told the reporter that the situation was "serious" and again denied that the union really represented his workers, evidenced by the fact that it did not call a strike. He also stated that there was nothing Deacon Brothers Sportswear could do to stop the picketing, although he noted that merchants in Woodstock had succeeded in obtaining a judgment. Belleville police stated they would not intervene as long as the picketing was peaceful and did not obstruct traffic.⁷² As far as can be determined, the picketing lasted for one day. There is also one report of picketing in Trenton, Ontario but the day and target have not been identified.⁷³



Stanley Clair in Belleville
Belleville Intelligencer (21 September 1962) 11

By this time it was clear that the ACW was losing support among the employees at Deacon Brothers Sportswear. Sometime in September or October, an application for decertification was made to the OLRB, although it was dismissed because the board was not satisfied there was no employer involvement in the petition. Around the same time, perhaps out of desperation, the ACW sought the OLRB's consent to prosecute Deacon Brothers Sportswear, apparently for violating its duty to bargain in good faith, but the application was withdrawn.⁷⁴

McRuer issued his judgment on 23 October. Whatever temptation he may have felt to give effect to his concerns about secondary action and hold it *per se* tortious, he clearly resisted it. Rather, he took the position that for there to be liability, it was necessary to find that the secondary action involved the commission of a nominate tort previously recognized by the courts. Moreover, McRuer was scrupulous in applying the law to the facts disclosed in the affidavits of William Hersee and Stanley Clair.⁷⁵ There was no suggestion of a trespass; picketing was not *per se* a nuisance and there was no evidence of a nuisance on the facts of this case; there was no conspiracy to bring about a breach of contract since the affidavit evidence of Hersee made it clear that

there was no contract between Hersee's and Deacon Brothers Sportswear at the time of the picketing; and, finally, there was no civil conspiracy to injure because the evidence did not establish an intention to injure the plaintiff distinct from the main intention of benefiting the union.⁷⁶

One week later the plaintiff filed a notice of appeal and Krever subsequently submitted a written memorandum of fact and law that set out the case to be argued. Krever adopted a two-pronged strategy. On the one hand, he argued that the picketing did fit within one of the existing nominate torts, notably civil conspiracy to injure and inducing breach of contract. With regard to the civil conspiracy claim, Krever argued that the affidavit evidence established that this was not merely "an educational campaign" but rather a concerted effort to harm Hersee's because of the store's refusal to comply with the defendants' demands. In support of this argument, Krever urged the court to take notice that, given the development of trade unionism and the ethic that "it was almost a treasonous act for one to cross a picket line," a picket line's purpose was never merely to communicate information, but to cause economic loss to the business whose premises are being picketed.⁷⁷ Krever also argued that the picketing was illegal (and implied it was also criminal) insofar as it attempted to require a person not to do something that he had a legal right to do.⁷⁸ Later in the memorandum, Krever also argued that quite apart from conspiracy, the picketing was in violation of a new tort, recently recognized by the Supreme Court of Canada in the *Therien* case — interference with the right to trade by unlawful means — and that there was a conspiracy to induce a breach of contract.⁷⁹

The second prong of Krever's strategy built on the observations made by Carrothers, discussed earlier, that the courts were operating on the underlying, unspoken principle that the right to trade should take precedence over the freedom to engage in secondary picketing. Thus, following his discussion of the elements of conspiracy, Krever directly addressed the secondary character of the action. He argued that it was never in the contemplation of the courts that members of a union could legitimately inflict harm on an innocent person who had dealings with the employer. He went on to urge that it was the function of the law to strike a proper balance between competing rights and that courts had wisely allowed workers to work together to advance their interest by interfering with a person with whom they had a direct conflict, but that the law of conspiracy did not permit interference with the right to trade of persons who were far removed from that dispute. Finally, he argued that the right to free speech was properly limited to pre-

vent one party from causing unnecessary harm to another who is some 200 miles away from the scene of the real dispute.⁸⁰

Although these arguments were made in support of the claim that the picketing was wrongful as a civil conspiracy to injure, one paragraph later the memorandum offered the courts another alternative:

[I]t is submitted that secondary picketing, in the circumstances of this case, is illegal. Except for the Judgment appealed from, in all cases in which Canadian Courts have considered secondary picketing, whether directly or obiter dictum, judicial opinion has been that secondary picketing is illegal.⁸¹

In support of that proposition, Krever cited a number of cases, including of course, McRuer's own observations in *General Dry Batteries*, as well as four other cases in which secondary boycotts had been held to be civil conspiracies to injure.⁸²

In short, the brief not only provided the Ontario Court of Appeal with several legal pegs on which it could hang its judgment — including the option of doing directly what courts had been doing indirectly and holding secondary picketing to be *per se* tortious — but also invoked broad legal principles that could be used to give support for the growing sentiment among many judges and opinion leaders like the *Globe and Mail* that workers' collective action needed to be curtailed in order to limit the ability of unions to disrupt the economy and interfere with trade.

The defendants' brief, prepared by Osler, was, well, briefer. It emphasized that the manner in which the picketing was conducted was lawful and that the defendants had every right to advise members of the public that some of the clothing being sold at Hersee's was manufactured at a firm where union standards were not met. Osler also argued that the defendants had a right to persuade members of the public to prefer union-made goods and that the defendants were not limited to picketing at premises where there was an employer-employee relationship between the picketers and the proprietor of the premises. Finally, he argued there could not be liability for inducing a breach of contract because no contracts were in existence. In short, Osler's strategy was to follow McRuer and argue that the defendants' actions did not fall afoul of any nominate tort, while giving short shrift to the secondary action issue. This proved to be a mistake.

Oral argument was heard on 10 December in Toronto before Justices John Aylesworth, Frederick MacKay, and George McGillivray. Neither Justices MacKay nor McGillivray practiced labour law before their appointment to

the bench and, while on the bench, neither had ruled on a labour injunction case.⁸³ Aylesworth, the most senior of the three, was an experienced management-side labour lawyer in Windsor, who had represented major automobile companies and other heavy manufacturers prior to his appointment to the bench in 1946. As discussed in William Kaplan's chapter in this collection, in 1943 Aylesworth appeared before the Select Committee of the Ontario Legislative Assembly holding hearings into proposed collective bargaining legislation, where he recommended that if compulsory collective bargaining legislation was to be adopted then it was necessary to ensure that it would promote improved industrial relations and impose greater responsibility on the part of "bargaining agencies."⁸⁴ He also represented Ford during the 1945 strike that produced the Rand Formula.⁸⁵ Despite his long tenure on the bench, prior to this case Aylesworth had only participated in one reported labour injunction case, in which he concurred with his two colleagues who wrote lengthy judgments.⁸⁶

There is no report of the oral argument, and the court reserved judgment. In the meantime, another decertification application was made at Deacon Brothers Sportswear and this time the OLRB ordered that a vote be held on 17 December. The union lost by a vote of thirty-seven to thirty, and on 7 January 1963 the OLRB formally terminated the ACW's bargaining rights.⁸⁷

Later that month there was one other event that contributed to the growing concern among certain circles that organized labour was out of control. A wildcat strike of 3,500 lumber and sawmill workers began on 14 January outside the northern Ontario town of Kapuskasing. Picketers targeted independent operators who continued to supply the struck mill with logs. Violent confrontations between the two groups climaxed tragically on 11 February when independent loggers fired into a large crowd of striking workers who were advancing toward their stockpile of logs at Reesor Siding. Three strikers were killed and many more were wounded.⁸⁸ The *Globe and Mail* editorialists were quick to condemn the government for not providing enough police to stop the violence earlier and called for stronger laws to penalize irresponsible trade unionists who were blamed for inciting labour violence.⁸⁹

The Court of Appeal issued its judgment on 27 February 1963, ruling in favour of Hersee's.⁹⁰ Aylesworth wrote the main opinion, with which both MacKay and McGillivray concurred, while MacKay provided additional reasons for allowing the appeal. Aylesworth's and MacKay's application of existing common law principles was, as Harry Arthurs' later scathing case comment abundantly demonstrated,⁹¹ sloppy to say the least. Aylesworth

held that, contrary to McRuer, the picketing was tortious because it induced a breach of contract. To support this result, Aylesworth first had to find that there was a contract between Hersee's and Deacon Brothers Sportswear, notwithstanding that William Hersee's affidavit expressly stated that at the time Clair approached him, there were no orders. To do this, Aylesworth pointed to a statement in Clair's affidavit that Hersee showed him an invoice for an order already placed, but Aylesworth ignored the rest of Clair's statement in which he stated that Hersee also told him that he had not placed an order for the fall. Moreover, he seemingly preferred Clair's ambiguous statement to Hersee's unequivocal statement that he had no outstanding orders with Deacon Brothers Sportswear, despite the fact that Hersee was in the best position to know.⁹² Moreover, Aylesworth never noticed that the wrong plaintiff had brought the inducing breach of contract action since it was the innocent victim of the breach who was entitled to sue, not the person who allowed himself to be induced. From there his judgment rambled. Aylesworth noted, "In this day and age the power of organized labour is very far indeed from negligible." He then took judicial notice of the power of a peaceful picket line to deter both union members and "members of the general public in a community where . . . there is widespread organization of labour" from doing business at picketed premises. Moreover, he found that the content of the picket signs was likely to confuse the public, making them think that Hersee's was in a dispute with organized labour. What any of this had to do with the tort of inducing breach of contract was never made clear, and Aylesworth concluded his analysis of this branch of the case by stating, without any analysis, that the picketing was also criminal watching and besetting.⁹³

MacKay's analysis of civil conspiracy to injure was equally problematic. Not only did he find it difficult to see how the unionized employees of Deacon Brothers Sportswear could possibly gain economic leverage from the promotion of a consumer boycott of their employer's products in Woodstock, but he also refused to accept there was a legitimate business justification for the union's action because the harm being inflicted on Hersee's outweighed the "negligible" benefit it would gain. Apart from his willful blindness, MacKay's turn to interest balancing departed from earlier precedent which refused to give weight to the quantum of damages being inflicted once a legitimate purpose was established.⁹⁴

To this point, Aylesworth's and MacKay's judgments were perfectly consistent with the observation made earlier by Carrothers that "the characterization of secondary picketing as being unlawful on the basis of com-

mon-law principles as they stand at present presents a colourful confusion of fact, inference, assumption, law and policy that would be kaleidoscopic in quality had it the saving grace of internal order.⁹⁵ The significance of the case, however, did not lie in its incremental contribution to the large pool of poorly crafted judgments in the tort law of picketing. Rather, what made the case precedent-setting was the court's decision to take up the invitation in Krever's brief and hold that secondary picketing was *per se* tortious and no longer had to be squeezed into the requirements of an existing tort. To justify this result, Aylesworth's judgment relied in part on a sweeping assertion that the right to trade is "far more fundamental and of far greater importance" than the right ("if there be such a right") to engage in secondary picketing, the former being for the benefit of the community, the latter for the benefit of a particular class.⁹⁶ In reaching this conclusion, he never adverted to the fact that earlier in his judgment he took judicial notice of the fact that members of the public, particularly in working-class communities, are likely to choose not to cross a picket line to do business with a merchant selling goods made by workers not being paid union wages. Secondly, he also pointed to a line of cases in which courts had expressed their antipathy to secondary action, but admitted that in all those cases the picketing had been enjoined because of its illegality. Nevertheless, he chose to "view them as declaring secondary picketing to be illegal *per se*,"⁹⁷ implying that his judgment was merely giving effect to existing precedent, when clearly it was not.

The defendants' lawyer sought leave to appeal to the Supreme Court of Canada, but the motion was denied on 22 April 1963, in part because the ACW had been decertified as bargaining agent for Deacon Brothers Sports-wear, although that hardly made the issue moot.

And the Rest Is History

SO HOW DID A small town case make it big? There really is no surprise here. It was a matter of the right case, at the right time, with the right people. The case was right because a court would have had to stretch to find any illegality based on the existing common law torts of nuisance, inducing breach of contract, or conspiracy to injure. It was also at the right time in the sense that among certain elites there was a growing sense that organized labour was out of control and needed to be made more responsible both for the violence that sometimes accompanied industrial disputes and for economic disruption caused by secondary action. Finally, there were the right people. Horace

Krever authored a brief that squarely invited the court to hold secondary action *per se* illegal and provided them with broad legal principles, if not precedents, that supported this step, and John Aylesworth, who while in practice sought to make unions more legally responsible, now had the opportunity to do so as a judge by narrowing the scope for workers' collective action.

But there is one other dimension to this case's importance that this paper has not yet explored, and that is its widespread impact and durability. The decision was, after all, a judgment of the Ontario Court of Appeal, and so was not binding in other provinces. Moreover, it could have been overturned by the Supreme Court of Canada (SCC) or by legislation. Yet, the tort of secondary picketing came to be accepted in most jurisdictions, was not legislatively reversed, and was not overruled by the SCC until 2002.

The judgment did not attract much attention immediately after it was released. Yes, the *Woodstock Sentinel-Review* endorsed the court's decision, but there were no editorials in the *Globe and Mail* or the *Star*.⁹⁸ As mentioned, Harry Arthurs published a withering case comment in the *Canadian Bar Review* in late 1963 that condemned the court's flawed legal reasoning, including its failure to notice that the tort was brought by the wrong plaintiff, and its sweeping policy pronouncements, while leaving open the possibility that a legislature might legitimately restrict secondary action.⁹⁹ Excerpts of Arthurs' comment subsequently made their way into the *Globe and Mail* when Wilfred List, the paper's labour reporter, chose to write up Arthurs' criticism in an article provocatively entitled, "Picketing and the Law: Judge vs. Professor." List focused more on Arthurs' criticism of the court's policy pronouncements than on its legal reasoning, reproducing a passage in which Arthurs condemned the court's assertion that individual and group interests should yield to the interests of the community as "an affirmation of totalitarian philosophy quite inconsistent with constitutional government."¹⁰⁰

Whatever consternation these words may have stirred in the legal community, Arthurs' critiques of *Hersees* gained little traction. The industrial relations community, informed as it was by the industrial pluralist perspective, would have agreed with his critique of the judiciary as reflexively hostile to collective action that interfered with private property rights. Therefore, they were poor judicial craftsmen and improperly manipulated the common law to achieve their desired results, and yet, they would have also shared the judiciary's concern that industrial conflict needed to be contained within narrow limits. While the legislature and not the judiciary should have made the decision about where to draw the line, the substan-

tive result did not deeply offend the industrial pluralist view of the limits of industrial legality.

Indeed, even the labour movement did little to challenge the result in *Hersees*. Rather, its focus was almost exclusively on the easy availability of *ex parte* and interlocutory injunctions, a matter that was of concern before the *Hersees* judgment, but that grew in importance afterwards as a result of growing labour militancy that challenged the bounds of industrial legality.¹⁰¹ In 1965 the Ontario Federation of Labour (OFL) published a report on injunctions prepared by John Osler, the union counsel in *Hersees*, which focused on the unfairness of the procedures, but did not say a word about secondary action.¹⁰² The following year, the OFL made a special submission to the government on injunctions in labour disputes, in part as a result of their use in the Tilco strike.¹⁰³ Again, the focus was on the use of injunctions, not the tort law of secondary picketing. In June 1966, the Ontario Minister of Labour commissioned a study on the role of labour injunctions in Ontario directed by Carrothers. Seven studies were produced, one of which was a study of the law of injunctions by Horace Krever, who had become a professor of law at the University of Toronto in 1964. Although his focus was on procedure, not substantive law, Krever was critical of the courts' unwillingness to give the interests of labour the same weight as the interests of employers, and, ironically, cited the Court of Appeal's judgment in *Hersees* as an example.¹⁰⁴ Carrothers' report made no formal recommendations and no action was taken, but before the study was released, the Ontario government appointed former Supreme Court of Canada Justice Ivan Rand to head a commission of inquiry into labour disputes.¹⁰⁵ As well, late in 1966 the federal government established the Task Force on Labour Relations, one of whose members was Carrothers.

The OFL's submissions to the Rand commission contained short sections defending the right to strike and picket, and a much longer section advocating prohibition of the use of injunctions in labour matters, but no mention was made of secondary picketing.¹⁰⁶ Employer submissions, however, called specifically for picketing to be limited to the struck employer's place of business.¹⁰⁷ The Rand Report, published in 1968, contained sweeping recommendations for labour law reform, including a prohibition on secondary picketing and boycotts except in cases where the target had become an ally of the struck employer.¹⁰⁸ The report was heavily criticized by the OFL, which for the first time specifically defended secondary action, calling for legislation to permit it.¹⁰⁹ The OFL's position was largely accepted by the federal

Task Force report, which recommended that secondary picketing in support of consumer boycotts be permitted.¹¹⁰

Political support to overturn *Hersees*, however, did not materialize. In 1970 a majority conservative Ontario government implemented some of Rand's recommendations in amendments to the *Labour Relations Act*.¹¹¹ The government also amended the *Judicature Act* to limit generally the availability of injunctions in labour disputes, and specifically to restrict the use of *ex parte* injunctions.¹¹² Although these measures were extensively debated, the question of secondary picketing or boycotts was never raised.¹¹³

In the period after 1970, courts in much of Canada continued to rely heavily on *Hersees* and the sharp distinction that it drew between primary and secondary picketing. Indeed, this distinction was applied to the interpretation of the *Judicature Act* amendments, holding that its restrictions on granting injunctions in labour disputes did not apply to secondary picketing, since this was not picketing in a labour dispute.¹¹⁴ Given its significance, much litigation focused on the boundary between primary and secondary picketing which, in turn, produced another round of critical academic commentary, leading David Beatty to write "so much has already been written of this area generally by Canadian labour law teachers who have been attracted to the topic with a child-like and absorbing pre-occupation" before he proceeded to make his own contribution.¹¹⁵

The reconfiguration of the line between primary and secondary picketing provided one avenue of retreat from *Hersees*, but in general movement was slow.¹¹⁶ Legislation in Manitoba in 1970 more severely restricted the availability of injunctions than in Ontario and it was interpreted by the Manitoba Court of Appeal as permitting secondary picketing that was otherwise lawful¹¹⁷ but, for the most part, there remained a high level of judicial hostility to secondary action in labour disputes and little political support for legislative action to reverse it. Indeed, in 1971 New Brunswick joined British Columbia and Newfoundland in limiting secondary action.¹¹⁸ Its eventual undoing by the Supreme Court of Canada in the *Pepsi* case is a story for another day. It is, however, fair to speculate that the change was partly contingent on a shift in the judicial imagery of organized labour from the "churlish adolescent" that Harry Arthurs described in 1960 to that of a senior citizen who no longer poses a threat to others and is losing her capacity to cope in an increasingly hostile environment.¹¹⁹ Now that's a labour movement the courts can trust to deliver autonomy, equality, and democracy to Canadian workers.¹²⁰

Postscript

THE WORKERS OF DEACON Brothers Sportswear were subsequently organized by the UGW, the more conservative historic rival of the ACW, in 1979. Ironically, the union organizer was Andre Bekerman, a self-described revolutionary socialist.¹²¹ After lengthy negotiations, the parties reached a collective agreement which was renewed several times until the company went out of business in 1991.¹²² Fred became a school trustee and conducted labour negotiations on the school board's behalf. This turned into a career as a school board negotiator after Deacon Brothers Sportswear closed its doors. William Hersee continued to operate his clothing store in Woodstock until the early 1990s. He passed away in 2000.¹²³ Hugh Gibson was appointed to the Exchequer court in 1964; John Osler was appointed to the High Court of Ontario in 1968; and Horace Krever followed him there in 1975. Krever went to the Court of Appeal in 1986 but is best known for his work leading several commissions, including the 1993 Commission of Inquiry on the Blood System of Canada.

Notes

- 1 See Kaplan (this volume).
- 2 British Columbia was the exception. See Alfred W.R. Carrothers, *The Labour Injunction in British Columbia* (Toronto: CCH Canadian Limited, 1956) [Carrothers, "Labour Injunction"]. For a view of Ontario that emphasizes the extent of the ongoing conflict, particularly around issues of union security, see Charles W. Smith, "The Politics of the *Ontario Labour Relations Act*: Business, Labour, and Government in the Consolidation of Post-War Industrial Relations, 1949–1961" (2008) 62 *Labour/Le Travail* 109 at 115–28 [Smith].
- 3 On the incidence of strikes, see Canada Department of Labour, Economics and Research Branch, *Strikes and Lockouts in Canada* (various years); Research Branch, Ontario Department of Labour, "Industrial Conflict in Ontario: 1958–1965," in Alfred W. R. Carrothers, *Report of a Study on the Labour Injunction in Ontario* (October 1966) at 227 [Carrothers, *Report*]; Stuart Marshall Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900–66* (Ottawa: Task Force on Labour Relations, Study No. 22, 1968) at 344–73 [Jamieson].
- 4 Harry W. Arthurs, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship" (1960) 38 *Can. Bar Rev.* 346 [Arthurs, "Tort Law"].
- 5 For expressions of concern that employers were becoming more hostile, see *Lab. Gazette* (1958), 1372 and 1375. On hostile labour legislation, see *Lab. Gaz.* (1960), 1281; (1961), 134 and 449–50. On injunctions, see *Lab. Gaz.* [1958] 348; *Lab. Gaz.* [1962] 1356; *Lab. Gaz.* [1963] 32.
- 6 *Hersees of Woodstock Ltd. v. Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.) [*Hersees C.A.*] rev'g 35 D.L.R. (2d) 616 (Ont. H.C.J.) [*Hersees H.C.*].
- 7 *Hersees* was overruled by the Supreme Court of Canada in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156.
- 8 Nick Mika & Helma Mika, *Belleville, Friendly City* (Belleville: Mika, 1973) at 85–127.
- 9 Fred B. Deacon, Speaking Notes [unpublished, n.d.]; Interview of Fred B. Deacon (3 July 2007) [Deacon interview].
- 10 On the history of the ACW, see Steven Fraser, *Labor Will Rule* (New York: Free Press, 1991). In Canada, see Ruth A. Frager, *Sweatshop Strife* (Toronto: University of Toronto Press, 1992); Mercedes Steedman, *Angels of the Workplace* (Toronto: Oxford University Press, 1997) [Steedman].
- 11 Canada, Department of Labour, Economic and Research Branch, *Labour Organization in Canada* (Ottawa: Queen's Printer, 1960).
- 12 *Daily Sentinel Review* [Woodstock] (28 August 1962) 9; Fred B. Deacon (25 September 2008) [Letter to the author].
- 13 See S.O. 1950, c. 34, s. 7. On post-war certification procedures, see John Logan, "How 'Anti-Union' Laws Saved Canadian Labour: Certification and Striker Replacements in Post-War Industrial Relations" (2002) 57 *Relations Industrielles* 129.
- 14 Ontario Labour Relations Board, *O.L.R.B. Report* (October 1959) at 251.
- 15 Fred B. Deacon speculates that his uncle John may have been getting advice on union avoidance techniques from a relative, Deacon interview, above note 9.

- 16 Ontario Labour Relations Board, *O.L.R.B. Report* (May 1960) at 64 (H.F. Irwin dissenting). The *OLRA* prohibited the board from certifying a union “if any employer or employers’ organization has participated in its formation or administration or has contributed financial or other support to it . . .” *OLRA*, S.O. 1950, c. 34, s. 9 (now s. 15).
- 17 Ontario Labour Relations Board, *O.L.R.B. Report* (August 1960) at 176.
- 18 For a discussion of these developments, see Steedman, above note 10 at 190–253; Michael Brecher, “Pattern of Accommodation in the Men’s Garment Industry of Quebec 1914–1959” in H.D. Woods, ed., *Patterns of Industrial Dispute Settlement in Five Canadian Industries* (Montreal: Industrial Relations Centre, McGill University, 1958) at 89–186.
- 19 *Hersees* (Affidavit of Stanley Clair, 5 September 1962, at para. 5), Toronto, Archives of Ontario, Court File (RG 22-523, B214344. File 442/1962) [Court File].
- 20 *Daily Sentinel Review* [Woodstock] (28 August 1962) 9.
- 21 Deacon interview, above note 9.
- 22 *Ibid.*
- 23 *Ibid.*
- 24 A union label is, as its name implies, a label placed on a product to indicate that it was produced by union labour. The labour movement actively promoted its use. For further discussion of the union label and Stanley Clair, see below text accompanying notes 30 to 36.
- 25 For example, see typescript report of Stanley Clair to the Third Convention of the Department, CLC (April 8, 1962) in CLC, Union Label Trades Department files, Ottawa, National Archives of Canada (R5699-96-X-E, Microfilm reel H-234).
- 26 Hersee Family, Woodstock, Woodstock Public Library (Vertical Files); Art Williams and Edward Baker, *Woodstock Bits and Pieces* (Erin, ON: Boston Mills Press, 1967); *Vernon’s City of Woodstock Directory* (Hamilton, ON: Henry Vernon & Son, 1920).
- 27 William Hersee states that Clair identified himself as the president of the CLC Union Label Department while Clair identifies himself as the Ontario Union Label Director for the ACW. Court File, above note 19 at paras. 1 and 3.
- 28 *Daily Sentinel Review* [Woodstock] (28 August 1962) 9.
- 29 *Ibid.*; Court File, above note 19.
- 30 There is no discussion of this strategy in the Union Label Trades Department files (NA, R5699-96-X-E), or in their Convention reports. In Quebec in 1958, the ACW picketed a retail store selling suits manufactured by an employer the union was seeking to organize. The store owner obtained an interlocutory injunction. See *Sauve Frères v. Amalgamated Clothing Workers of America* [1959] C.S. 341 (Que. S.C.) [*Sauve Frères*].
- 31 Jacob Clayman, (then the director of organization and union label for the ACW, speech to the founding convention of the union label department) *Lab. Gaz.* [June 1956] 659.
- 32 Dana Frank, *Purchasing Power* (New York: Cambridge University Press, 1994) at 193–211; Daniel Bensman, *The Practice of Solidarity* (Urbana: University of Illinois Press, 1985) at 151–67 and 185–211; Harry W. Laidler, *Boycotts and the Labor Struggle*, rev. ed. (1913; repr., New York: Russell & Russell, 1968) [Laidler].
- 33 Toronto Trades and Labour Council *Toronto Labor Directory and Union Label Handbook* [unpublished, n.d.]; Steedman, above note 10 at 61 and 107–8.

- 34 Trades and Labor Congress of Canada, *Proceedings* (1898) at 31.
- 35 For discussions of consumer spending and consumer advocacy, see Joy Parr, *Domestic Goods* (Toronto: University of Toronto Press, 1999); Julie Guard, "Canadian Citizens or Dangerous Foreign Women? Canada's Radical Consumer Movement, 1947-1950" in Marlene Epp, Franca Iacovetta, & Frances Swyripa, eds., *Sisters or Strangers* (Toronto: University of Toronto Press, 2004) at 161-89.
- 36 (September 1952) Lab. Gaz. 1189; (June 1956) Lab. Gaz. 659.
- 37 On the history of boycotting in the US, see Laidler, above note 32; Gary Minda, *Boycott in America* (Carbondale, IL: Southern Illinois University Press, 1999). There is a paucity of writing on Canadian consumer boycotts in the labour context. I discuss some early efforts in "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889" (Fall 1994) 12 Law and History Rev. 308.
- 38 Douglas Brodie, *A History of British Labour Law 1867-1945* (Oxford: Hart, 2003) at 27-38; Carrothers, "Labour Injunction," above note 2 at 38-98; Arthurs, "Tort Law," above note 4 at 362-88; Innis M. Christie, *The Liability of Strikers in the Law of Tort* (Kingston, ON: Industrial Relations Centre, Queen's University, 1967) at 61-130 [Christie, *Liability of Strikers*].
- 39 Carrothers, above note 2, c. 3.
- 40 *Ibid.* at 3-10 and 192-215.
- 41 Laidler, above note 32 at 169 ("... boycotts, prosecuted primarily by means of the union label, are unquestionably legal."). The legality of municipal bylaws requiring the city to purchase products bearing the union label, however, has been contested. For example, in 1903 the City of Toronto passed a bylaw requiring the union label on all clothing bought by the city. The bylaw was struck down by the court as beyond the powers of the city. Lab. Gaz. (December 1903) 598.
- 42 The first attempt to get union label legislation in 1898 passed the Commons but failed in the Senate. Subsequent efforts met a similar fate until 1927 (S.C. 1926-27, c. 71). See, CLC, Union Label Trades Department, Circulars, Correspondence, Relevant legislation (Code 2-L) (NA, R5699-96-X-E, Microfilm reel H-425). Even prior to this legislation, fraudulent use of the union label was unlawful and, in one case, David Pearlstein was sentenced to one day in jail for violating an injunction prohibiting him from placing union labels on boxes of cigars he was selling to tobacconists. Lab. Gaz. (November 1907) 618.
- 43 The literature is vast. Daniel R. Ernst, *Lawyers Against Labor* (Urbana and Chicago: University of Illinois Press, 1995); William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991) at 79-95; Haggai Hurvitz, "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Judicial Reorientation of 1886-1895" (1986) 8 Indus. Rel. L.J. 307; Michael A. Gordon, "The Labor Boycott in New York City, 1880-1886" (1975) 16 Lab. His. 184.
- 44 For some early exceptions, see Judy Fudge & Eric Tucker, "Forging Responsible Unions: Metal Workers and the Rise of the Labour Injunction in Canada" (Spring 1996) 37 Labour/Le Travail 107.
- 45 BC was exceptional. See *Hollywood Theatres v. Tenney*, [1940] 1 D.L.R. 452.

- 46 Carrothers, "Labour Injunction" above note 2 at 47. The primary/secondary distinction had been identified much earlier in American writing on the subject. For example, see Laidler above note 32 at 64.
- 47 *Ibid.* at 65.
- 48 Quebec cases include *Verdun Printing and Publishing Inc. v. Union internationale des clichés et électrotypistes de Montréal*, local 33, [1957] C.S. 204 [*Verdun Printing*]; *Sauve Frères*, above note 30; *Noe Bourassa Ltée. v. United Packinghouse Workers*, [1961] C.S. 604 (QC). *Verdun Printing* was commented upon favourably in Marie-Louis Beaulieu, "Critique des arrest" (1958) 18 *Revue du Bateau* 161. See also *Dusessoy's Supermarkets St. James Ltd. v. Retail Clerks Union, Local 832, et al.* (1961), 30 D.L.R. (2d) 51 (Man. QB).
- 49 Alfred W.R. Carrothers, "Secondary Picketing" (1962) *Can. Bar. Rev.* 57 at 66 [Carrothers, "Secondary Picketing"].
- 50 *Labour Relations Act*, S.B.C. 1954, c. 17 [*Labour Relations Act*]; *Trade-unions Act*, S.B.C. 1959, c. 90, s. 3(2). Jamieson, above note 3 at 374–86.
- 51 The impetus for the appointment came from the Ontario Federation of Labour (OFL) which conducted hearings around the province in 1956 and submitted a brief to the legislature that was highly critical of the administration of the *Labour Relations Act*. Some submissions to the OFL condemned *ex parte* injunctions, but they were not a primary concern. Both the CCF and the Liberals supported the appointment of a select legislative committee. See *Lab. Gaz.* (1956) 972; Ontario, *Legislative Debates* (1957) at 1040–45, 1487, and 1672–76. For an extended discussion of these developments, see Smith, above note 2 at 128–34.
- 52 Ontario, Legislative Assembly, *Report of the Select Committee on Labour Relations* (1958) at 6.
- 53 Smith, above note 2 at 134.
- 54 Above note 52, recommendations 34, 36, and 41.
- 55 *Ontario Labour Relations Amendment Act*, S.O. 1960, c. 54. See also Monroe Johnson, "Illegal Picketing Wasn't Mentioned but Section 27 Covers It" *Toronto Star* (9 March 1960) 7 ("Many people will be interested in knowing whether Section 27 is intended as an instrument against illegal picketing and secondary boycotts."); "The Labor Law-and the Law," Editorial, *Globe and Mail* (26 February 1960) (failure of amendment to deal with picket line violence and dissatisfaction with provincial authorities for not enforcing the criminal law). More generally, see Bora Laskin, "The Ontario Labour Relations Amendment Act, 1960" (1961) 14 *Can. Bar Rev.* 117 [Laskin] and Smith, above note 2 at 134–40.
- 56 The construction strike is discussed in Jamieson, above note 3 at 408–9.
- 57 W.M. McIntyre, Secretary of the Cabinet, to A. Kelso Roberts, 19 June 1961; A. Kelso Roberts, Press Release, OA, RG4-2, File 159.9 (20 June 1961).
- 58 William Kaplan, *Everything That Floats* (Toronto: University of Toronto Press, 1987) at 101–12.
- 59 "Time for a Stand," Editorial, *Globe and Mail* (9 June 1961). A sample of additional *Globe and Mail* editorials includes: "Labour Anarchy," Editorial, *Globe and Mail* (16 June 1961); "Labor and the Law," Editorial, *Globe and Mail* (20 June 1961); "Surrender to Violence," Editorial, *Globe and Mail* (30 April 1962); "Dealing with the Team-

- sters," Editorial, *Globe and Mail* (25 June 1962); "The Nation's Shame," Editorial, *Globe and Mail* (2 July 1962); "Action to End Violence," Editorial, *Globe and Mail* (7 July 1962).
- 60 "No Place for Pickets," Editorial, *Toronto Star* (1 August 1962); "Intimidation by Pickets," Editorial, *Globe and Mail* (2 August 1962). Two picketers were subsequently convicted of criminal watching and besetting. Warren K. Winkler, "Picketing of Private Homes: The Anomalous Peaceful Picketing Clause" (1963) 2 Osgoode Hall L.J. 437
- 61 Fred Deacon, "Store Picketing Continues in Clothing Company Issue," Letter to the Editor, *Daily Sentinel Review* [Woodstock] (30 August 1962) 13.
- 62 Fred B. Deacon said that his lawyer, Hugh Gibson, advised him not to become involved. Deacon interview, above note 9.
- 63 Young was a partner in a small local firm, Young and Hutchinson. In 1963 he ran unsuccessfully for the Liberals against Wallace Nesbitt, the long-serving Progressive-Conservative member of Federal parliament for Oxford.
- 64 Court File, above note 19; *Daily Sentinel Review* [Woodstock] (31 August 1962) 1.
- 65 E.E. Palmer, "The Labour Injunction in Ontario: Juridical Data 1958–1966" in Carrothers, *Report*, above note 3 at 87; *Judicature Act*, S.O. 1960, c. 52, s. 1. On the *Judicature Act* amendment, see Laskin, above note 55.
- 66 Eric W. Cross, Papers, Toronto, Archives of Ontario (F 1025). His arbitration work began in the early 1950s and continued until his death in 1965. He lived in Woodstock and would have known the Hersee's store. Prior to his judicial appointment, Cross was a Liberal member of the legislative assembly and minister in Hepburn's cabinet.
- 67 Interview of Horace Krever (15 October 2007).
- 68 Interview of John H. Osler (27 June 2001), Toronto, Archives of Ontario (Osgoode Society Fonds, C-81); David Lewis, *The Good Fight* (Toronto: Macmillan, 1981) at 373 and 389.
- 69 *General Dry Batteries of Canada Unlimited v. Brigenshaw et al.*, [1951] O.R. 522 at para. 15. Charles Dubin represented the union in this case.
- 70 *Wilson Court Apts. v. Jenovese et al.*, [1958] O.W.N. 302. For a more general and favourable discussion of McRuer's labour law decisions, and a full biography, see Patrick Boyer, *A Passion for Justice* (Toronto: Osgoode Society, 1994) especially at 258–68 [Boyer].
- 71 *Dewar et al. v. Dwan et al.*, [1957] O.R. 546 at para. 4. In that case McRuer also observed (at para. 28) that the *Rights of Labour Act*, which gave trade unions protection against civil conspiracies to injure, had not been judicially applied or interpreted and that he too would refrain from doing so since it was not necessary to decide the case.
- 72 *Belleville Intelligencer* (21 September 1962) 11.
- 73 *Belleville Intelligencer* (18 December 1962).
- 74 Ontario Labour Relations Board, *O.L.R.B. Reports* [1962–63] at 227 and 229. A spokesperson for Deacon Brothers told the *Belleville Intelligencer* (18 December 1962) that the board had ruled on the ACW's application, holding "that the Union was the author

- of its own misfortune in this matter, and the refusal of the company to continue to bargain, in the circumstances of this case, was not unreasonable or in bad faith.”
- 75 Indeed, McRuer was critical of Hersee’s lawyer for including reference to a newspaper report of the picketing, which was inadmissible as hearsay. *Hersees H.C.*, above note 6 at 617.
- 76 *Hersees H.C.*, *ibid.* As in previous cases, the *Rights of Labour Act* was ignored.
- 77 *Ibid.*, Plaintiff’s Memorandum at para. 8.
- 78 *Ibid.* at para. 9. The implication of its criminality arose from the citation of the *Criminal Code* to support the claim made that the picketing was illegal.
- 79 *Ibid.* at paras. 13 and 15. *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265.
- 80 *Ibid.* at paras. 10–12.
- 81 *Ibid.* at para. 14.
- 82 *Ibid.*
- 83 I have not found biographical material on either. Krever recalls that MacKay was a small town lawyer in Owen Sound, while McGillivray was general counsel to the TTC prior to their appointments to the bench. A Quicklaw search found no labour injunctions cases in which either was involved. This is not surprising; the Ontario Court of Appeal heard very few such cases in the decade prior to *Hersees*.
- 84 Ontario, Journals of the Legislative Assembly, *Report and Proceedings of the Select Committee of the Legislative Assembly Appointed to Inquire into Collective Bargaining between Employers and Employees* vol. 77 (1943), Part Two, Appendix No. 2, 1214; Kaplan, this volume.
- 85 Herb Colling, *Ninety-Nine Days* (Toronto: NC Press, 1995) at 63 and 175; Kaplan, this volume.
- 86 *Fokhul v. Raymond et al.*, [1949] 4 D.L.R. 145 (injunction based on wrongful interference with contractual relations).
- 87 OLRB Reports (1963) at 413; Letter from A.M. Brunskill to Messrs. Kimber & Dubin (17 April 1963) in Court File, Affidavit of H. Lorne Morphy (18 April 1963); *Belleville Intelligencer* (18 December 1962).
- 88 Jamieson, above note 3 at 412–14.
- 89 “Threat Made Good,” Editorial, *Globe and Mail* (12 February 1963); “Crime and Punishment,” Editorial, *Globe and Mail* (14 February 1963). Twenty independent loggers who shot into the crowd of strikers were subsequently arrested and charged with murder. The charges were dismissed by the local grand jury. Three of the loggers were subsequently convicted of illegal possession of firearms and were fined \$100 each. Two-hundred and twenty three strikers were charged with rioting and were convicted on the lesser offence of unlawful assembly and fined \$200 each. Chief Justice McRuer presided over these trials. Jamieson, above note 3 at 412–14; Boyer, above note 70 at 259–61.
- 90 *Hersees C.A.*, above note 6.
- 91 Harry W. Arthurs, “Comment,” (1963) 41 Can. Bar Rev. 573 [Arthurs, “Comment”].
- 92 *Hersees H.C.*, above note 6, Affidavit of Stanley Clair, para. 8. The phrase “garment order already placed” is underlined in the court file and in the margin is written “a contract.”

- 93 *Hersees C.A.*, above note 6 at 454. Arthurs, “Comment,” above note 91 at 575–76, was also critical of Ayleworth’s failure to notice that it was the party that had been induced to breach the contract that was the plaintiff, rather than the third party would had been injured by the inducement. The too was a complete departure from precedent.
- 94 *Ibid.* at 457–58; Arthurs, “Comment,” above note 91 at 578–79.
- 95 Carrothers, “Secondary Picketing,” above note 49 at 74.
- 96 *Hersees C.A.*, above note 6 at 454–55.
- 97 *Ibid.* at 456.
- 98 *Daily Sentinel Review* [Woodstock] (2 March 1963) 4.
- 99 Arthurs, “Comment,” above note 91 at 584–85.
- 100 Wilfred List, “Picketing and the Law: Judge vs. Professor” *Globe and Mail* (20 December 1963) 7. Arthurs was not pleased with List’s account and wrote a letter to the editor pointing to two “embarrassing distortions”: *Globe and Mail* (27 December 1963) 6. At least two other academic criticisms of *Hersees* were published in the 1960s. See Alfred W.R. Carrothers, “Labour Law: Doctrine, Dogma, Fiction and Myth” (1964) 14 *U.N.B.L.J.* 12; and Christie, *Liability of Strikers*, above note 38 at 184–87.
- 101 For a discussion of the 1964–66 period that focuses on wildcat strikes, see Bryan D. Palmer, *Canada’s 1960s: The Ironies of Identity in a Rebellious Era* (Toronto: University of Toronto Press, 2009) at 211–41.
- 102 John H. Osler, *Report on Injunctions* (Toronto: Ontario Federation of Labour, 1965).
- 103 Ontario Federation of Labour, *Submission to the Ontario Government on Matter of Injunctions* (Toronto: Ontario Federation of Labour, 1965) at 5–6 [OFL, *Submission*]; Joan Sangster, “‘We No Longer Respect the Law’: The Tilco Strike, Labour Injunctions, and the State” (Spring 2004) 53 *Labour/Le Travail* 47.
- 104 Horace Krever, “The Labour Injunction in Ontario: Procedure and Practice” in Carrothers, *Report*, above note 3 at 26.
- 105 For a discussion of Rand’s work on the commission, see William Kaplan, *Canadian Maverick: The Life of Ivan C. Rand* (Toronto: Osgoode Society, 2009) at 391–421.
- 106 OFL, *Submission*, above note 103 at 14–27.
- 107 See, for example, Canadian Electrical Manufacturers Association, *Submission to the Royal Commission of Inquiry into Labour Disputes* (January 1967) at 13; Automotive Transport Association of Ontario, *Submission to the Royal Commission Inquiry into Labour Disputes* (March 1967) at 17.
- 108 *Report of the Royal Commission Inquiry into Labour Disputes* (Toronto: Queen’s Printer, 1968) at 33 and 77.
- 109 Ontario Federation of Labour, *Submission to Honourable Dalton Bales, Q.C., Minister of Labour, Ontario in regards to the Report of the Royal Commission Inquiry into Labour Disputes* (January 1969) at 11–12.
- 110 Task Force on Labour Relations, *Canadian Industrial Relations* (Ottawa: Privy Council Office, 1968) at para. 628.
- 111 *Labour Relations Amendment Act, 1970 (No. 2)*, S.O. 1970, c. 85.
- 112 *Judicature Amendment Act, 1970 (No. 2)*, S.O. 1970, c. 91.

- 113 Ontario, *Debates of the Legislative Assembly* (1970).
- 114 *Darrigo's Grape Juice Ltd. v. Masterson* (1971), 21 D.L.R. (3d) 660. For a discussion of this case and on the post-*Hersees* caselaw generally, see Susan A. Tacon, *Tort Liability in a Collective Bargaining Regime* (Toronto: Butterworths, 1980).
- 115 David M. Beatty, "Secondary Boycotts: A Functional Analysis" (1974) 52 Can. Bar Rev. 388. Also see Paul Weiler, "The 'Slippery Slope' of Judicial Intervention" (1971) 9 Osgoode Hall L.J. 47 (describing *Hersees* as "the worst example of the deficiencies of abstract doctrinal analysis which is unrelated to the realities of labour relations policies"); J. Craig Patterson, "Union Secondary Conduct: A Comparative Study of the American and Ontario Positions" (1973) 8 U.B.C.L. Rev. 77.
- 116 For a discussion, see Alfred W.R. Carrothers, E.E. Palmer, & W.B. Rayner, *Collective Bargaining Law in Canada*, 2d ed. (Toronto: Butterworths, 1986) at 676–720.
- 117 S.M. 1970, c. 79, s. 2; *Chanel Seven Television Ltd. v. National Association of Broadcast Employees & Technicians AFL-CIO-CLC* (1971), 21 D.L.R. (3d) 424 (Man. C.A.).
- 118 S.N.B. 1971, c. 9, s. 105. British Columbia and Newfoundland had limited secondary action prior to the *Hersees* decision.
- 119 Even the *Globe and Mail* welcomed the decision, characterizing the *Hersees* decision as an "overstatement." See "Where pickets may legally protest," *Globe and Mail* (26 January 2002).
- 120 *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at paras. 81–86.
- 121 Gord Doctorow, "André Bekerman 1943–1999[:] Revolutionary Youth and Labour Cadre" Socialist Action (Fall 1999), online: www.socialisthistory.ca/Remember/Profiles/Bekerman.htm.
- 122 "Board to Rule on Union Issue" *Belleville Intelligencer* (6 July 1979); "City Clothing Firm Seeks Conciliation to Settle Dispute" *Belleville Intelligencer* (25 October 1979); "Firm, Union Reach Accord" *Belleville Intelligencer* (20 December 1979); Deacon interview, above note 9.
- 123 Interview of Gail Hersee (23 August 2007).