

## “We didn’t want to totally break the law”: Industrial Legality, the Pepsi Strike, and Workers’ Collective Rights in Canada

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Volume 74, Fall 2014

URI: <https://id.erudit.org/iderudit/1060922ar>

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Publisher(s)

Canadian Committee on Labour History

ISSN

0700-3862 (print)

1911-4842 (digital)

[Explore this journal](#)

Article abstract

Canada’s system of industrial legality has routinely limited the collective abilities of workers to strike. Under the conditions of neoliberal globalization, those limitations have intensified. Yet, in 1997, the Retail, Wholesale and Department Store Union (rwdsu) in Saskatoon, Saskatchewan, waged a successful strike against Pepsi-Cola Canada. In addition to defeating the company, the union also expanded workers’ collective rights through a successful constitutional challenge to restrictive common-law rules limiting secondary picketing. This paper examines the history of that strike, exploring the multifaceted strategies that the workers undertook to challenge the company, the state, and the existing law. It argues that workers were successful because they utilized tactics of civil disobedience to defend their abilities to picket. Recognizing that success, the paper is also critical of the Supreme Court of Canada’s decision and its evolution of common-law torts to limit workers’ collective action. The paper concludes by arguing that the Pepsi conflict highlights the importance of civil disobedience in building workers’ movements while emphasizing the inherent limitations of constitutional challenges to further workers’ collective freedoms in Canada.

Cite this article

Smith, C. (2014). “We didn’t want to totally break the law”: Industrial Legality, the Pepsi Strike, and Workers’ Collective Rights in Canada. *Labour / Le Travail*, 74.

## ARTICLE

# “We didn’t want to totally break the law”: Industrial Legality, the Pepsi Strike, and Workers’ Collective Rights in Canada<sup>1</sup>

**Charles W. Smith**

THE 1970S AND 1980S WERE A TIME of retrenchment for working people and their unions. Throughout this period, social forces associated with neoliberal globalization besieged Canada’s model of industrial legality.<sup>2</sup> The neoliberal assault took two primary forms: weakening labour relations acts to make workplace organizing and bargaining more onerous and ending workplace disputes through back-to-work legislation.<sup>3</sup> State-led restructuring liberated capital from postwar social compacts with labour, allowing employers to engage in “hard-bargaining” that demanded reorganization and downsizing within firms.<sup>4</sup> By the 1990s, the neoliberal assault compelled unions to respond in

1. This research was supported by a Social Sciences and Humanities Research Council (SSHRC) Insight Development Grant, Organized Labour, and the Charter of Rights and Freedoms, grant #430-2012-0681.

2. See Gregory Albo, “The New Realism and Canadian Workers,” in Alain Gagnon and James P. Bickerton, eds., *Canadian Politics: An Introduction to the Discipline* (Toronto: Broadview Press, 1990); Bryan Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800–1991* (Toronto: McClelland & Stewart, 1992); Thom Workman, *If You’re in My Way, I’m Walking: The Assault on Working People Since 1970* (Halifax: Fernwood, 2009); Eric Tucker, “Great Expectations” Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA,” *Comparative Labor Law & Policy Journal* 26 (Fall 2004): 97–150.

3. Leo Panitch and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* (Toronto: Garamond, 2003).

4. Gregory Albo, “The ‘New Economy’ and Capitalism Today,” in Norene J. Pupo and Mark P. Thomas, eds., *Interrogating the New Economy: Restructuring Work in the 21st Century*

new and creative ways. Throughout North America, many activists experimented with new forms of organizing in non-traditional union sectors such as cleaning, agriculture, and retail.<sup>5</sup> Despite these efforts, labour unions met with mixed results, especially in areas dominated by large multinational service companies. In 1997, however, a small group of newly unionized workers in the Saskatchewan Retail, Wholesale, and Departmental Store Union (RWDSU) waged a successful strike against Pepsi-Cola Canada Beverages (West) (PCCB), a subsidiary of the multinational food giant PepsiCo.<sup>6</sup> The strike was a surprising victory given that PCCB was demanding familiar concessions over job security, work time, wages, and benefits. Workers were successful in their struggle because they were prepared to respond militantly, challenging the traditional boundaries protecting employer property. In so doing, the workers moved beyond so-called legal picket line behaviour, instead utilizing tactics of civil disobedience that included occupying the Pepsi plant and later picketing outside the personal residences of management and other secondary locations. These actions built a new solidarity among the workers and helped entrench the union in the workplace.

The workers' decision to utilize tactics of civil disobedience inadvertently pushed against the ambiguous legal restrictions surrounding secondary picketing in Canada. Until 2002, the common law denied workers the ability to picket secondary locations not directly aligned with a primary employer.<sup>7</sup> Nevertheless, when PCCB was granted an injunction limiting secondary picketing, the union challenged that injunction arguing that it violated the Charter of Rights and Freedoms. To the surprise of many, the Supreme Court of Canada (SCC) ruled that the injunction violated the constitutional guarantee

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(Toronto: University of Toronto Press, 2010), 8–15. See also, Jeff Noonan, "The Historical and Contemporary Life-Value of the Canadian Labour Movement," *Labour/Le Travail* 71 (Spring 2013): 9–27.

5. Kendra Coulter, "Unionizing Retail: Lessons From Young Women's Grassroots Organizing in the Greater Toronto Area in the 1990s," *Labour/Le Travail* 67 (Spring 2011): 77–93. See also the essays in Pradeep Kumar and Christopher Schenk eds., *Paths to Union Renewal: Canadian Experiences* (Toronto: Broadview Press, 2006). In the United States, see the essays in Ruth Milkman and Kim Voss eds., *Rebuilding Labor: Organizing and Organizers in the New Union Movement* (Ithaca and London: Cornell University Press, 2004).

6. This research benefitted from the inclusion of several semi-structured interviews with RWDSU officers, staff, and rank-and-file members involved in the 1997 Pepsi strike. The author conducted all of the interviews in spring and summer 2013 and included Rocky Luchsinger, (RWDSU staff representative and former Local 558 Chief Steward); Garry Burkhart, RWDSU Saskatchewan Secretary Treasurer (and past staff representative); Greg Goodheart (rank-and-file activist and former RWDSU Local 558 Steward); Jeff Peters (current RWDSU Saskatchewan President and rank-and-file activist); Les Barker (rank-and-file activist); Linda Reiber (past-President RWDSU Local 558); Tracy Goodheart (past-Vice-President RWDSU Local 558); and Randy Penner (rank-and-file activist).

7. Bernard Adell et al., *Labour and Employment Law: Cases, Materials, and Commentary* 8<sup>th</sup> ed. (Toronto: Irwin, 2011), 441.

of expression and concluded that secondary picketing should be considered “generally lawful” unless it engaged in “tortious or criminal conduct.”<sup>8</sup> On the surface, this decision represented a significant legal victory for workers and created a new momentum for the country’s labour movement to pursue further gains through the courts, including the right to organize,<sup>9</sup> bargain,<sup>10</sup> and strike.<sup>11</sup>

Yet, the SCC’s decision was also clear that the property rights of business could not easily be overridden by workers’ collective action. In coming to its conclusion, the SCC reverted back to early 20th-century common-law restrictions on the right to picket, which it termed the Wrongful Action Model (WAM).<sup>12</sup> As described by the SCC, WAM’s primary purpose is to utilize common-law torts to “catch [the] most problematic picketing – *i.e.*, picketing whose value is clearly outweighed by the harm done to the neutral third party.”<sup>13</sup> This being the case, it is unclear how WAM emancipates workers’ abilities to picket. Rather, I suggest that WAM reinforces the anti-picketing biases of judges and highlights the balancing act courts undertake to recognize some forms of workers’ freedoms while ensuring protection for property owners’ rights to trade. In other words, the Pepsi case represents a paradox for those interested in expanding labour rights through the courts. On the one hand, it was the workers’ militancy that exposed the inadequacy of the law to protect workers’ rights and thus expanded the zone of legal toleration for picketing. On the other hand, the elevation of early 20th-century tort laws to regulate picket line conduct is predicated on the principle of protecting property and thus likely constrains future worker militancy.<sup>14</sup>

Given the complex web of social, political, and legal struggles that defined this relatively small strike in Saskatchewan, it is worth examining how the workers’ actions protested against the employer and the state. How, for instance, did the strike build a culture of solidarity in the workplace? Moreover, how

8. *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156., para 3 (“RWDSU v. Pepsi”).

9. *Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465.

10. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391.

11. *Saskatchewan Federation of Labour et al. v. Saskatchewan*, SCC leave to appeal granted, 17 October 2013.

12. Bernard Adell, “Secondary Picketing after Pepsi-Cola: What’s Clear, and What Isn’t?” *Canadian Labour & Employment Law Journal* 10 (2003): 136.

13. RWDSU v. Pepsi, para 106.

14. I borrow the concepts of legal “zones of toleration” and “boundaries of constraint” from Bryan Palmer’s, “What’s Law Got to do With It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority,” *Osgood Hall Law Journal* 41 (2003): 466–490. See also, Eric Tucker, “‘That Indefinite Area of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837–1877,” *Labour/Le Travail* 27 (1991): 15–54.

did the expression of worker solidarity culminate in altering Canada's common-law rules regarding secondary picketing? And what are the implications for workers embracing collective acts of resistance as well as legal strategies to pursue social change? As will be argued, the answers to these questions reside in the workers' willingness to challenge legal and political restraints through collective acts of civil disobedience. The decisions to occupy the Pepsi plant and publically shame replacement workers empowered the strikers and directly contributed to their victory. When the struggle moved to the courts, workers felt less emboldened in their struggle and this narrowed their eventual victory. As the legal decisions were divorced from the politics of larger class struggles, the victory was inevitably limited by the law's inseparability from capitalist relations of property. In other words, when the broader issues of workplace rights moved to the courts, workers were restrained in their ability to shape political and economic change. Nevertheless, the success on the picket line and the SCC decision itself should be understood as an important moment of worker solidarity that revealed the power of civil disobedience to grow the labour movement and to challenge the state and employers in the period of neoliberalism.

### **Industrial Legality, Strikes, and Secondary Picketing in Canada**

CANADA'S CURRENT SYSTEM of industrial legality has its origins in the class turmoil that followed the end of World War II.<sup>15</sup> Out of those struggles came Canada's peculiar form of industrial pluralism, a relatively structured set of legal rules governing workplace organizing, collective bargaining, and the peaceful settlement of disputes.<sup>16</sup> These rules inscribed in law the ability of workers to organize through a state-mediated process, required employers to recognize *bona fide* unions, and imposed "good faith" bargaining in order to conclude collective agreements.<sup>17</sup> Notwithstanding these workplace gains, the "central purpose" of Canada's regime of industrial legality was to "regulate strikes" in order to preserve labour peace and thus sustain uninterrupted flows of private production.<sup>18</sup> According to Judy Fudge and Eric Tucker, the

15. Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Relations System During World War Two," *Labour/Le Travail* 3 (1978): 175–196.

16. Peter S. McInnis, *Harnessing Labour Confrontation: Shaping the Postwar Settlement in Canada, 1943–1950* (Toronto: University of Toronto Press, 2002) and Charles W. Smith, "The Politics of the Ontario Labour Relations Act: Business, Labour, and Government in the Consolidation of the Post-War Industrial Relations Framework, 1949–1961," *Labour/Le Travail* 62 (Fall 2008): 109–151.

17. A.W.R. Carrothers, E.E. Palmer, and W.B. Rayner, *Collective Bargaining Law in Canada* (Toronto: Butterworths, 1986), 63–64.

18. Jon Pierce, *Canadian Industrial Relations* (Toronto: Prentice Hall, 2003), 339; Bernard Adell et al., *Labour and Employment Law*, 390.

limits that Canadian authorities placed on strikes were the “most outstanding” feature of this new system as it rendered political, recognition, and solidarity strikes virtually illegal.<sup>19</sup>

Unions that complied with legal restrictions on their ability to strike remained somewhat free from state coercion. If workers engaged in illegal strikes, however, direct state intervention was almost assured. While that intervention took many forms, the criminal and civil jurisdiction of the courts took precedent in regulating strikes. Court criminal powers were important in regulating so-called illegal activities, which in extreme cases might subject workers to fines or imprisonment for questionable behaviour on the picket line. By contrast, the civil jurisdiction of the courts was far more important in regulating the form, content, and effectiveness of workers' collective action. As had become routine in the first part of the 20th century, employers were able to constrain strike activity through the usage of the “nominate” or “economic” torts.<sup>20</sup> Nominated torts include nuisance, trespass, assault, property damage, and defamation while the more modern economic torts are civil violations based on charges as widespread as conspiracy, intimidation, and inducing breach of contract.<sup>21</sup> In the context of strikes, alleged violations of torts allow employers to apply for injunctive relief in order to end illegal strikes or to restrain picketing during legal strikes. The most notable example of civil remedies acting as tools of employer power occurred in the latter half of the 1960s and 1970s, when waves of wildcat strikes challenged the legitimacy of postwar industrial legality.<sup>22</sup> In most cases, those disputes were met with court injunctions to weaken picket lines or to end illegal strikes. When workers violated those court orders, police violence and mass arrests routinely followed.<sup>23</sup>

19. Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900–1948* (Oxford: Oxford University Press, 2001), 273; Judy Fudge and Eric Tucker, “The Freedom to Strike in Canada: A Brief Legal History,” *Canadian Labour & Employment Law Journal* 15 (2009–2010): 335.

20. Judy Fudge and Eric Tucker, “Forging Responsible Unions: Metal Workers and the Rise of the Labour Injunction in Canada,” *Labour/Le Travail* 37 (Spring 1996): 81–120; Fudge and Tucker, *Labour Before the Law*, 19.

21. Bernard Adell et al., *Labour and Employment Law*, 418.

22. Bryan Palmer, *Canada's 1960s: The Ironies of Identity in a Rebellious Era* (Toronto: University of Toronto Press, 2009), 219–235; Peter S. McInnis, “Hothead Troubles: Sixties-Era Wildcat Strikes in Canada,” in Lara Campbell, Dominique Clément, and Gregory S. Kealey eds., *Debating Dissent: Canada and the 1960s* (Toronto: University of Toronto Press, 2012), 155–170.

23. Joan Sangster, “‘We No Longer Respect the Law’: The Tilco Strike, Labour Injunctions, and the State,” *Labour/Le Travail* 53 (Spring 2004): 47–87. The ease by which employers obtained civil remedies was a serious challenge to worker acceptance of industrial pluralism. The issue was only resolved when several provinces imposed restrictions on the ability of judges to grant injunctions. In Ontario, amendments to the *Judicature Act* in 1970 led to improvements in the procedural and substantive prerequisites for judicial injunctions during labour disputes. In British Columbia, the NDP's labour code transferred jurisdiction regarding strikes from the courts to the British Columbia Labour Relations Board. On these changes, see H.W. Arthurs,

As constructed by the common law, the rules surrounding picketing in Canada fall into two categories: primary and secondary. Primary picketing involves legal disputes between unionized workers and a single employer. During the consolidation and later administration of the regime of industrial legality, labour relations statutes evolved to protect the legal right of workers to engage in peaceful picketing against single employers. Statutory rules were particularly concerned with the timeliness of strikes, restricting them during the life of a collective agreement, after state-sponsored conciliation, and often after mandatory “cooling off” periods. Beyond the timing of strikes, legislatures left the regulation of picketing to judges who had historically demonstrated deep-seated scorn for collective activities that challenged employer property.<sup>24</sup> Even within the new model of industrial legality, these biases continued to guide judicial philosophy. For instance, the line between primary picketing and the law’s recognition of those picket lines was not always clear. In *Harrison v. Carswell* [1976], the SCC ruled that the location of a Winnipeg picket line could not intrude on mass retail establishments housing multiple businesses. In this dispute, the court held that a picket line targeting a single business (Dominion Grocery) within a shopping mall (Polo Park) constituted trespassing when the picketers encroached on mall property.<sup>25</sup> In coming to this conclusion, the SCC simply applied existing tort rules to new commercial “quasi-public places,” where the lines between public and private property were blurred and did not necessarily reflect the lived reality for workers labouring in the shopping mall.<sup>26</sup>

Notwithstanding setbacks such as *Harrison v. Carswell*, the laws respecting strikes were far more limiting for so-called secondary picketing. These restrictions were given judicial voice in a 1963 Ontario dispute entitled *Hersees of Woodstock Ltd. v. Goldstein*.<sup>27</sup> In *Hersees v. Goldstein*, the Amalgamated Clothing Workers of America leafleted a third party business (Hersees) in order to place pressure on its primary employer (Deacon Brothers). In their leaflets, union picketers encouraged a consumer boycott of all Deacon Brothers’ products in Hersees’ clothing store. Hersees responded by applying for an injunction arguing that the union’s actions violated his right to trade. In siding with Hersees, the Ontario Court of Appeal found several civil tort

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“The Dullest Bill”: Reflections on the Labour Code of British Columbia,” *British Columbia Law Review* 9 (1974): 280–340. I would like to thank Eric Tucker for highlighting these points.

24. Harry J. Glasbeek, “Contempt for Workers,” *Osgood Hall Law Journal* 28 (1990): 1–52.

25. [1976] 2 S.C.R. 200. (“Harrison v. Carswell”).

26. Philip Girard and Jim Phillips, “A Certain ‘Mallaise’: *Harrison v. Carswell*, Shopping Centre Picketing, and the Limits of the Post-war Settlement,” in Judy Fudge and Eric Tucker, eds., *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin, 2010), 267.

27. 1963, 38 D.L.R. (2d) 449. (“*Hersees v. Goldstein*”); Eric Tucker, “*Hersees of Woodstock Ltd., v. Goldstein*: How a Small Town Case Made it Big,” in Judy Fudge and Eric Tucker, eds., *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin, 2010), 217–248.



violations including inducing a breach of contract (between Hersees and Deacon), "besetting" of Hersees' place of business causing (or likely to cause) damage, and conspiracy to injure the retailer. In adopting these positions, the judge actually went beyond the existing tort law concluding that all secondary picketing was *illegal per se*. That being the case, a right to secondary picketing "must give way ... to the retailer's right to trade which is a more fundamental right for the benefit of the community at large than the right of secondary picketing which is exercised for the benefit of a particular class only."<sup>28</sup> Although critiqued by leading labour law scholars as out of step with Canada's constitutional tradition of free expression,<sup>29</sup> the court's *illegal per se* doctrine set a long-standing precedent limiting workers' ability to secondary picketing.<sup>30</sup>

By the 1980s, many unions believed that the newly constituted Charter might expand the legal zone of toleration for workers collective activity. The opportunity arose out of a 1984 conflict between the RWDSU, Purolator Inc./ Supercourier and Dolphin Delivery Ltd., a third party shipping company.<sup>31</sup> In the course of a legal strike, Dolphin Delivery was granted a *quia timet* injunction stopping secondary action before it actually occurred.<sup>32</sup> The union challenged the injunction on the grounds that the Charter restricted civil actions if used to limit "democratic expression."<sup>33</sup> To use the torts to hinder peaceful picketing in this new environment would be "akin to trying to bring back the stone axe [when we] have learned to live and work with the laser beam."<sup>34</sup> In other words, secondary acts of picketing are not simply actions between workers and individual businesses. Rather, picketing represents a collective act of human expression that "contributes to the central economic and political debate within the community."<sup>35</sup>

The SCC remained unconvinced. In siding with the employer, the court ruled that there was no constitutional right to secondary picketing nor did the Charter trump common-law rules protecting property. In arriving at this

28. *Hersees v. Goldstein*, 87–88.

29. Harry Arthurs, "Case Comments: *Hersees of Woodstock v. Goldstein*," *Canadian Bar Review* 41 (1963): 579.

30. In the 1970s, labour boards and the lower courts eased the *illegal per se* doctrine by adding an "ally doctrine." The ally doctrine recognized secondary picketing if a union was able to prove that the struck employer and a secondary location were in fact business allies.

31. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. ("*RWDSU v. Dolphin Delivery*")

32. Translated literally, *quia timet* means, "because he or she fears." A *quia timet* injunction allows employers to legally stop a union from picketing before a picket line is established if there is legitimate fear that a future action may result in tortious conduct.

33. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (factum of the Appellant at 23). ("*RWDSU factum*")

34. *RWDSU factum*, 22.

35. *RWDSU factum*, 27.



conclusion, the SCC reaffirmed that the potential harm to property owners far outweighed the rights of workers to express their opinions through picketing.<sup>36</sup> This conclusion reinforced judicial antipathy to workers' collective action, an opinion that was solidified in the 1987 "labour trilogy" of SCC cases that denied a general constitutional right to strike.<sup>37</sup> These decisions limiting workers' rights to picket remained the law in Canada until a small group of Saskatchewan workers challenged their employer's usage of replacement workers through a coordinated plan of secondary picketing in 1997.

## The Origins of the Pepsi Dispute

THE 1997 STRIKE HAD its origins in the complex class relations that characterized the North American soft drink industry in the 1980s and 1990s. In North America, PepsiCo was comprised of two primary business units: Pepsi-Cola North America (PCNA) and Pepsi-Cola Company International.<sup>38</sup> PCNA manufactured dozens of beverage products in over 165 plants in the United States and Canada. Throughout the 1980s, the trends toward monopolization increasingly coalesced around the now familiar lines between the Coca-Cola and Pepsi companies. Integrated within that rivalry was the acquisition of new brands owned by each company. In 1986, PepsiCo purchased 7UP from cigarette giant Phillip Morris, giving PepsiCo a lucrative corner of the Canadian soft drink industry.<sup>39</sup> By 1997, these consolidations extended PepsiCo's dominance in the now global food market, making it one of the largest companies in the world with over \$22 billion in sales.<sup>40</sup> Throughout North America, PCNA shipped its commodities (soft drinks and syrups) through its own factories and several "independent licensees or unconsolidated affiliates" who manufactured, sold, and delivered product to local markets.<sup>41</sup> As the food retail business moved to mega-box stores in the 1990s, PepsiCo restructured its manufacturing and bottling division (accounting for over \$7 billion in sales) to accommodate larger grocery outlets.<sup>42</sup> This change alone led to a dramatic

36. *RWDSU v. Dolphin Delivery*, para 23.

37. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

38. *United States Securities and Exchange Commission*, Form 10-K Annual Report PepsiCo, Inc. Fiscal Year Ending 27 December, 1997, 1., accessed 15 September 2013, <http://www.sec.gov/Archives/edgar/data/77476/0000077476-98-000014.txt>.

39. PepsiCo Canada, *Our History*, accessed 16 September 2013, <http://www.pepsico.ca/en/Company/Our-History.html>.

40. PepsiCo, Inc. *Annual Report 1998: Getting our ducks in a row* (New York 1998), 1.

41. *United States Securities and Exchange Commission*, Form 10-K Annual Report PepsiCo, Inc. Fiscal Year Ending 27 December, 1997, 1.

42. PepsiCo, Inc. *Annual Report 1998*, 2.

restructuring of Pepsi's distribution chain with smaller bottlers coming under direct PepsiCo ownership. The consolidation of the supply network led to restructuring of the workforce, although employment numbers at PCCB grew to around 3,000 employees in five regional distribution plants. In the same year, PCCB (West) employed 600 people and sold over \$75 million worth of product across western Canada.<sup>43</sup>

In Saskatoon, the Listwin family had long owned and operated Starlite bottlers, a small franchise that bottled and distributed Pepsi products in the region.<sup>44</sup> In the early 1980s, some members of what would become RWDSU Local 558 in Saskatoon's Pepsi plant attempted to organize Starlite, but the drive failed because the company paid its drivers on a semi-commission, semi-wage basis that proved lucrative for drivers and delivery workers.<sup>45</sup> The purchase of 7UP, however, had a ripple effect in smaller markets, as local franchises were bought out or merged. In 1989, Blackwoods Beverages in Winnipeg bought the bottling plants (including Starlite) in western Canada, which were then amalgamated into PCCB (West) Ltd. The amalgamation led to layoffs, changed the wage rate for warehouse workers, and virtually eliminated the commission paid per delivery for drivers. Although Pepsi attempted to offset the elimination of commission with a higher base pay, it did not make up for the loss in salary, as many drivers reported working long hours with little overtime pay. Through a process of aggressive downsizing, the company also proceeded to force existing workers to "re-apply" for their jobs. This "humiliating" experience<sup>46</sup> led numerous plant workers to organize with RWDSU, which won union representation at the Pepsi plant on 22 April 1994.<sup>47</sup> Later that year, the workers were able to bargain a first contract, but according to one union official it was really an "experimental agreement" that allowed the workers to build for the future.<sup>48</sup>

Notwithstanding the successful certification drive, the union faced an uphill struggle to build a culture of worker solidarity in the plant. RWDSU's first challenge was to break the loyalty that members had to the Pepsi brand. For many workers, the success of the Saskatoon Pepsi plant dating back to the Listwin ownership occurred because of management's emphasis on partnership and brand loyalty. That reputation was reinforced by the fact that

43. *Canadian Key Business Directory* (Toronto: Dun & Bradstreet, 1997), 604.

44. "George Listwin Obituary," *Star Phoenix*, 20 February 2009, accessed 13 September 2013, <http://www.legacy.com/obituaries/thestarpheonix/obituary.aspx?n=george-listwin&pid=124381391#fbLoggedOut>.

45. Greg Goodheart, interview by author.

46. Goodheart interview.

47. *Pepsi-Cola Canada Beverages (West) Ltd. (Re)* [1997] S.L.R.B.D. No. 40, LRB File Nos. 166-97, 172-97 to 187-97 ("Pepsi SLRBD No. 40"); Luchsinger interview.

48. Garry Burkhart, interview by author.

the Saskatoon branch had been awarded “market unit of the year” in 1996 because of its high volume of sales.<sup>49</sup> That success led to an “ingrained” culture where many of the plant and delivery workers “bled Pepsi blue.”<sup>50</sup> These workplace obstacles were exemplified by the organizational structure of Local 558. In RWDSU Saskatchewan, workers belong to composite locals, which are amalgamations of workers in several different workplaces. In 1997, Local 558 consisted of workers from Coca-Cola, McGavin’s Bread Basket, Nashua Photo, Brinks security, and Canadian and AlSCO Linen. Local 558 also had an all-female executive, which included President Linda Reiber, Vice-President Tracy Oleksyn, and Treasurer Annette Duchscher. All of these women worked at Nashua Photo, a picture-developing shop that employed mostly women workers in Saskatoon. The Pepsi workers were an all-male component of Local 558. The gendered division within the union, while not an obstacle to participation within the local itself, had specific implications for events on the picket line during the 1997 strike.

Many of the strike strategies used in 1997 also emerged out of the organizational culture of RWDSU Saskatchewan. Throughout the postwar period, RWDSU survived in the province through loyal organizers like Len Wallace and Walter Smishek who became central in building the union in rural grocery stores, retail establishments, and confederated co-op chains.<sup>51</sup> Building the union through local contacts in rural and urban centres led the membership to guardedly protect their union from employers and their own international leadership.<sup>52</sup> In 1969 and 1970, 2,323 members in fifteen Saskatchewan locals became the first Canadian private sector union to break away from its American International.<sup>53</sup> After its successful break, the Canadian Labour Congress (CLC) deemed RWDSU Saskatchewan a “rebel organization” making it vulnerable to raids from other CLC affiliates, especially from the United Food and Commercial Workers (UFCW).<sup>54</sup> During this period, RWDSU Saskatchewan’s only real chance of survival was to organize new workplaces, the most prominent being the Regina based farm equipment manufacturer Morris Rod Weeder in 1972 and 1973. Morris Rod Weeder’s centrality to

49. Jeff Peters, interview by author; George Manz, “Pepsi free: Although Pepsi called its Saskatoon workers the best of the best, that didn’t stop the multinational from locking-out its employees,” *Briarpatch*, September/October 1997.

50. Burkhart interview.

51. Jim Warren and Kathleen Carlisle, *On the Side of the People: A History of Labour in Saskatchewan* (Regina: Coteau Books, 2005), 136–139.

52. Eileen Sufrin, *The Eaton drive: The campaign to organize Canada’s largest department store, 1948 to 1952* (Toronto: Fitzhenry & Whiteside, 1983); Warren and Carlisle, *On the Side of the People*, 137–138.

53. Saskatchewan Joint Board Retail, Wholesale and Department Store Union, History, accessed 22 January 2014, <http://rwdsu.sk.ca/member-information-4/about-rwdsu/history/>.

54. Warren and Carlisle, *On the Side of the People*, 188–189.

Saskatchewan's agricultural economy had yielded the company considerable financial and political support from local politicians eager to expand the province's manufacturing base.<sup>55</sup> When the union met with fierce resistance from the company and state officials in its bid to win a first contract, organizers and shop-floor activists staged an illegal sit-down strike and won a collective agreement.<sup>56</sup> The success of the Morris Rod Weeder action became a central part of union history, cementing the tactic of direct action in the minds of many future union leaders while also allowing the union to survive until it regained affiliation to the CLC in 1984.<sup>57</sup> For the workers that rose to union leadership positions in the 1980s and 1990s, these events proved paramount for challenging and defeating large employers in the province.

### The Pepsi Strike

WORKERS IN SASKATCHEWAN'S food industry faced a difficult year in 1997. Early in the year, Canada Safeway Ltd. announced that it was closing its Regina distribution centre, resulting in a loss of 142 RWDSU jobs. Safeway's decision came after seven other food plants closed or moved their Saskatchewan operations between 1988 and 1995, resulting in the loss of 455 jobs.<sup>58</sup> This economic restructuring cast a long shadow when bargaining began at Pepsi. For RWDSU, one of the most important issues was to protect its workers from contracting out and to bring shop workers up to wage-parity with workers at the Coca-Cola bottling plant. At the time, Pepsi shop workers earned roughly \$16 per hour while Coca-Cola workers doing similar work made almost \$20.50 per hour.<sup>59</sup> Notwithstanding its wage demands, the workers were really seeking enhanced job security. Too often, workers were vulnerable to reduced shifts or arbitrary layoffs. Drivers also demanded better overtime pay, greater dependability of Monday to Friday shifts not subject to arbitrary change by management, and a host of other benefits including allowances for new equipment. Although PCCO district manager Blair Patterson stated that the company was committed to a quick resolution, this was not the impression of the union. Rather, the bargaining team was convinced that Pepsi's actions demonstrated a priority to weaken the union so that plant workers, drivers, and maintenance workers

55. Don McLean, "Proud Words on a Dusty Shelf: An Analysis of the Morris Rod Weeder Strike," Honours thesis, University of Regina, 1976, 25.

56. Don McLean, "Proud Words on a Dusty Shelf," 54–66.

57. Burkhart interview.

58. Ted Boyle (Department of Labour) Memo to Labour Minister Robert W. Mitchell, Closure of Canada's Safeway's Regina Distribution Centre, 11 March 1997, Robert W. Mitchell Fonds (hereafter RWMF), BF 3-8, File 8.13, AOU-M, 1996–1997, Saskatchewan Archives Board (hereafter SAB).

59. Betty Ann Adams, "Pepsi workers occupy bottling plant," *Star Phoenix*, 16 May 1997; Saskatchewan Joint Board RWDSU, *The Defender*, June 1997.

were more vulnerable to contracting out of services.<sup>60</sup> For many rank-and-file workers, Pepsi's bargaining position was to simply "bulldoze their way through" negotiations, regardless of union demands.<sup>61</sup>

Talks broke off completely on 13 May 1997, and the union served strike notice while the employer responded with a lockout notice. Under the Trade Union Act (TUA), workers and employers are required to respect a 48-hour "cooling off period" before the commencement of a strike or lockout.<sup>62</sup> Drivers and several members of the bargaining team held an initial stratagem session at a local gas station near the plant on 15 May. At that meeting, numerous workers expressed both anger and apprehension about strike action. Their apprehension was not unwarranted. Garry Burkhart, RWDSU's staff representative and chief negotiator, had previously warned workers that striking against Pepsi-Cola was an economic war against a large, multinational company with almost infinite resources. Other members of Local 558 admitted that global companies like Pepsi or Coke "would rather lose money fighting their employees paying for lawyers and extra security ... than actually concluding a fair agreement with their workers."<sup>63</sup> Workers were also aware that Pepsi intended to recruit replacement workers to break the strike. According to one striker, these realities were "not a pretty picture" but "we knew the risks involved."<sup>64</sup> Notwithstanding their anxiety, the drivers came to a consensus that a general plan of social disruption, civil disobedience, and work slowdown was an appropriate way to pressure the employer before formal picket lines were established. Out of their stratagem session, drivers decided to organize a convoy of Pepsi trucks and upon arriving at the plant, tipped over their deliveries inside the trucks, sprayed Pepsi crates with syrup, and snapped keys off in the ignition.<sup>65</sup> Once inside the plant, workers engaged in a series of workplace slowdowns and held a second impromptu study session with the bargaining team on the factory floor. After some initial discussion with management, it became clear that the employer was determined to proceed with the lockout.

Legally, workers knew that they had a right to peacefully picket outside the premises of their employer. Many of the workers and the bargaining team also knew that the lockout was a direct challenge to their economic security. This inspired Rocky Luchsinger, Dale Wildey, and Garry Burkhart toward more militant and illegal actions, which included occupying the plant. For them, the choice was clear: "we could fight them in the street or we can take this

60. Luchsinger interview.

61. Les Barker, interview by author.

62. *Saskatchewan Trade Union Act* 1994, c. 47, s. 11 (6) (a), (7), (a).

63. Linda Reiber, interview by author.

64. Peters interview.

65. Goodheart interview.



**Plant Occupation.**  
RWDSU Saskatchewan Files



**Stratagem Session.**  
RWDSU Saskatchewan Files



place over and fight them from here.”<sup>66</sup> The suggestion ignited the mood on the floor and the workers chased Pepsi management and security from the plant.<sup>67</sup> While some workers left to form a picket line outside, roughly a dozen workers turned the security cameras away from the shop floor and secured the doors using forklifts to place hundreds of cases of Pepsi product in front of factory doors. Others emptied CO<sub>2</sub> tanks, making the future delivery of syrups by replacement workers more difficult. Having used the company’s product as a central tool of the occupation, several strikers later reflected on the irony that the only way the company could forcefully end the occupation was to destroy the Pepsi product piled in front of plant doors.

Garry Burkhart later accounted that his recommendation to occupy the Pepsi factory originated from his experience as a young welder during the Morris Rod Weeder action.<sup>68</sup> For other workers, the decision to participate in the occupation was not taken lightly. Several workers expressed apprehension about the legality of occupying employer property. Yet, once the occupation began in earnest, much of the apprehension melted away. Occupiers maintained communications with workers and supporters on the picket line, chatting through open factory windows only accessible by forklift. As all of the members of the bargaining team were inside the plant, they vowed to stay until an agreement was reached, stating they will “conduct negotiations through the doors and over the cellular phone.”<sup>69</sup> Workers remained busy by fortifying the barricades with Pepsi crates and later using promotional material such as a basketball and net. Outside the plant, striking workers did their best to thwart management attempts to break the occupation. In one case, strikers delayed tow trucks from removing Pepsi trucks by forming a human line. When the tow trucks eventually entered the compound, strikers closed and dead bolted the gates behind them.<sup>70</sup> These actions empowered the strikers as they kept vigil throughout the night.

After 24 hours, Pepsi obtained a temporary court injunction from the Court of Queen’s Bench demanding that the workers vacate the factory.<sup>71</sup> Once the injunction was served, the illegality of the situation became more concrete and reinforced what many workers always understood: that the law favoured owners of property. As Garry Burkhart stated,

66. Luchsinger interview.

67. Penner interview.

68. Burkhart interview. See also, “The Pepsi Counter-Revolution,” *Prairie Dog*, June 1997.

69. Adams, “Pepsi workers occupy bottling plant.”

70. Penner interview.

71. Betty Ann Adams, “Pepsi staff won’t budge, ignore order to leave,” *Star Phoenix*, 17 May 1997. Serving the injunction proved to be a challenge because company representatives were unable to access the doors to the plant. After several failed attempts, the injunction was eventually served through an upstairs office window.



We knew we were breaking the law. I mean we didn't agree with the law, but I knew the law was on the employer's side. Property always trumps labour's rights so I knew we were breaking the law.<sup>72</sup>

For others, the right of property was far more abstract. Many felt their actions "border[ed] on illegal activity" but were nevertheless legitimate.<sup>73</sup> For most workers, their actions were justifiable because it was their workplace. In fact, the philosophy that "ownership" meant more than possession of a commodity or physical infrastructure proved central in many of the workers reflection of the occupation. When the temporary injunction arrived, however, the full pressure of the state was placed on the workers to end the occupation. Garry Burkhart laid out their options in plain language: "we've pushed this as far as we're going to push it ... if they break in and get us, we're not going to be on this picket line, we're going to be in jail." That reality challenged the legitimacy of the occupation for many of the strikers. Numerous workers felt that they had defied the employer and having done so, demonstrated to the company that they were serious and, ultimately, they "didn't want to totally break the law."<sup>74</sup> As Luchsinger told local media outlets, "our fight isn't with the law, so why [risk] a criminal record? Our fight is with the company."<sup>75</sup> Given the threats of jail time and thus weakening the picket line, workers decided to end the occupation and quietly slipped out the backdoor.

Once Pepsi management concluded that the plant was empty (taking several hours), it took numerous days to clean up and move the piled crates. Having recruited scab labour from its Winnipeg, Calgary, and Edmonton operations, PCCO began deliveries on 20 May 1997. As replacement workers filled the plant, strikers reached out to RWDSU members from other locations to join the picket line. Local 558's President Linda Reiber and Vice-President Tracy Oleksyn often joined the line after a full day shift at Nashua Photo. Both women engaged in daily picketing but were rarely involved in direct action. Many later admitted "it was actually a bit awkward for us as women because we didn't really know a lot of people who worked at Pepsi or Coke or any of the locals that were predominantly male. But having said that, we understood that this was a strike and so we felt really compelled to be there."<sup>76</sup> When the situation became confrontational, most of the women strikers were shielded from engagement with replacement workers. In instances where female strikers were challenged directly, there was an unspoken response by male strikers to rush to their aid. In many ways, Reiber's and Oleksyn's experiences reflected

72. Burkhart interview.

73. Penner interview.

74. Barker interview.

75. James Wood, "Pickets begin in earnest at Pepsi plant," *Star Phoenix*, 20 May 1997.

76. Tracy Goodheart, interview by author.

both a culture of solidarity among the strikers, but also the gendered nature of picket line conflict.<sup>77</sup>

The company's usage of replacement workers elevated the conflict as the strikers developed a two-pronged strategy to protect their line. First, workers engaged in collective acts of civil disobedience to thwart company spying while also delaying replacement workers from entering or leaving the plant. On several occasions, workers used large mirrors to shine light into security cameras while others tipped over cars used by replacement workers. One striker spent his shifts hidden in a large cardboard box with a hammer and a pick, slowly digging a trench to disrupt trucks from entering or leaving the plant.<sup>78</sup> Others directly confronted replacement workers by jumping on the hoods of vehicles and shouting at the drivers. Some threw eggs and rocks, while others left large nails and spikes near delivery trucks to puncture tires.<sup>79</sup> While many of these actions were illegal, they reinforced the strikers' belief that the struggle to defend their jobs superseded laws protecting property.

Second, workers developed a coordinated secondary picketing strategy to challenge the employer throughout the city.<sup>80</sup> On the same day that primary picketing began in earnest, several workers decided to secondary picket outside the private homes of Pepsi management. While the mood was "pretty intense," these strikers felt it was important to send a public message that the recruitment of replacement workers was not simply a business decision. That being the case, strikers picketed outside the houses of PCCO managers Graham Fraser and Peter Kenyan.<sup>81</sup> These actions certainly raised the ire of company managers, who immediately applied for a court injunction to prevent the pickets. The injunction ended the pickets at private residences, but workers

77. Reiber interview; Goodheart interview. Although beyond a full inquiry in this paper, the role of gender on picket lines is an essential area of investigation to fully explain the multiple dimensions of class conflict in Canada. For some prominent studies see Joan Sangster, "We No Longer Respect the Law"; Joan Sangster, *Transforming Labour: Women and Work in Postwar Canada* (Toronto: University of Toronto Press, 2010); Mary Horodyski, "Women and the Winnipeg General Strike of 1919," *Manitoba History* 11 (Spring 1986): 28–37; Linda Kealey, "'No Special Protection, No Sympathy': Women's Activism in the Canadian Labour Revolt of 1919," in Deian R. Hopkins and Gregory S. Kealey, eds., *Class, Community, and the Labour Movement Wales and Canada, 1850–1930* (Toronto: University of Toronto Press, 1989), 171–195; Steven Penfold, "Have you No Manhood In You?": Gender and Class in the Cape Breton Coal Towns, 1920–1926," *Acadiensis* 2 (Spring 1994): 21–44; Julie Guard, "Authenticity on the Line: Women Workers, Native 'Scabs,' and the Multi-ethnic Politics of Identity in a Left-Led Strike in Cold War Canada," *Journal of Women's History* 15 (Winter 2004): 117–140.

78. Goodheart interview.

79. Leslie Perreux, "Pepsi workers cited for breaking injunction," *Star Phoenix*, 25 June 1997.

80. Penner interview; Luchsinger interview.

81. Penner interview; Luchsinger interview.



**Pepsi Scab Patrol 1.**  
RWDSU Saskatchewan Files



**Pepsi Scab Patrol 2.**  
RWDSU Saskatchewan Files

used similar tactics outside of local hotels where out-of-town management and replacement workers were residing.<sup>82</sup>

Shortly after the initial secondary actions, a few workers dreamed up the idea of “Scab-mobiles,” which were quickly dubbed the “Pepsi Scab Patrol.”<sup>83</sup> The Scab Patrol maintained a fairly sophisticated communication network to follow and confront replacement workers throughout the city. At the beginning of each day, several strikers targeted scab workers on their routes. When replacement workers attempted to make deliveries, strikers followed in a Scab-mobile and then picketed outside these locations. In some instances, strikers found support from other unionized workers who refused to handle “hot cargo and sabotaged the drivers making deliveries.”<sup>84</sup> Strikers also confronted hostile business owners or pugnacious replacement workers. On one occasion, an attempt to stop a truck from making a delivery near a Safeway loading dock resulted in a worker’s foot being crushed when the truck jumped into gear.<sup>85</sup> Strikers also used their contacts with local merchants to discredit replacement workers, requesting that storeowners refuse Pepsi deliveries. In making these requests, workers leaned on their long-time community interactions to legitimize secondary picketing. As one striker stated, “we’re the guys in your community that coach your kids’ baseball team. We shop at your stores. These are just some scabs from Calgary and Winnipeg ... and they’re taking our jobs.”<sup>86</sup> That argument resonated with numerous local shop owners, many of whom cancelled or limited Pepsi orders.

The “Pepsi Scab Patrol” was an innovative way to shame replacement workers and to bring community pressure on the employer. Pepsi management sought to thwart these secondary actions by appealing to the courts. First, Pepsi filed a grievance claiming that the union was engaged in trespassing, deliberate tampering, vandalism, sabotage, theft, intimidation, illegal secondary picketing, and holding union meetings on company property.<sup>87</sup> Second, Pepsi filed a civil action at the Court of Queen’s Bench, claiming that the workers were “basically out of control,” and sought yet another injunction to further limit picketing. In awarding the injunction, Justice Ronald Barclay<sup>88</sup> compared the

82. Leslie Perreux, “Pepsi dispute ‘time bomb’: judge,” *Star Phoenix*, 23 May 1997.

83. Luchsinger interview.

84. Goodheart interview. In one case, allied workers “tied off” the doors of a delivery truck, tearing the doors off when it drove away.

85. Jason Warick, “Striking Pepsi worker injured,” *Star Phoenix*, 21 May 1997. The worker injured was Dale Braun, a rank-and-file activist in the union.

86. Luchsinger interview.

87. Graham Fraser (Pepsi Manager), Pepsi Grievance Letter to the RWDSU, 26 May 1997, RWME, BF 3-8, File 8.16 AOU-P; 1996–1997, SAB.

88. It is worth noting that for two decades Barclay worked at employer side law firm *MacPherson, Leslie & Tyerman* (MLT). Pepsi used MLT to argue its case against RWDSU. Jana G.

dispute to a “ticking time bomb” and found the union in violation of several torts, including intimidation, mischief, and uttering threats.<sup>89</sup> Barclay therefore restrained workers from picketing anywhere but at Pepsi’s distribution plant, constrained workers from interacting with replacement workers, and restrained all persons from blocking or impeding Pepsi’s vehicles from entering or leaving the plant. Barclay’s blanket prohibition on secondary picketing was at the centre of the union’s later claim that the court had violated its constitutional rights of expression.

The immediate implication of the injunction was to limit the ability of picketers to stop replacement workers from delivering Pepsi products. When strikers restarted picketing, Pepsi sought to secure its legal victory by firing five strikers it considered the “ringleaders” of the illegal activity.<sup>90</sup> Unbeknownst to the company, the firings rallied the workers and solidified the belief that the company was trying to break the union.<sup>91</sup> Throughout June, both sides further dug in their heels, leading to further conflict on the picket line. Confrontation was particularly heated with Pepsi security guards who were represented by the UFCW. In fact, the UFCW security guards took their jobs so seriously that the strikers deemed them to be “worse than a scab.”<sup>92</sup> Hostility with Pepsi personnel led to fourteen workers being cited with contempt for breaking the 26 May injunction. The company alleged that these workers committed various acts of assault and mischief, uttered threats, slashed tires, destroyed property, and sabotaged company property.<sup>93</sup> Undeterred by the charges, the strikers continued to resist the company in innovative ways. In early June, the workers began selling Coca-Cola products to community members stopped in daily rush-hour traffic and often placed Coca-Cola labelling around the plant. The city’s labour movement also orchestrated a boycott of Pepsi, which included a door-to-door leafleting campaign that played on Pepsi’s well-known advertising slogan encouraging the public to “find a positive alternative to the Pepsi de-generation.”<sup>94</sup> The union countered Pepsi’s legal actions by applying for

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Pruden, “Regina Justice Ron Barclay calls it a career,” *Regina Leader-Post*, 2 August 2010.

89. *Pepsi-Cola Canada Beverages (West) Ltd., v. rWDSU Local 558*, 1997 SKQB No. 941; Leslie Perreux, “Pepsi dispute ‘time bomb’: Judge,” *Star Phoenix*, 22 May 1997.

90. The fired workers were: Randy Penner, Dale Wildey, Rocky Luchsinger, Ron White, and Larry St. Germain. Saskatchewan Department of Labour, Appointment of arbitrators with respect to the grievances of fired rWDSU members, 23 September 1997, rWME, BF 3-8, File 8.16 AOU-P; 1996–1997, SAB.

91. Goodheart interview; Peters interview; Betty Ann Adam, “Pepsi firings intimidation tactic, say union lawyers,” *Star Phoenix*, 28 May 1997.

92. Saskatchewan Joint Board rWDSU, “Worse than a scab,” *The Defender*, June 1997.

93. Leslie Perreux, “Pepsi workers cited for breaking injunction,” *Star Phoenix*, 25 June 1997.

94. Retail, Wholesale, Department Store Union, *Boycott Pepsi: Support the locked out Pepsi Workers*, June 1997, University of Saskatchewan Special Collections-Pamphlet/VF, XXVII-389; Joanne Paulson, “Labor groups throw support behind locked-out workers,” *Star Phoenix*, 3

an interim decision from the Saskatchewan Labour Relations Board (SLRB), arguing that the company violated the “lockout” provision in TUA.<sup>95</sup> The SLRB’s chair was prominent legal scholar Beth Bilson. Bilson was appointed to the board by the Saskatchewan New Democratic Party (SNDP) in 1992 and won praise for her even-handed decisions, although some unions believed she did “not have the best interest of labour at heart when she writes her decisions.”<sup>96</sup> All of this criticism, however, ended in her last decision as chair. In a unanimous ruling against Pepsi, the board determined that the lockout provisions in the TUA limited the ability of employers to use replacement workers. In coming to this conclusion, Bilson reasoned that strikes and lockouts are economic weapons that are highly regulated by the TUA. In determining the legality of a strike, for instance, the board is required to examine both the substantive (*i.e.*, not a wildcat) and procedural (*i.e.*, a proper strike vote is taken, proper notice is given) aspects of a union’s actions. That being the case, similar scrutiny was necessary to determine the legality of the new wording of “lockout” in the act. The board insisted that both strikes and lockouts were premised on the notion that each party takes a substantial risk in walking away from collective bargaining. As the act defined a lockout as “a suspension of work or a refusal to continue to employ employees,” employers could not mitigate their risk by employing replacement workers in order to gain an unfair advantage over the union. Bilson thus concluded, “if an employer chooses to refuse to continue to employ employees, those employees cannot be replaced by other employees.”<sup>97</sup> While management could perform worker duties during a lockout (as they are not employees), the use of replacement workers constituted a violation of the TUA.

The immediate implication of the SLRB’s decision was to end picketing at Pepsi’s Saskatoon plant. In declaring victory, the RWDSU called on the company to end the lockout and return to the bargaining table.<sup>98</sup> Local Pepsi management agreed, but nevertheless felt compelled to appeal the SLRB decision “for the good of the province.”<sup>99</sup> These gestures were enough to bring the

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July 1997.

95. *Saskatchewan Trade Union Act* 1994, c. 47, s (j.2) states: “lockout” means one or more of the following actions taken by an employer for the purpose of compelling employees to agree to terms and conditions of employment: (i) the closing of all or part of a place of employment; (ii) a suspension of work; (iii) a refusal to continue to employ employees.

96. Brian Stewart (President of UFCW Local 1400), Letter Re: Labour Relations Board to Robert W. Mitchell, 6 February 1997, RWMF, BF 3-8, File 7.23, UFCW (United Food and Commercial Workers), 1997, SAB.

97. Pepsi SLRBD No. 40, 7.

98. Saskatchewan Joint Board RWDSU, “Armed Truce at Pepsi,” *The Defender*, August 1997.

99. Robert W. Mitchell Letter Re: RWDSU v. Pepsi-Cola Labour Relations Board Decision to Roy Romanow, 28 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996–1997, SAB. The Court of Queen’s Bench heard the appeal on 12 August 1997, but adjourned the matter pending a final



union back and the strikers returned to work on 9 July 1997. The return to work order, however, did not include the five workers fired by the company.<sup>100</sup> For some strikers, the absence of their colleagues was enough to stay on the line, but pressure from the union's legal advisors changed their minds.<sup>101</sup> Strikers responded by returning to the plant wearing black armbands inscribed with the names of their fired co-workers.

The SLRB's decision enraged the province's business lobby, stating that it unilaterally "turned labor law on the management side on its ear."<sup>102</sup> In a four-page letter to Labour Minister Robert "Bob" Mitchell and Premier Roy Romanow, the Saskatchewan Chamber of Commerce claimed to be "shocked" and accused the board of "tipping the balance to place business in this province at a great disadvantage when attempting to achieve agreements."<sup>103</sup> The Canadian Federation of Independent Business declared that its members were opposed to the decision, warning of the risks that the pro-labour decision posed to "attract and keep business in the province."<sup>104</sup> The Mining Association also entered the debate, stating that the board's decision eroded the "necessary balance" between unions and labour.<sup>105</sup> Claiming to speak for the province's business community, the chamber demanded clarification on the government's position:

To find that this legislation created anti-replacement worker requirements in a lockout situation is either a correct interpretation, in which case business has been betrayed by the government, or it is not correct, which would be in conformity with what we were told when the legislation was introduced.<sup>106</sup>

The chamber's position reflected its long distrust of the SNDP, an opinion that had been cemented by the social democratic party's historical relationship with organized labour in the province.

Business hostility to the Romanow TUA, however, was misguided. Throughout the 1980s and early 1990s, the shift away from postwar social

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decision by the SLRB.

100. Peter interview; Luchsinger interview; Goodheart interview; Penner interview; Barker interview.

101. Peters interview.

102. Leslie Perreaux, "Ruling turns labor law 'on its ear,'" *Star Phoenix*, 9 July 1997.

103. Larry Seiferling (Chairman, Labour Relations Committee), Letter Re: Labour Relations Board-Pepsi Decision to Robert Mitchell, 24 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

104. Dale Botting Letter Re: Labour Relations Board-Pepsi Decision to Robert Mitchell, 22 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

105. Bill Eatock (President Saskatchewan Mining Association) Letter Re: Labour Relations Board-Pepsi Decision to Premier Roy Romanow, 20 August 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

106. Seiferling to Mitchell, 24 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.



democracy included the SNDP's acceptance of freer trade, balanced budgets, fiscal austerity, and lower taxes.<sup>107</sup> These economic transformations paralleled similar changes in the party's relationship with the organized working class. For labour, the most important priority after the SNDP's electoral victory in 1991 was to reverse the changes to the TUA made by the previous Conservative government. Labour also demanded several "new" rights in the TUA, including first contract arbitration, sectoral bargaining, ending court injunctions, protection for workers who handle "hot cargo," eliminating the ability of employers to sue unions, strengthening the SLRB's ability to regulate employer unfair bargaining, and most prominently, a ban on the use of scabs.<sup>108</sup> For the unions, anti-scab legislation was a logical extension of the province's regime of industrial legality because it "places employers and employees on a more equal footing and will give both sides an equal incentive to settle any disputes. Furthermore it will reduce the number of protracted disputes and the levels of tension associated with them."<sup>109</sup>

Deviating from past SNDP administrations, the Romanow government only committed to craft labour legislation built on "consensus" for the "harmonious functioning of labour relations in Saskatchewan."<sup>110</sup> That commitment led to a three-year process of consultation with business and labour that included two separate tripartite committees that failed to arrive at government's desired consensus.<sup>111</sup> When the SNDP finally introduced its TUA amendments in 1994, it gave labour few reforms. To be sure, the SNDP did reverse some of the Conservatives' more regressive amendments, such as altering the definition

107. John Warnock, *Saskatchewan: The Roots of Discontent and Protest* (Montreal: Black Rose Books, 2004), 369-373; Lorne A. Brown, Joseph K. Roberts, and John W. Warnock, *Saskatchewan Politics From Left to Right '44 to '99* (Regina: Hinterland Publications, 1999), 52.

108. Barb Byers (President SFL), Letter to Roy Romanow Re: Bill 54, 10 May 1994, Roy Romanow Fonds (hereafter RRF), F 525-5, Saskatchewan Federation of Labour, File 1101.03, SAB.

109. *Justice in the workplace: Proposals for a new Trade Union Act from the Saskatchewan Federation of Labour* (Regina: Saskatchewan Federation of Labour, 1993).

110. Daniel Ish, Chairperson of the Trade Union Act Review Committee, *Report to the Honourable Ned Shillington, Minister of Labour*, 7 June 1993; Barb Byers letter to Roy Romanow, 25 January 1995, RRF, F 525-5, File 1199, Labour Minister Memos, SAB. As Byers later stated, "to pass labour legislation only where there is consensus is to hand business a veto over union legislation. We recognize that there are some good employers, but one would have to be naive to believe that some of the more extreme ones would ever voluntarily agree to progressive legislation. It flies in the fact of our collective experience, and we cannot accept that they should have this veto over us."

111. For a more thorough review of this process, see Mariusz Kijowski, "Charles E. Lindbom's revised pluralism and the 1994 reform to the Saskatchewan Trade Union Act," MA thesis, University of Regina, 1997; Warren and Carlisle, *On the Side of the People*, 262-263; Charles W. Smith, "The 'New Normal' in Saskatchewan: Neoliberalism and the Challenge to Workers' Rights," in David McGrane ed., *New Directions in Saskatchewan Public Policy* (Regina: Canadian Plains Research Centre, 2011), 129-137.

of an employee to make it easier for workers to be part of a bargaining unit, removed employer “free speech” provisions, and altered the legal definition of “lockout.”<sup>112</sup> These relatively minor changes, however, did not overlook the fact that the SNDP refused to implement sectoral bargaining or anti-scab provisions because business refused to compromise on these issues.

Given the limits of the SNDP's TUA, the labour movement was delighted with the SLRB decision. For the unions, Bilson had done what the SNDP was not willing to do in 1994: introduce a form of anti-scab legislation. Labour leaders praised the SLRB chair's commitment to protecting working people because “in a province where the rights of working people is [sic] theoretically one of the cornerstones of the government party's philosophy, corporate giants and their friends now do not have a free hand to oppress, repress and exploit their work force.”<sup>113</sup> Saskatchewan Federation of Labour (SFL) President Barb Byers argued that the decision was “in tune with our times,” as employers use “lock-outs and scabs to wrench concessions from workers.”<sup>114</sup> In a private meeting with the premier, Byers further urged the government to respect the SLRB ruling and to use it as justification to introduce *bona fide* anti-scab legislation. The premier responded that his government does not have “a predisposition for an environment which permits scab legislation” stating that he supports a “gradual approach ... so that positive change can last.”<sup>115</sup> As Glen Makahonuk, president of the Canadian Union of Public Employees Saskatchewan, had earlier argued, however, the whole premise behind the government's consensual approach to labour relations did not reflect reality for working people. In fact, labour was “not really interested in reaching a consensus between labour and employer representatives.”<sup>116</sup> Using the RWDSU dispute as an example, Makahonuk alleged that anti-scab legislation would protect workers as “the courts have always issued injunctions against unions in order to prevent them from committing or engaging in certain actions such as picketing.”<sup>117</sup>

112. *Saskatchewan Trade Union Act*, R.S.S. 1978, c. T-17, 1994, c. 47. The government also gave labour unions freer rein to organize in new workplaces and made minor changes to the discretionary powers of the SLRB.

113. Cindy McCallum (National Director, Prairie Region Canadian Union of Postal Workers), LRB Ruling on Pepsi Lockout to Roy Romanow, 22 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

114. Barb Byers, Labour Relations Board Decision RWDSU Local 558 and Pepsi Cola, Saskatoon to Roy Romanow, 17 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

115. Steven Bobiash (Senior Ministerial Assistant), Memo Re: SFL Labour Issues Including Pepsi, Most Available (Additional) Hours and Replacement Workers to Robert W. Mitchell, 8 October 1997, RWMF, BF 3-8, File 7.18, SFL (Saskatchewan Federation of Labour), 1997, SAB.

116. Glen Makahonuk, CUPE's request for anti-scab legislation to Robert W. Mitchell, 23 June 1997, RWMF, BF 3-8, File 7.6, Canadian Union of Public Employees, 1997, SAB.

117. Glen Makahonuk, Labour's Demand for Anti-scab Legislation to Robert W. Mitchell, 28 May 1997, RWMF, BF 3-8, File 7.6, Canadian Union of Public Employees, 1997, SAB.

The SLRB decision highlighted the tension between the SNDP's narrow belief in "consensus" with its political linkages to workers and their unions. The premier's immediate response was hostile, stating that there was concern that the board's decision "disrupts the balance of industrial relations climate" in Saskatchewan.<sup>118</sup> This firm commitment to the 1994 TUA was particularly difficult for Mitchell who had close personal connections to RWDSU and been a former deputy minister of labour in the SNDP government of Allan Blakeney.<sup>119</sup> Mitchell was also in a precarious situation because he had spearheaded a 1987 campaign to ban replacement workers that ended with his own anti-scab private members' bill.<sup>120</sup> While Mitchell's "belief in the soundness of [anti-scab legislation] never waived [sic.] ... Cabinet did not think it was appropriate to include them in the final provisions."<sup>121</sup> Cabinet's position compelled the minister to defend the existing act, stating that he would only entertain banning replacement workers if labour conceded to essential service legislation "in order to protect the health and safety of the public."<sup>122</sup> In other words, the government's official policy was that restrictions on replacement workers in the private sector had to be offset with limits on the ability of public sector workers to strike. For a social democratic party, this reasoning was strangely anachronistic. While governments had not historically shied away from using replacement workers (especially in crown corporations), governments usually used legislative tools to end public sector strikes. Thus, for the SNDP, there would be little need to balance anti-scab legislation with essential service legislation except to appease business.

Throughout the summer and early fall, labour leaders demanded government action on anti-scab legislation. Within the labour ministry, officials acknowledged that bans on replacement workers did lead to more peaceful picket lines and recognized that such a ban was consistent with a policy framework promoting *bona fide* collective bargaining. These same officials also insisted that any such ban would also be rejected by business because "it would give unions too much power over an employer's ability to remain competitive, especially small businesses where big unions have large strike funds."<sup>123</sup> Thus, while some

118. Murray Mandryk, "NDP gov't to clear air over labor board ruling," 15 July 1997; Byers to Romanow, 17 July 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

119. Warren and Carlisle, *On the Side of the People*, 187.

120. Robert W. Mitchell and Bob Lyons, Letter to labour representatives, 23 June 1987, RWMF, BF 3-16, File No. 796, Trade Unions 1986-1989, SAB.

121. Robert Mitchell, email to author, 11 August 2014.

122. Robert W. Mitchell, Letter to Glen Makahonuk, 22 July 1997, RWMF, BF 3-8, File 7.6, Canadian Union of Public Employees, 1997, SAB; Premier Roy Romanow Letter to Glen Makahonuk, 19 August 1997, RWMF, BF 3-8, File 7.6, Canadian Union of Public Employees, 1997, SAB.

123. Department of Labour, Replacement Worker and Essential Service Legislation, 17 July 1997, RWMF, BF 3-8, File No. 1.4, Boards, Agencies, and Commissions, 1997, SAB.

advantages were recognized for workers, the public service was clear that any form of anti-scab legislation was undesirable for business.<sup>124</sup> That being the case, the government simply refused to take a position, stating that the board's ruling was an interim decision and thus not final.<sup>125</sup>

The board reconvened to hear final arguments in RWDSU's case on 20 August and reached its final decision on 10 October 1997.<sup>126</sup> In the intervening time, Bilson had retired as chair and been replaced by Gwen Gray. Gray had previously served as a labour-side lawyer and was appointed as the Board vice chair in 1995. Given her labour side background, Gray was considered sympathetic to labour. In the second hearing, she also demonstrated a commitment to consensual industrial relations policy through a strict interpretation of the act. In a 3–2 ruling, the employer-side representatives and the new chair sided with Pepsi, striking down the interim order. In a rather bizarre decision, the majority spent most of its time debating the merits of anti-scab legislation. While recognizing that a legislative ban on replacement workers had merits, it concluded that section 46(4) of the TUA actually contemplated the use of replacement workers and allowed for it. That being the case, the SNDP clearly had no intention of banning the use of replacement workers. On this point, the board reasoned that the decision to ban replacement workers was a political rather than an administrative one. Thus, the act's definition of a lockout as "a refusal to continue to employ employees" only referred to workers employed before the actual lockout began.<sup>127</sup>

The SLRB's final decision did not immediately solve the problem for the government. The SNDP official response was that the 17 October decision "simply affirmed the status quo."<sup>128</sup> The labour minister also conceded that the board's ruling will "no doubt fuel the efforts of labour in lobbying for legislative changes to be made."<sup>129</sup> At the SFL's 22 October annual convention the premier

124. Some Ministers went out of their way to reassure business that the decision was isolated and not reflective of government policy. Murray Mandryk, "Labor board ruling isolated case: MacKinnon," *Star Phoenix*, 12 July 1997.

125. Regina Chamber of Commerce Annual State of the Province Address, Steven Bobiash (Senior Ministerial Assistant) Saskatchewan Chamber of Commerce Dinner, 26 September 1997, RRF, F 525-4, Romanow Speeches, 30 September 1997, SAB.

126. Pepsi-Cola Canada Beverages (West) Ltd. (Re) [1997] S.L.R.B.D. No. 62, LRB File No. 166-97. ("Pepsi SLRBD No. 62").

127. Pepsi SLRBD No. 62, para 81. The labour side minority argued that the majority's decision failed to recognize the structural advantage that employers received in using the lockout weapon. The minority thus defended the board's original decision, stating that the new definition in the act balanced employers' structural advantage in the collective bargaining relationship.

128. Department of Labour, Memo Re: Leader Post Reporting of LRB's October 1997 'Pepsi' Ruling to Robert W. Mitchell, 17 October 1997, RWMF, BF 3-8, File No 1.4, Boards, Agencies and Commissions, 1997, SAB,

129. Robert W. Mitchell, RWDSU v. Pepsi Cola Labour Relations Board Decision, to Roy

and the labour minister again repeated the message that lasting labour legislation could only be found through consensus. That message angered the room as several delegates booed while numerous others turned their backs on the speakers.<sup>130</sup> While some labour leaders sided with the government, the SNDP's refusal to address labour's core legislative demand left a lasting fracture between the SNDP and organized labour in the province.<sup>131</sup>

The failure of the SNDP to address the underlying tensions surrounding the Pepsi dispute left the RWDSU in a precarious position. Although the workers had gone back to work, they were still without a contract and five of their colleagues remained fired. Over the next several months, bargaining continued to be fractured with management refusing to concede on several issues. By early winter, however, three issues coalesced that helped resolve the impasse in favour of the union. First, the bargaining team and union membership remained steadfast in their commitment to bargain as a united group. This implied that Rocky Luchsinger and Dale Wildey, who were among the five fired employees, remained part of the bargaining unit. Although Pepsi threatened to end bargaining and reinstate the lockout, the workers promised to resume their strike tactics, including increasing their secondary picketing tactics. Rather than take that risk, Pepsi agreed to bargain with the entire bargaining team, undermining management's position on the legitimacy of the firings.<sup>132</sup> Second, there was clearly pressure from upper Pepsi management to end the dispute. The summer and fall boycott had contributed to the relatively flat growth of PCCB sales in western Canada and local managers Jim Diotte, Blair Patterson, and Graham Fraser were all demoted or moved to other locations after the conclusion of the dispute.<sup>133</sup> Finally, the union grievance challenging the firings of the workers was making its way through mediation.<sup>134</sup> During those meetings, it became clear that the firings were random and

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Romanow, 16 October 1997, RWMF, BF 3-8, File 1.25, Premier's Correspondence (Labour), 1997, SAB.

130. James Parker, "Replacement law tough to write: premier," *Star Phoenix*, 23 October 1997.

131. That fracture was made even worse in 1998 and 1999 when the government ordered electrical workers and nurses back to work while on legal strike. These actions led SFL President Barb Byers to conclude that it was increasingly difficult to "motivate people by saying "they're the best of a bad lot." Barb Byers, International Brotherhood of Electrical Workers Back to Work Legislation, to Roy Romanow, 4 November 1998, RRF, F 525-5, File 12101.03, Saskatchewan Federation of Labour SFL, SAB.

132. Luchsinger interview; Burkhart interview; Peters interview.

133. *Canadian Key Business Directory* (Toronto: Dun & Bradstreet, 1997 and 1998). These records report zero sales growth for PCCB during the strike year.

134. Saskatchewan Department of Labour, Appointment of arbitrators with respect to the grievances of fired RWDSU members, 23 September 1997, RWMF, BF 3-8, File 8.16 AOU-P; 1996-1997, SAB.

constituted an unfair labour practice.<sup>135</sup> This rebuke led to the company rehiring all of the dismissed workers, but it attempted to save its reputation by imposing a single condition that union staff representative Garry Burkhart not participate in negotiations. After Burkhart agreed, the Department of Labour assigned a mediator to coordinate talks. All of these factors directly led to the successful conclusion of an agreement with the Pepsi workers winning significant concessions from Pepsi. The union won an \$800 signing bonus and an 8 per cent wage increase over 3 years, a shorter workweek, more overtime pay, more vacation time, greater job security, and strengthened benefits.<sup>136</sup>

For the workers, the legacy of the strike continues to resonate. For them, it was a significant victory that was accomplished by “solidarity in our group, I mean the way we held together ... solidarity in the way we came back stronger and solidarity ... with all the different unions.”<sup>137</sup> For most of the workers, their solidarity strengthened the picket line and emboldened the union to take their actions beyond Pepsi’s plant. The workers firmly believed that it was,

... our fight and we had to go all the way. If we stick with it, justice should be on our side. So we’re trying to get the guys – and it’s not just the guys, the guys all had their wives and their kids and everyone else on the line right? ... So we’re trying to get it so that they we’re believing that we all are going to win.<sup>138</sup>

In fact, the decision to occupy the plant and to engage in secondary picketing remained a defining moment in the victory. However, the actual legality of their actions remained unclear. Given this open-ended question, there was internal pressure from union officials and enthusiastic legal advisors to pursue the legal question through the courts. In many ways, this belief was reflected in a sense of political malaise, as union officials were conscious that the SNP would not alter the TUA in their favour.

### **The Constitution and Secondary Picketing: *RWDSU v. Pepsi* [2002]**

THE UNION’S CONSTITUTIONAL CHALLENGE originated from Justice Barclay’s original injunction that had significantly constrained picketing at the Pepsi plant. Once the dispute was concluded, however, there was internal union pressure to end the court challenge because the decision to go to court came with significant costs. Not only did the legal battle “result in a ton of lawyer fees [and] a lot of things to pay for,” it also taxed the financial relationship between the local and broader union for several years.<sup>139</sup> The union’s partial success before the Saskatchewan Court of Appeal encouraged

135. Peters interview; Burkhart interview; Luchsinger interview.

136. Betty Ann Adam, “Pepsi workers ratify new contract,” *Star Phoenix*, 9 April 1998.

137. Peters interview.

138. Goodheart interview.

139. Reiber interview.

further litigation. In that ruling, the judges reasoned that the workers' actions outside the private residences of management were not constitutional expressions because they were tortious. However, the appellate judges were critical of Barclay's injunction, highlighting "that picketing does constitute an exercise of fundamental freedom of expression."<sup>140</sup> The matter then went to the SCC, which finally decided the question over the legality of secondary picketing in 2002. Pepsi was well prepared for its legal argument. Having appeared as an intervener in two earlier picketing cases,<sup>141</sup> the company argued that secondary picketing was simply *illegal per se*. Noting that no court had overturned *Hersees v. Goldstein*, the company suggested that where there was legislative silence, the common law prevailed. Relying on the SCC's comments in *UFCW v. Kmart* that the "signal" of a picket line may be "based on its coercive effect rather than persuasive force of the picketers," Pepsi insisted that the prohibition of secondary picketing was legally justified.<sup>142</sup> The company maintained that RWDSU's secondary picketing activities involved "threatening and often dangerous conduct" that should not be elevated to constitutionally protected speech.<sup>143</sup> In taking these positions, Pepsi was supported by the government of Alberta, who similarly argued that picketing is a private matter and that secondary picketing causes damage to neutral businesses.<sup>144</sup>

The union's legal arguments challenged the employer's belief that the common-law torts justifiably limited the rights of workers' free expression. The union submitted that picketing is a universally recognized form of expression that contributes information to the public. As workers have the individual right to express their opinion, there cannot be restrictions on the collective ability to exert those same rights. At the centre of this opinion was the belief that both existing jurisprudence and evolving Charter values implied that *Hersees v. Goldstein* (and the modified *Hersees* rules) were "dead" and thus suggested that there was no longer a tort prohibiting secondary picketing. To this point, the union's position was simply that,

[W]orkers have the same rights – to carry placards outside the premises of a company, asking citizens not to do business with them because the struck employer benefits from that company. Absent the commission of criminal acts and, at least for the purposes of

140. *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [1998], 167 D.L.R. (4<sup>th</sup>) 220, 230.

141. Pepsi was an intervener in *UFCW Local 1518 v. Kmart Canada* [1999] 2 S.C.R. 1083 ("UFCW v. Kmart") and *Allsco Building Products Ltd. v. UFCW, Local 1288P*, [1999] 2 S.C.R. 1136.

142. *UFCW v. Kmart*, para 42; *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 (factum of the appellant). ("Pepsi factum").

143. Pepsi factum.

144. *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 (factum of the Alberta Attorney General, para 26–27).



this case, the commission of a civil tort, this form of expression is commonly utilized by Canadian citizens, presumably because they sanction it.<sup>145</sup>

Building on these principles, RWDSU took issue with the employer's primary argument regarding "innocent third parties." Relying on the "ally" doctrine that grew out of the modified *Hersees* approach, the union sought to expand the definition of "ally" to any company that has an "interest" in the outcome of the strike. For the union, a business cannot be neutral if it contributes to an organization that is publicly opposing the strike, lobbies government to change laws in the interest of the struck employer, supports laws making it illegal to strike, or continues to do business with a struck employer. In any of the above situations, the idea of "neutral" or "innocent" third party is simply fictional.

To the surprise of many, the SCC sided with the union and expanded Charter rights to include secondary picketing. In coming to this conclusion, the justices walked a fine line between Pepsi's argument regarding labour relations "balance" and the union's constitutional position regarding freedom of expression. In writing for the majority, Justices McLachlin and Lebel declared that the *Hersees illegal per se* doctrine could not be sustained in an era of evolving Charter values. For the SCC, freedom of expression was one of the most important rights in a free society. Moreover, the court recognized that policymakers had long accepted a right to picket but had refused (except in BC) to legally define it. The judges suggested that this legal ambiguity demonstrates that most governments accepted that strikes take many forms.<sup>146</sup> Through this reasoning, the SCC built on the court's rationale in *UFCW v. Kmart* by declaring that acts of picketing including secondary picketing are an important exercise of free expression. It was therefore inconsistent with the Charter to suggest that labour groups could be denied the right to disseminate information outside a place of business when the constitution guaranteed those same rights to individuals and other groups.<sup>147</sup>

The court recognized that constitutionally protected speech by a labour union might result in economic harm, but it was not reasonable to assume that third parties should be legally insulated from such harm.<sup>148</sup> In taking this position, the court was careful to indicate that evolving Charter values did not erode traditional business interests. Rather following the issues in *Kmart*, the question was how to balance the constitutional rights of workers while limiting third parties from "undue" harm. In its current form, the *illegal per se* doctrine was a relic of 19th-century legal reasoning that "reflects a deep distrust of

145. *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 (factum of the respondent, para 84–85).

146. *RWDSU v. Pepsi*, para 23–29.

147. *RWDSU v. Pepsi*, para 32–37.

148. *RWDSU v. Pepsi*, para 43.

unions and collective action in a labour dispute.”<sup>149</sup> The court also reasoned that the “modified” *Hersees* rules (and the ally doctrine) suffered from inconsistent application and were thus entirely unhelpful in protecting the right to strike and the right of third parties. These observations were certainly important victories for the union, as *Hersees* remained a stubborn thorn in the side of any union attempting to place economic pressure on an employer.

Having dismissed the *Hersees* precedent, the court then validated the Wrongful Action Model as an appropriate legal tool to “treat labour and non-labour expression in a consistent manner.”<sup>150</sup> In essence, WAM begins on the assumption that all picketing is permitted unless that picketing is tortious (a civil wrong) or criminal in nature. By maintaining that all picketing is legal, the court downplayed its concern in *Kmart* regarding the coercive ‘signal effect’ of a picket line suggesting that such an argument undermines the peaceful nature of most picketing in the current era. On the surface, WAM’s recognition of the broad right to picket suggests that the Charter’s guarantee of expression gives the unions a specific legal tool to challenge employers. To be sure, it certainly gives the impression that a strike in one location can be extended to the broader community. This potential alone raised the anxiety of management-side lawyers concerned that the common-law torts would not “provide adequate protection to the economic and property rights of neutral third parties.”<sup>151</sup>

Yet, the underlying principles supporting WAM suggests that the SCC was confident that existing torts provided adequate legal protection to third party interests during a labour dispute. In order to gauge the legality of a strike, for instance,

the preferred methodology is to begin with the proposition that Secondary Picketing is *prima facie* legal, and then impose such limitations as may be justified in the interests of protecting third parties.<sup>152</sup>

According to the judges, torts such as trespass, intimidation, nuisance, defamation, misrepresentation, and inducing breach of contract “will protect property interests and ensure free access to private premises” and, in particular, “the breadth of the torts of nuisance and defamation should permit control of most coercive picketing.”<sup>153</sup> The court’s consistent emphasis on terms like “coercive” picketing continued the long judicial hostility toward workers’ collective rights to strike. In fact, WAM arguably builds more consistent and clear

149. *RWDSU v. Pepsi*, para 55.

150. *RWDSU v. Pepsi*, para 80.

151. Henry Dinsdale and Dan Awrey, “Secondary Picketing in Canada: Thoughts for the Pepsi Generation,” *Queen’s Law Journal* 29 (2003–2004): 806.

152. *RWDSU v. Pepsi*, para 67.

153. *RWDSU v. Pepsi*, para 73; 103.

boundaries of constraint over workers' rights to picket as almost all picket line behaviour can push against the established torts.<sup>154</sup>

Thus, the SCC believed that the common law continues to provide necessary protection of property interests, free access to private premises, and maintains the sanctity of business relationships codified through contract. If situations arise where WAM proves inadequate, courts and legislatures are then free to alter legislation or develop "the common law sensitively, with a view to maintaining an appropriate balance between the need to preserve third party interests and prevent labour strife from spreading unduly, and the need to respect the Charter rights of picketers."<sup>155</sup> In other words, if picketing becomes problematic, there are ranges of legislative and legal tools to restrict such actions.<sup>156</sup> The court thus defended WAM on the notion that there is a natural constitutional division between the economic rights of private property holders and the human rights of workers to publically express their grievances against employers or government. In taking such an approach, the SCC arguably elevates the economic right of businesses to defend their contractual obligations against any collective action that pushes up against the nominate or economic torts. Such a conclusion makes it extremely difficult for workers' collective action to seriously challenge the power of capital through constitutional arguments surrounding expression or association.

## Conclusion

WITH REGARDS TO WORKERS' CAPACITY to strike, the SCC's decision in *RWDSU v. Pepsi* highlights both the contested and contradictory nature of Canada's regime of industrial legality. There is little question that the workers' actions violated the common-law rules regulating secondary picketing in Canada. Workers knowingly pushed the boundaries of legal behaviour when they occupied the plant, picketed outside of the personal residences of management, and engaged in coordinated secondary picketing throughout the city. This being the case, their actions represented creative forms of civil disobedience that directly challenged the power of the company in a time of economic restructuring. As the strike escalated, the workers' actions indirectly challenged state power regulating strikes and lockouts in Saskatchewan. In so doing, the workers pushed against the boundaries of legitimate legal behaviour and transformed the law itself. For many workers, that legacy of resistance reflected,

almost a David and Goliath story. To me it will be remembered as a huge stepping-stone, not so much a stepping-stone, but a huge accomplishment. Just because you're battling a huge corporation or the government doesn't mean you can't effectively picket them I guess

154. Harry W. Arthurs, "Labour and the Real Constitution," *Les Cahiers de droit* 48 (2007): 49.

155. *RWDSU v. Pepsi*, para 107.

156. Adell, "Secondary Picketing After *Pepsi-Cola*," 149–150.

or negotiate with them. They just can't run roughshod over you because you're a smaller group.<sup>157</sup>

Underlying that observation is the belief that even the most sympathetic governments rarely defend workers' collective interests over the economic rights of business. Workers simply recalled that,

when you look at the people who are making the laws or coming up with the laws, have they ever been through anything like [the strike]? Do they even understand the dynamic? I mean it's pretty difficult to make laws about things you don't understand because you've never had that experience or gone through it. To be honest, people don't trust that the people who make the laws are going to make them to benefit us.<sup>158</sup>

Indeed, the Pepsi workers demonstrated that the SNDP's amendments to the TUA reflected a creeping acceptance of neoliberalism by the province's social democrats. After the 1997 strike, it was clear that the SNDP was unwilling to amend the TUA unless it had significant consensus from business. Such a philosophy inevitably narrowed the rights workers could expect from the government.

To be sure, many of the workers find pride that the SCC vindicated many of their actions. All of the workers spoke with gratification about the SCC decision, believing that they had an important role in expanding the rights of working people in Canada. Reflecting on the decision, one RWDSU member stated that,

... it was incredible. Wherever we go as a group, the soft drink workers, whether we're at a soft drink counsel, the Pepsi guys, everybody sitting in that room knows [about] the secondary picketing decision. You go out and you speak at a Longshore convention [and] they know about the ruling. You sit in the Saskatchewan Federation of Labour general meetings and you're recognized for what you did.<sup>159</sup>

For many of the Pepsi workers, there was a direct correlation between their solidarity and militancy on the picket line and the eventual changes to the law. Clearly, behind this observation is a faith in the transformative potential of constitutional interpretation. Within the context of existing political alternatives, perhaps this is not surprising. Others were also conscious that litigation strategies have become more important for labour because unions have "lost [their] way. We've forgotten how to fight. I mean why not have a discussion of a province-wide strike? We could set up picket lines all across this province in every goddamn industry and government would have had to back down."<sup>160</sup>

Reflected within these competing narratives about the SCC decision is the underlying notion that judicial victories are limited by the structural constraints inherent in the law itself; once the question over the legitimacy of the

157. Penner interview.

158. Tracy Goodheart interview.

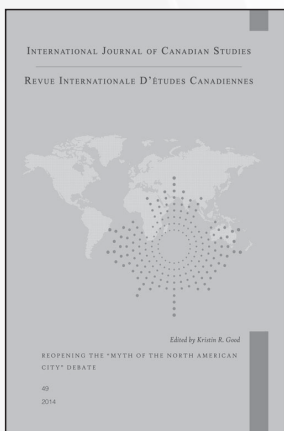
159. Luchsinger interview.

160. Burkhart interview.

workers actions went to court, judges immediately began balancing workers' rights against the economic interests of the corporation. Even though the workers can correctly interpret the SCC's decision as a victory for Charter protected speech, the court also maintained that civil torts continue to adequately police the boundaries between acceptable and unacceptable picketing. The SCC's construction of WAM and the continued reliance on the civil torts to regulate the excesses of picketing reflect a judicial distrust of picketing. While the boundaries of legal constraint changed after the SCC's decision, they certainly were not eliminated. Ultimately, the SCC's balancing act in *RWDSU v. Pepsi* reflects the limitations of using constitutional litigation as a tool for social transformation. That being the case, advocates of workers' legal rights need to think twice before engaging in a broad litigation to challenge the powers of capital or the state. If anything, the Pepsi workers' actions demonstrate that sustained political or legal transformation can only occur when workers confront the power of capital on their own terms. In this case, it was workers' solidarity and the tactical usage of civil disobedience that expanded the zone of legal toleration for strikes. In reflecting on that legacy, the Pepsi workers demonstrate that successful challenges to neoliberalism are unlikely to occur through direct engagement with the courts alone.

*I would like to thank SSHRC for its generous financial contribution to this research. I would also like to thank Rocky Luchsinger for his help in organizing the interviews with RWDSU workers. The paper also benefited from earlier comments by Eric Tucker, Mark Leier, Beth Bilson, Andrew Stevens, and the anonymous reviewers of this journal. Their expertise and insights were invaluable in strengthening the article. Of course, any errors or omissions remain entirely my own. Finally, this paper could not have been completed without the exceptional research assistance of Emily Lafreniere.*

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