SECONDARY BOYCOTTS: A FUNCTIONAL ANALYSIS

DAVID M. BEATTY*

Toronto

> "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, ['hard-core pornography'] and perhaps I could never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that."†

Introduction

But for a collection of recent decisions handed down by the Ontario courts and the recent legislative revisions in British Columbia,[1] there would arguably be little rationale, need or even incentive for yet another academic analysis of any aspect of the law pertaining to strikes, picketing and boycotts in Ontario.[2] Indeed so much has already been written of this area generally by Canadian labour law teachers[3] who have been attracted to the topic with a

* David M. Beatty, of the Faculty of Law, University of Toronto.

† *Jacobellis* v. *Ohio* (1963), 378 U.S. 184, per Stewart J., at p. 197.

[1] Labour Code of British Columbia, Bill 11, effective on a date to be proclaimed.

[2] Particularly is this so with regard to the law of secondary picketing where the Ontario courts had, prior to the series of decisions which are canvassed here, mechanically and laconically adhered to the Court of Appeal's judgment in *Hersees of Woodstock* v. *Goldstein*, [1963] 2 O.R. 81, 38 D.L.R. (2d) 449 prohibiting as *per se* illegal all peaceful secondary picketing. A list of such decisions would include: *Edland Construction (1960) Ltd.* v. *Childs & Sallafranque*, [1963] 2 O.R. 366, 39 D.L.R. (2d) 536; *Robertson Yates Corporation Ltd.* v. *Fitzgerald et al.* (1965), 50 D.L.R. (2d) 508; *Heather Hill Appliances Ltd. et al.* v. *McCormack et al.* (1966), 52 D.L.R. (2d) 292; *Toronto Harbour Commissioners* v. *Sninsky et al.*, [1967] 2 O.R. 520, 64 D.L.R. (2d) 276; *Pietro Culotta Grapes Ltd.* v. *Moses et al.* (1968), 65 D.L.R. (2d) 500; *Darrigo's Grape Juice Ltd.* v. *Masterson* (1972), 21 D.L.R. (3d) 660; *C.T.V. Television Network Ltd.* v. *Kostenuk*, [1972] 2 O.R. 653, 26 D.L.R. (3d) 397, aff'd [1972] 3 O.R. 338, 28 D.L.R. (3d) 180; *J. S. Ellis & Co. Ltd.* v. *Willis et al.*, [1973] 1 O.R. 121, 30 D.L.R. (3d) 397.

[3] A partial catalogue of those who have made the law pertaining to strikes and picketing the focus of inquiry would include: H. W. Arthurs, Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship (1960), 38 Can. Bar Rev. 346; Comment, (1963), 41 Can. Bar Rev. 573; A. W. R. Carrothers, Recent Developments in the Tort Law of Picket-

child-like and absorbing pre-occupation, that the casual observer might well be excused for his scepticism that another piece could do little more than add quantitatively to the existing literature. However legitimate such scepticism may be, at least three factors have justified, to the present writer, yet another examination of the law relating to secondary pressure. Primary amongst these is the fact that after being prohibited absolutely as "*per se* unlawful"[4] for the last decade, some conduct of a secondary nature is now being recognized by some courts and legislatures as a legitimate mode of exerting economic and social pressure in certain contexts. Such a shift in what was, in Ontario at least, firmly settled jurisprudence, is of itself, worthy of comment and analysis.

The second inducement for yet another discourse on secondary picketing and boycotts follows from the first. Although one can perceive a significant shift in the jurisprudence related to secondary pressures, the shift has been sporadic, often inconsistent and incomplete, and on all occasions without any unifying underlying rationale to support it. The courts appear to have tested the legitimacy of the conduct before them by reacting in a vacuum to the particular facts before them, to their own economic predilections and to a myriad of legal stimuli. Failure to articulate a unifying and common standard against which union pressures can be tested has resulted in identical forms of social and economic pressure being subjected to widely disparate judicial determinations. To distil the underlying rationale which sanctions certain species of secondary conduct and to elucidate the general principles which flow therefrom was a major inducement for this article.

Quite apart from the recent legal trend away from the "*per se* unlawful" approach to secondary conduct is the belief engendered from the cases themselves as well as from news reports generally, that secondary boycotts, regardless of their present propriety, are becoming a more accepted form of group pressure in certain contexts than they have been in the past. This itself provides an incentive to precisely delineate the criteria to distinguish permitted

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ing (1957), 35 Can. Bar Rev. 1005; Secondary Picketing (1962), 40 Can. Bar Rev. 57; I. M. Christie, Liability of Strikers in the Law of Torts (1967); J. Finkelman, The Law of Picketing in Canada (1937-38), 2 U. T.L.J. 67, 344; M. A. Hickling, The Judicial Committee on Picketing and Trade Disputes (1961), 24 Mod. L. Rev. 375; B. Laskin, Picketing: A Comparison of Certain Canadian and American Doctrines (1937), 15 Can. Bar Rev. 10; E. Palmer, The Short Unhappy Life of the "Aristocratic" Doctrine (1959-60), 13 U.T.L.J. 166; J. C. Paterson, Union Secondary Conduct: A Comparative Study of the American and Ontario Positions (1973), 8 U.B.C.L. Rev. 77; C. A. Wright, The English Law of Torts: A Criticism (1955), 11 U.T.L.J. 84.

[4] Since 1963 in Ontario when the Court of Appeal decision in *Hersees* was handed down and since 1959 in British Columbia resulting from the promulgation of The Trade Unions Act, R.S.B.C., 1960, c. 384.

from prohibited forms of union pressure. It demands a lucid enunciation of the principles by which such conduct is to be judged. Even more fundamentally it requires that such principles sympathetically reflect the competing social and economic interests inherent in such industrial conflict. In short, the purpose of the present inquiry will be to chart the direction of judicial lawmaking which has steered a course away from prohibiting, as *per se* illegal, all forms of secondary action and to analyze the deficiencies in this current judicial tack. To remedy such defects a formula is offered which, consistent with legislative intention and economic logic, may assist the courts to resolve the contradictions and confusions generated by their present efforts to escape the suffocation of the *Hersees* decision.

It follows from the above that this is not intended as an exhaustive analysis of all of the recent decisions touching upon the propriety of secondary pressure. Rather it is an attempt to develop and articulate a logical mode of analysis to confront the conundrum of secondary boycotts. This analysis will be set against the backdrop of and is to be contrasted with the most recent pronouncements from the Ontario bench which have attempted to escape from the absolute prohibition of the *Hersees* ruling.

I. *Hersees of Woodstock* v. *Goldstein*: *The Law As It Was.*

In 1962, in an exceptionally prescient passage, A. W. R. Carrothers wrote:[5]

> It is remarkable that in the welter of labour cases decided in Canada in the past decade and a half, there has been no definitive pronouncement on the lawfulness of secondary action by unions.

One year later, in what, if nothing else, was a definitive pronouncement, the Ontario Court of Appeal responded in its *Hersees* judgment that "secondary picketing is illegal *per se*".[6] The case has already been the subject of a comprehensive and searching criticism by Professor Arthurs which effectively exposed the shortcomings manifest in both the legal and philosophical underpinnings of the judgment.[7] Most critically Professor Arthurs noted that less than three years prior to the *Hersees* decision, the Ontario legislature in enacting what is now section 67 of the Ontario Labour Relations Act[8] had refused to follow the recommendation of the

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[5] Carrothers, Secondary Picketing, *op. cit.*, footnote 3, at p. 57.

[6] *Hersees of Woodstock* v. *Goldstein, supra*, footnote 2.

[7] Arthurs, Comment, *op. cit.*, footnote 3 which was cited with approval by Freedman C.J.M. in the more recent decision of *Channel 7 Television Ltd.* v. *N.A.B.E.T.* (1972), 21 D.L.R. (3d) 424, at p. 436.

[8] R.S.O., 1970, c. 232, s. 67 which provides:

(i) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person

1958 Legislative Select Committee which would have prohibited all picketing at the premises of a secondary employer.[9] Professor Arthurs concluded that the "*per se* illegal" holding of the court:[10]

> . . . forbids picketing which contravenes neither limb of the expressed statutory policy and makes illegal per se what the legislature by its silence, has declined to do.

However, at an even more basic level, the *Hersees* case not only makes unlawful what the legislature declined to do, but in addition prohibits what the legislature elsewhere had permitted. That is, not only did the legislature refrain from expressly prohibiting all secondary conduct, but to the contrary, in certain instances it had implicitly authorized it. When one analyzes the language and the legislative history of section 67, it is manifest that the Assembly simply did not turn its mind to the myriad possible contexts in which secondary pressures could be exerted. From the debates the only discernable intention is to prohibit organizational picketing[11] and picketing which would induce or support unlawful strikes.[12] Limited to these two specific instances, to characterize section 67 as a complete codification of legislative intention on secondary conduct would be imputing to the legislature an intention which simply did not exist. To the contrary, from the statutory regime of collective bargaining in general and from sub-section (2) of section 67 in particular, it is evident that the legislature did in fact sanction as permissible numerous secondary consequences which are necessarily associated with the primary strike. Indeed the then Minister of Labour explicitly recognized this in the course of the legislative debates.[13] To the extent a strike can effectively shut down the primary employer, permitted secondary consequences include interference with suppliers' and distributors' ability to do business with the struck employer and consumers' ability to purchase the struck product. Precisely, by sanctioning the legal strike, the legislature has permitted all those "secondary" concerns which are *functionally integrated* (that is dependently related) with the primary's business, to be enmeshed

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or persons will engage in an unlawful strike or an unlawful lock-out.

(ii) Subsection 1 does not apply to any act done in connection with a lawful strike or lock-out.

[9] For a brief discussion on the legislature's reaction to the recommendations of the Select Committee see B. Laskin, The Ontario Labour Relations Amendment Act 1960 (1961-62), 14 U.T.L.J. 116, at p. 120.

[10] Arthurs, Comment, *op. cit.*, footnote 3, at p. 584.

[11] (1960), 2 Ontario Legislative Assembly Debates 2107, at p. 2111.

[12] *Ibid.*, at pp. 2108, 2110, 2112. See also B. Laskin, *op. cit.*, footnote 9.

[13] *Ibid.*, at p. 2112 where on more than one occasion he asserted: "We do not want men to cross legal picket lines."

in and affected by a labour dispute in which they have no other interest than that functional connection. It follows in terms of the delicate economic balances struck by the Act, that a determination that "secondary picketing is *per se* illegal" obfuscates the extent to which the legislature in fact intended to shelter third parties from the effects of industrial conflict. Such a ruling misconceives that interference with the operations of a third party or neutral employer is itself the evil sought to be confronted by the legislature. Rather, it is economic and social pressure of a particular quality or species levelled against third parties which was to be prohibited. Whether union pressure is prohibited as secondary should be determined not by the fact that it is executed at a location away from the primary situs, but rather by the conclusion that it is a kind or character of pressure which entangles or affects third persons in a manner dissimilar to that by which they are entangled by a simple legal strike. So phrased the defect of the *per se* illegal ratio in the context of secondary trade union conduct can be characterized as a definitional one and will be analyzed as such. It should perhaps be noted here that throughout this analysis the assumption is made that the pressure wherever situate is free from tortious and criminal conduct. This is so because to the extent that any pressure, primary or secondary, could be described as a nuisance or trespass, it could be enjoined because of the tortious nature of the appeal. This is so regardless of its physical location. Secondary site appeals are as susceptible as primary appeals to attract liability for such unlawful means. The issue that is the focus of the present inquiry is when, if ever, secondary site appeals which are free from such unlawful means should be prohibited as unlawful because of their geographical location away from the primary site.

The distinction between what is primary and permitted and what is secondary and proscribed is sufficiently refined and elusive as to have generated a glut of academic analysis and judicial heart ache.[14] Attempting to grapple with the primary-secondary dichotomy one court has despaired:

> No cosmic principles announce the existence of secondary conduct, con-

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[14] Some of the more thorough discussions would include: R. Goetz, Secondary Boycotts and the L.M.R.A. (1970-71), 19 Kansas L. Rev. 651; H. Lesnick, The Gravamen of the Secondary Boycott (1962), 62 Col. L. Rev. 1363; Job Security and Secondary Boycotts (1964-65), 113 U. Pa. L. Rev. 1000; M. Levin, "Wholly Unconcerned": The Scope and Meaning of the Ally Doctrine (1970-71), 119 U. Pa. L. Rev. 283; R. Koretz, Federal Regulation of Secondary Strikes and Boycotts—Another Chapter (1959), 59 Col. L. Rev. 125; Note, The Ally Doctrine . . . A Functional Approach (1962), 37 N.Y.U. L. Rev. 508. Of these I found, in shaping my own conclusions, the two pieces by Lesnick to be the most exhaustive and instructive.

demn it as an evil or delimit its boundaries. These tasks were first undertaken by judges intermixing metaphysics with their notions of social and economic policy. And the common law of labour relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous and shifting than those separating "primary" from "secondary" activities.[15]

From time to time however, courts and commentators alike have succeeded in verbalizing a formula. Two of the more widely cited attempts would include the following:

It has been written that the gravamen of a secondary boycott, is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands.[16]

By secondary action I mean the exertion of economic pressure, either through picketing or some other medium, on an employer or other person to induce him in turn to use his influence, usually of an economic kind (for instance, the maintenance or severance of trade relationships, contractual or otherwise), on an employer with whom the union is engaged in a labour dispute.[17]

The difficulty with such definitions however is their failure to identify or demark the distinguishing features between permitted and prohibited secondary consequences. That is, applied literally they would embrace conduct which would be regarded universally as primary and lawful notwithstanding its secondary impact.

To overcome this difficulty and identify the critical distinction in the primary-secondary dichotomy one may usefully compare what was prohibited on the facts in *Hersees* with what would be recognized as permissible activity by virtually all courts and commentators. In the *Hersees* case it will be recalled, the Amalgamated Clothing Workers of America who were in a position to launch a legal strike against Deacon Brothers Sportswear Ltd. engaged in a campaign of consumer or informational picketing. This entailed three or four of its members parading in front of Hersees, a retailer of men's clothing in Woodstock. The placards implored the public not to buy products of the "primary" employer Deacon Brothers. Although there was some discussion that the placards were in fact misleading, the court was prepared to assume otherwise for the purposes of its ruling that because of its physical location the pressure was secondary and *per se* unlawful.

It is simple to project that the consequences of such conduct if it had been effective, would have been the unwillingness of the public to purchase Deacon Brothers' products, the inability of the

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[15] *Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.* (1969), 394 U.S. 369, at p. 386.

[16] *I.B.E.W.* v. *N.L.R.B.* (1950), 181 F. 2d 34, at p. 37 (2nd Cir.).

[17] Carrothers, Secondary Picketing, *op. cit.*, footnote 3, at p. 57.

retailer to merchandise these commodities, likely resulting in a refusal by Hersees to renew or replenish its inventory with the products of the primary employer. Contrast with the above an alternate course of conduct available to a union in the position of the Amalgamated. In lieu of the consumer picketing which was actually deployed, the Amalgamated might have authorized a strike of its workers at Deacon Brothers and caused a picket line to be set up around that company's premises. The consequences of such a lawful strike or primary site picket line or both, if effective, would have included the inability or unwillingness of the company to continue production and to fill its orders, the inability of the retailer to replenish its stock or supply of those particular products and the consequential denial to the consuming public of an ability to purchase such products. The effects would be identical whether the primary employer, Deacon Brothers, voluntarily ceased production in the face of such a strike or attempted to continue production in the face of a legal walkout by its employees if the suppliers, distributors, truckers and replacement workers responded to the primary picket line and refused to cross as subsection (2) of section 67 would allow.

In all three instances, (i) a legal strike inducing voluntary shutdown, (ii) an effective primary site picket line being respected by both primary and secondary employees, or (iii) a consumer boycott, retailers would be unable or unwilling to sell the primary products and the consuming public unable or unwilling to buy the offending products. In all three instances the secondaries, the retailers and the consumers, are linked to and deployed in the struggle to the extent of their economic or functional integration, whether vertical or horizontal, with the primary's business. The nature of the pressure is of an identical character in all cases. The secondary impact is exactly the same. In all cases the secondary employer, Hersees, is induced to act or respond to pressure generated by the effect that the picket line has had on others; that is in the first instance in halting production, in the second in curtailing production and inhibiting distribution and in the third in deterring purchasing of the struck product. In the first two instances, the "primary" strike and primary site picket line disrupt the supply side of the secondary's business by interfering with his ability to trade in the struck product. In the third, the consumer picket disrupts his demand side by interfering with his ability to trade in the offending goods. It is acknowledged that the legislature has expressly sanctioned the union's ability to embrace or affect secondary employers so functionally related to the primary by means of the first two mechanisms. It should follow that there is no logical basis to prohibit a third mode which embraces the secondary in

exactly the same manner as the first two. So long as the kind of economic or social pressure adopted by the union is not qualitatively dissimilar from that associated with a primary strike or primary site picket line, there can be no rational economic, philosophical or legal basis which would allow courts to differentiate between them. Indeed and to the contrary, to do otherwise is to destroy the precise and delicate economic balances created by our regime of collective bargaining. This is so because it is often the case that the union which turns to the technique of consumer picketing does so because of its inability to marshal an effective legal strike to occasion the identical economic consequences. To allow such peaceful secondary site appeals admittedly does extend the physical scope and the visibility of the dispute beyond the primary site. Philosophically such an extension could be described either as an undue intrusion upon the public's sensibilities or alternatively as a cementing of the right to advise and be advised. More critically however is the recognition that such an extension does not aggravate the economic consequences associated with the dispute. To repeat, there is no logical basis by which these various forms of suasion can be rationally distinguished. (Parenthetically, and in the interests of symmetry it should be noted that whether the union elects a consumer boycott, a primary picket line or the employer voluntarily ceases production, the effect on him (the primary) is also precisely the same, an inability to produce or merchandise his product or both. Assuming the consequences are lawful, it should be irrelevant, and for the same reasons, whether the union was able to achieve this end by means of appeals to the public, distributors, suppliers, or replacement employees. Again the assumption must be made that with each of these appeals, wherever situate, that the means employed are peaceful and not otherwise tainted with nominate torts or crimes.)

I have argued the problem of secondary pressures to be of a definitional nature, in the sense of demanding an identification and articulation of those elements which determine which forms of union suasion are to be prohibited as secondary. I have suggested that as a matter of logic, and legislative intention in Ontario, the gravamen lies in the nature, species or character of pressure to which the secondary is subjected. Precisely, the standard to be applied is whether the union has exerted against the secondary a kind of pressure which is qualitatively different from that to which he would be subjected as a consequence of a legal strike. Specifically this will mean that only when the union seeks to elicit the support of others, be it the public or employees of the neutrals or the neutrals themselves, by persuading such persons to act in a manner different from that which they are persuaded, induced or

required to act by a lawful primary strike or primary site picket line will such suasion be deemed secondary and prohibited. As a practical matter this will mean the union is able to pursue on vertical or horizontal lines those whose business is functionally integrated with (in the sense of being dependantly related to) the primary by means of a legal strike and means of the same character as a legal strike. It could be argued that as a matter of logic this analysis could be invoked to support the diametrically opposite conclusion. That is a court, beginning from the *Hersees* premise that all secondary picketing is *per se* unlawful, might well conclude that all primary site pressure which is qualitatively of the same nature as that which was prohibited by the *Hersees* rationale, should be similarly denied. Although arguable as a matter of logic, such a conclusion must be rejected as being inconsistent with the declared legislative intention of protecting primary site picket lines as well as with the declared judicial acceptance of the peaceful primary site picket.

Recognition of this functional definition of the primary-secondary dichotomy will allow the courts to succeed in their present attempt to escape the confines of the *Hersees* doctrine, in a consistent, straight-forward and logical manner. In addition, it will serve to identify which, if any, of certain American doctrines known as the ally, common situs and consumer boycott doctrines can be supported as proper delineations of the primary-secondary dichotomy and thereby deserve explicit recognition in our jurisprudence. Such a determination is of critical importance given that these doctrines have found their way into the recent pronouncements of the British Columbia legislature[18] and have been advanced by some academics[19] as a proper basis for our courts to distinguish permitted from prohibited forms of economic coercion.

Before invoking this functional definition to analyze the recent judicial ruminations on secondary conduct, it is imperative to comprehend not only what the definition embraces, but also what it excludes. Specifically, to adopt a functional definition for determining what is to be prohibited as "secondary" conduct, is to deny a definition based upon (i) the location at which the pressure is applied or (ii) the intention of those who are exerting it. The location of the picketing, the test implicitly adopted by the court in *Hersees* and those that subsequently have mechanically mouthed the *per se* litany[20] is, standing alone, irrelevant. The illegality of secondary picketing simply does not flow from its location—the

[18] *Supra*, footnote 1.
[19] Paterson, *op. cit.*, footnote 3.
[20] *Supra*, footnote 2.

where of picketing[21]—away from the primary site of the dispute. As will be elaborated below there may be instances of picketing which, though physically located away from the primary situs of the dispute, have no greater effect than that occasioned by a lawful primary site picket line. Indeed there may be picketing which, though located at the premises of the struck employer, because of its character should be more properly defined as secondary. An example will illustrate the distinction. Assume that in the context of the *Hersees* case the primary manufacturer arranged with its retailers to have the latter assume responsibility for obtaining and transshipping the primary's products. Assume further that owing to the physical proximity between the primary and the retailer the latter merely instructs one of its sales staff to pick up their orders from the primary's plant. It is clear that, without more, a peaceful picket line at the site of the primary employer might properly seek to induce such an employee or employees of the secondary to refrain from crossing the line and fulfilling their instructions. That is precisely the kind of secondary consequence associated with a primary strike or primary site picket line which is implicitly sanctioned by the regime of collective bargaining embraced by the Act generally and by subsection (2) of section 67 specifically. Although, as canvassed below, such a refusal may well spawn issues of breach of employment contract, breach of the collective agreement[22] (if any), or violation of the Labour Relations Act,[23] as between the secondary employer and his employees, no liability would attach to the picketers. Compare such a picket line with one at the secondary's premises which restricts its appeal to the secondary's employees to cease handling any of the primary products. Clearly the economic consequences to the retailer are identical. If successful, such an appeal deprives him of the services of his employees in exactly the same fashion and to the same extent as the effective legal strike or primary site picket line just described. In both these cases he would become involved in the manufacturer's labour dispute to the extent that that part of his business functionally integrated with the primary's is interfered with.

Contrast now with the above pickets situated either at the

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[21] A term used as a basic criterion to distinguish permitted from prohibited picketing by the Woods Task Force (1967), Recommendations, pp. 626-628.

[22] *Re General Truck Drivers' Union, Local 879 and Transit Mixed Concrete and Builders Supply Ltd.* (1965), 15 L.A.C. 451 (Thomas); *Re Toronto Newspaper Guild, Local 87 and The Telegram* (1961), 12 L.A.C. 165 (Hanrahan).

[23] *Hutchinson Mechanical Installation*, [1973] O.L.R.B. Rep. 241 (May); *Dover Corp. of Canada Ltd.*, [1972] O.L.R.B. Rep. 435 (May); *Associated Freezers Co. Ltd.*, [1972] O.L.R.B. Rep. 445 (May); *Pigott Construction Co. Ltd.*, [1969] O.L.R.B. Rep. 399 (June).

primary site or at the secondary retailer's place of business which seek to enlist the support of the secondary's employees by appealing to them not merely to cease handling the offending product, but to suspend all services from the secondary for so long as he continues to deal with the primary. Clearly in this situation, regardless of its location, such an appeal is secondary and beyond the pale. By entangling the neutral's employees and their employer in the dispute in a manner beyond that which they would be enmeshed by a lawful strike, the picketing should be defined as secondary and unlawful. In the context of a primary strike the permitted secondary impact on the neutral embraces his ability to deal in the offending product. In the context just described, the secondary is affected not only in his ability to deal in the offending product but in his ability to trade at all. That is, more than that part of his business which is dependently related to or integrated with the primary would be interrupted. By extending or changing the nature of the secondary pressure, such action may be properly labelled secondary and declared illegal *per se*.

A further illustration of pressure located at the primary site which may be properly identified as secondary, occurs in what has come to be known as the "common situs" context. In these circumstances although the picketing is primary in location, it may take on a different character from that associated with the archetypical primary site picket line owing to the fact that the primary shares a common place of operations with other neutral employers whose employees respect the picket line. The classic instance occurs in the construction industry where a union lawfully on strike against one sub-contractor induces all other employees on the project to withhold their services from their employers pending a resolution of the primary dispute. In such a context the pressure exerted on the secondary employers usually induces a complete withdrawal of services by the secondary employees rather than a withdrawal limited to services they perform on the primary products or with primary employees. As such and notwithstanding its primary location, it can be condemned as secondary. In sum, the location of the pressure must be, without more, immaterial to a determination of whether it is conduct properly prohibited as falling within the rubric of the "secondary boycott".

To the extent a definition of what is secondary and therefore prohibited focuses on the intention of those applying the pressure, it suffers from the same defects and results in the same illogical distinctions that are generated by a geographical definition. In addition, such a definition would suffer severe problems of application. Applied subjectively, virtually every species of union suasion could be said to be intended to enlist the support of neu-

trals to further the interest of the union in the conflict. Such an approach, lacks the certainty and precision of result inherent in the functional analysis. This spectre of uncertainty, a negative component inherent in any broad legal standard, is compounded in the field of labour relations where historically such standards have been exercised to the detriment of the labour movement. Simply put, the question to be answered should be whether *in fact* the neutral was subjected to offending pressure and not whether by the pressure deployed the union sought, *inter alia*, to affect or indeed injure the neutral.

To summarize, the essential issue is not *whether* neutrals merit insulation from the effects of labour disputes but rather the *extent* to which they are entitled to such protection. Looked at from the focus of the dispute itself, the issue becomes a definitional one of demarking the kinds of pressures—the how of picketing and boycotts—that can be deployed by the employees against their employer. Such an analysis properly ignores the where and the why of the pressure. It recognizes that third persons are often closely embraced and seriously affected by disputes between other employers and their employees. A strike of the basic steel industry which closes the mills can force hundreds of secondary but related firms into bankruptcy, thousands of their workers into unemployment. Recognition that in sanctioning the primary strike and primary site picket line the legislature has conceded the legitimacy of such secondary consequences, demands as its corollary that similar conduct be treated in the same fashion. So analyzed, courts will be able not only to know secondary pressure when they see it, but more critically, advise others how to do the same.

Having articulated a mode of analysis or definitional standard which properly enables one to examine the validity of various species of trade union conduct, it remains to test it by and apply it to the recent series of decisions emanating from the Ontario courts. In the interests of organizational clarity and brevity, one may arbitrarily assign similar cases to and analyze them within the perimeters of the aforementioned ally, common situs and consumer boycott doctrinal divisions. In so doing one can test the merits not only of the decisions themselves, but the very doctrines which explicitly, in the American regime and implicitly in the Ontario context, are said to support them. These doctrines embrace the most common forms of union pressure associated with labour conflict. As a result an examination of their propriety and the cases subsumed thereunder should permit conclusions to be drawn which will anticipate most forms of pressure which might be brought to the courts in the future. More critically one may determine which of these doctrines properly distinguish primary

from secondary conduct and which, owing to their reliance upon false criteria, should be ignored by the courts in their delineation of the primary-secondary dichotomy.

II. *The Ally Doctrine.*

(i) *Performance of Struck Work.*

In describing the purview of the protection against secondary pressure offered by the American Congress in enacting section 8(b)(4)(B) of the National Labor Relations Act,[24] the ally doctrine was defined in the following terms:

> . . . an employer is not within the protection of [now s. 8(b)(4)(B)] when he knowingly does work which would otherwise be done by the striking employees of the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the service.[25]

[24] *National Labour Relations Act* (1935), 49 Stat. 449, as am. by L.M.R.A. (1947), 61 Stat. 136, s. 8(b)(4)(A), as am. by L.M.R.D.A. (1959), 73 Stat. 519, s. 8(b)(4)(B). It provides: "It shall be an unfair labor practice for a labor organization or its agents— . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . ."

[25] *N.L.R.B.* v. *Business Machine and Office Appliance Mechanics Conference Board, Local 459 (Royal Typewriter)* (1955), 228 F. 2d 553, at p. 559 (2nd Cir.), cert. denied (1962), 351 U.S. 962.

The rationale supporting the ally doctrine is simply that the secondary employer by performing work which, but for the strike, would have been done by the primary employees, is viewed as part of the primary employer's effective economic strength which is being marshalled to blunt the impact of the strike. Characterization of picketing the secondary as picketing the effective economic strength of the primary in so far as it relates to the dispute, is a concept which has received some support from one member of the Supreme Court of Canada.[26] More critically it accords with the notion of permitting as primary all species of pressure which affect the neutral in the same manner as he would be by a primary strike, regardless of its location. This is so because the effect of a secondary employer having his employees perform the "struck work" is of identical consequence to the primary striking employees as if the primary employer had hired and brought to his place of business his own replacement employees. So defined, the pressure applied by a trade union against the employees of the "allied" employer is of the same character as that associated with an inducement directed at primary replacement employees to withhold their services. Not being different in kind or character from that associated with a lawful strike or picket line, the pressure is permitted as primary.

Performance of struck work as the principle on which to legitimize picketing which would otherwise be a prohibited secondary appears to be the rationale supporting the judgment of Mr. Justice Moorhouse in *Falconbridge Nickel Mines Ltd.* v. *Tye, Baudreau, Genereau et al.*[27] In this case Local 786 of the Ironworkers commenced a lawful strike against Sudbury Mechanical and Electrical Contracting Industry Ltd. (Sudbury Mechanical). Sudbury Mechanical had, prior to the strike, contracted with Falconbridge Nickel Mines to perform certain electrical and mechanical repair and modification work to the latter's new refinery. As a result of the strike the union picketed, as it should be entitled to do, the Falconbridge premises as being a work site of the primary employer, Sudbury Mechanical. The effect of the picketing was to substantially stop completion of the refinery. As a result, Falconbridge, "gave notice that Sudbury Mechanical would not thereafter be requested to supply the plaintiff Falconbridge with ironworkers", and that this work would be completed by Falcon-

[26] *Williams et al.* v. *Aristocratic Restaurants (1947) Ltd.*, [1951] S.C.R. 762, at p. 787, [1951] 3 D.L.R. 769, at p. 792, per Rand J. wherein he stated: "The fact that two of the restaurants were not within the unit of employees for which the union was authorized to act does not affect the question; the owner's economic strength is derived from his total business, and it is against that that the influence of information is being exerted."

[27] 71 CLLC 14,100 (Ont. H.C.).

bridge's own employees. When the picketing continued, Falconbridge sought an injunction on the basis the picketing was secondary and therefore unlawful. In a remarkably confused, vague and ambiguous passage, Mr. Justice Moorhouse rejected Falconbridge's application in these terms:[28]

> It is agreed secondary picketing is unlawful in this province. The defendant argues this is not secondary picketing. What in effect has occurred here is that the plaintiff has divided the work ordinarily carried out by members of Local 786. It is argued the workmen now carrying out the work are really strikebreakers. The plaintiff made the choice of who was to do the work and should not now be heard to complain. I think I must follow the decision of Wilson J. in *Refrigeration Supplies Company Limited* v. *Laverne Ellis* . . . 70 CLLC 14,035 and the cases upon which it relies. This is not a parallel case but under the circumstances here the picketing when it commenced was primary rather than secondary. I am not prepared to hold the plaintiff, by its own act, can make the picketing secondary.

A preliminary point should be made at the outset. As will be described below and indeed as recognized by Moorhouse J., the *Refrigeration Supply Co.* v. *Ellis* decision is distinguishable. Essentially that was a case where the primary and secondary employers operated from a shared or common situs. From the very brief outline of the reported facts, it appears Sudbury Mechanical was supplying tradesmen to perform work at the refinery in addition to those belonging to Local 786. If this were so, it would have been open to the court simply to invoke the common situs doctrine and to argue that by continuing to perform work at the Falconbridge site that project remained a primary situs or place of operations of Sudbury Mechanical. To the extent certain criteria adumbrated below were adhered to, that should have entitled Local 786 to picket that site.

However, Moorhouse J. went further and recognized that more was involved than simply a case of shared premises between the primary employer and Falconbridge. Rather, as argued by the union, the workmen of Falconbridge who were carrying out the work were in reality "strikebreakers". Falconbridge, the secondary employer had by its conduct commenced to perform work which otherwise would have been done by the members of Local 786. As Moorhouse J. stated, "I am not prepared to hold the plaintiff, by its own act, can make the picketing secondary".

The situation is identical to that which would have transpired if Sudbury Mechanical had attempted to continue to perform this work at the Falconbridge site, with its own replacement employees, with its own supervisory staff or with employees of another contractor. Each of these persons would be a legitimate focus of Local

[28] *Ibid.*

786's pressure. So too then were Falconbridge's employees to the extent Sudbury Mechanical allowed them to perform the struck work. Such employees became legitimate sources of concern for the union to the extent they were functionally connected to the primary dispute by performing the primary work assignments. It was irrelevant that in this case the allied employer was one and the same person as the employer for whom the work was being performed and not as in the usual case, an entity separate and distinct from both the primary and the employer for whom the work was being performed. In either case, no matter the location or intention, the pressure was identical to that which would be associated with a lawful primary site picket line aimed at replacements hired by the primary. The economic effect of hiring replacements to work at the primary site is for the striking employees identical to that occasioned by hiring an independent business (Falconbridge) to perform the work. To that extent the picket line at the Falconbridge site directed at the latter's employees was not different in kind from a picket line at the primary site aimed at primary employees. Local 786's pickets did not attempt to induce these employees to refuse to do any work for their employer. To the contrary their appeal was restricted to inducing the secondary employees to refrain from performing duties which were associated with the strike. As such and as the court found, the pressure was properly characterized as primary and lawful *per se.*

One must realize that to the extent the functional delineation of the primary-secondary dichotomy allows appeals to secondary employees by means other than a primary site picket line, it will condone appeals which would be prohibited in the American jurisprudence. The latter prohibits all *secondary site* pressure which induces secondary employees to refuse to perform any work on or with the offending products unless their employer is "allied" to the primary. The functional analysis will however allow pressure in any instance where the secondary was dependently related with the primary to the extent the appeal only affected that part of the secondary's business which was so related. The American position restricting legitimate secondary site pressure to the ally context flows from a limitation super-imposed by statute on the functional analysis rather than from any inherent defect in the latter. Indeed, but for this congressionally imposed limitation, it is admitted the logic of the analysis requires the approval of secondary site picketing permitting secondary employees to refuse to handle the primary products in instances in addition to those where the secondary is in fact an ally.[29] In effect this will mean that unlike the American

[29] Lesnick, The Gravamen of the Secondary Boycott, *op. cit.*, footnote 14, at p. 1414.

jurisprudence governed by section 8(b)(4)(B), in our legal environment the ally doctrine would be only one illustration rather than the exclusive instance of secondary site appeals which could properly be directed at secondary employees.

Hot Cargo Agreements: The "performance of struck work" aspect of the ally doctrine raises directly the efficacy of hot cargo agreements. By these provisions unions seek in advance to secure the identical co-operation from the signatory "neutral" employer that is derived from a lawful picket line. In such agreements signatories consent, *inter alia*, to permit their employees to refuse to cross a "primary" picket line, or to handle struck work. In one sense such clauses only do *a priori* what the other forms of suasion—the picket line, the boycott, and so on, do *ex post facto*. So viewed their propriety should be tested by the same functional analysis that is applied to picket lines, boycotts, and so on.

It has been argued that employees on strike against their primary employer should be permitted to appeal to employees of an allied-secondary to respect a picket line situated at the ally's place of business or to refuse to perform struck work. It should therefore be equally legitimate for the employees of the ally, for their own protection against any possible liability to their own employer, to secure the latter's consent *a priori* to their refusal to cross such a picket line or to perform such struck work. In fact, to the extent the functional analysis extends beyond the perimeters of the ally doctrine and sanctions other secondary site pressure as primary, it should be equally valid for the employees of the secondary to obtain the latter's consent in advance to any such conduct sought to be induced by the primary employees. Absent such a hot cargo agreement and notwithstanding the propriety of the appeal directed at the secondary employees, the secondary employer quite properly should be entitled to discipline such of his employees who by respecting the primary picket line or refusing to handle the struck work breach their collective agreement. Simply, the propriety of the pressure exerted and the obligations of the secondary employees *under their collective agreement* are distinct. Accepting such a conclusion, the desire for and purpose of obtaining the secondary's consent to such conduct in the form of hot cargo agreements becomes readily comprehensible.

Recognizing the pragmatic impetus behind such provisions, one must realize that complex legal issues are nevertheless raised when the employees of the secondary refuse to cross a picket line situate at the primary's premises, refuse to handle any primary products in response either to a secondary site picket line or to a provision in their own collective agreement, or refuse to perform any work which would otherwise be performed by the primary

striking employees. Specifically the question arises as to whether such refusals will be found to be a concerted effort on the part of these employees designed to restrict or limit the output of the secondary's business. If answered in the affirmative they may be prosecuted for participating in an unlawful strike[30] or disciplined for engaging in an unlawful strike or simply for an insubordinate refusal to obey their employer.[31]

To the extent courts evoke a "loyalty to the picket line"[32] response to their inquiry as to the motivation behind the neutral employees' refusal to perform the work, such a refusal would in fact be deemed a strike in contravention of a collective agreement, if existing, and of the statute. In any event, at a minimum, such conduct at the level of the individual employee would reasonably be construed to be insubordinate and sanction some disciplinary response from the employer. To the extent any of these hypotheses are not only possible, but probable, it would be in the interests of these persons to extract from their employer his consent to such limited refusals to render their services in the circumstances described.

The legitimacy of such agreements, tested against the functional analysis of the primary-secondary dichotomy has already been determined. They are to be tested in the identical fashion as any other form of union pressure which has consequential effects for neutrals. It merits repeating that so analyzed, in our jurisprudence, unlike the American, the propriety of such clauses will be affirmed in contexts beyond the confines of the ally doctrine. However, such an analysis notwithstanding, a more fundamental question remains of whether such agreements are valid in the face of our statutory imperatives which prohibit all concerted refusals to work during the currency of a collective agreement.

This question has been confronted on several occasions by the Ontario Labour Relations Board,[33] by at least two courts[34] and one

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[30] Ontario Labour Relations Act, *supra*, footnote 8, ss 36, 63, 65 prohibiting, *inter alia*, strikes during a collective agreement, ss 85, 88 and 90 being the enforcement by prosecution provisions of the Act.

[31] Re *Transit Mixed Concrete and Builders Supply Ltd.* and *Re Toronto Newspaper Guild etc., supra*, footnote 22. In the latter award in passing, the arbitrator offered the opinion that such a refusal by an employee, being insubordinate conduct, would on that basis merit disciplinary action. In addition such conduct might be argued to be a breach of the no strike provision which following ss 36 and 37 of the Act are statutorily injected into every collective agreement.

[32] *Smith Brothers Construction Co. Ltd.* v. *Jones et al.*, [1955] O.R. 363, [1955] 4 D.L.R. 255, 113 C.C.C. 16.

[33] *Supra*, footnote 23.

[34] *Re Otis Elevator Co. Ltd. et al. and International Union of Elevator Constructors Local 125* (1973), 36 D.L.R. (3d) 402 (N.S.C.A.), rev'g in part (1972), 22 D.L.R. (3d) 709.

arbitrator.[35] On each of the occasions when the issue was put to the Ontario Labour Relations Board, it has declared, citing its earliest decision in *Pigott Construction*, that:[36]

> These sections, [now ss. 63 & 65], set out unqualified prohibitions. The article in the agreement appears to us to embody an attempt by the parties to negotiate themselves out of the provisions of the Labour Relations Act and to make a law to themselves outside its evident scope and intent. We do not think the parties are competent to enact private legislation which would permit that which the Labour Relations Act prohibits even though, at the same time, they give lip service to the provisions of the Act governing the content of collective agreements.
>
> We find the provisions of Article 15.6 to be contrary to [the] purpose and intent of the Labour Relations Act . . . .
>
> It may, of course, be argued that s. 15.6 is intended solely to relieve the union against a claim for damages in the event of arbitration proceedings arising out of a withdrawal of its members from a work site in the circumstances set out in 15.6. This, however, does not warrant absolution in so far as its clear transgression against the provisions of the Labour Relations Act is concerned so as to make it available as a defense to any alleged violation of the Act when and if the need should arise.
>
> In our opinion, the clause is invalid and cannot be countenanced as a defense to the charge involving allegations with respect to an illegal strike. It cannot make lawful that which the statute states so clearly is unlawful.

If the position taken by the Ontario Labour Relations Board, notwithstanding its inherent self contradiction, has appeal as a sound compromise in terms of labour policy, and in addition has merit in law, then one could expect such agreements to provide a defense for employees of the secondary who were disciplined as a result of their refusal to do work associated with the primary product. In addition they should provide a defense for the union if the employer claimed a breach of the no-strike provision of the agreement.

In fact, in at least one jurisdiction it has now been held that an arbitrator cannot invoke such provisions of an agreement to justify a refusal by a group of employees to perform the work delimited by that clause. In Re *Otis Elevators Co. Ltd.*[37] the Nova Scotia Court of Appeal, affirming a decision of Bissett J., held that such clauses, being in conflict with the statutory ban against strikes during the life of the agreement, must be *void* for *all* purposes. Cooper J.A. formulated the conclusion in these terms:[38]

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[35] *Re Toronto Photo-Engravers' Union No. 35-P and Toronto Star Ltd.* (1971), 22 L.A.C. 319 (Weatherill), aff'd (1972), 23 D.L.R. (3d) 153 (Ont. H.C.).

[36] *Supra*, footnote 23, paras 19-22.

[37] *Re Otis Elevator Co. Ltd.*, *supra*, footnote 34.

[38] *Ibid.*, at p. 410.

> I think that the arbitrator fell into error of law in not giving effect to s. 19(1) of the Trade Union Act as requiring that there be no stoppage of work in the circumstances here present and that this error is apparent in the face of the record. This statutory enactment is paramount to and has the effect of rendering void the contractual agreement between the parties expressed in Appendix A.

It is doubtful from the superficial level of the legislative debates whether one can draw the same conclusion that the Ontario legislature intended to preclude the parties from contracting out of the statutory no-strike ban. The question raises difficult philosophical and legal considerations of public policy and freedom of contract which demand more sophisticated and detailed analysis than the simple assertion of statutory paramountcy made by the Nova Scotia Court of Appeal. However suffice to say here that having made the same assumption as the Ontario Labour Relations Board as to the primacy of the statute, the court came to the logically more defensible conclusion that in law such supremacy would render void, for all purposes, any agreements to the contrary. If applied in Ontario, such reasoning would effectively negate the Board's hypothesis that such provisions may remain provisionally valid as a defense available to the union and the employees to a claim of breach of the no-strike clause.

Contrasted with both of these positions is the case of *Toronto Photo-Engravers Union No. 35-P. and Toronto Star Ltd.,*[39] the only reported arbitration award confronting the issue. In a grievance launched by the Toronto Star alleging a breach of the no-strike clause the defense was raised that by the terms of the agreement the employer had consented to a refusal by the employees to perform such work. The clause read:

> No member of the Union shall be required to handle work which emanates from offices where an authorized legal strike of the L.P.I.U. exists, or to cross a picket line in instances where a strike has been authorized by the L.P.I.U.

The arbitrator found that the struck employer, Providence Gravure, did not own the disputed work which involved the printing of a supplement known as "Maryland Living". Rather he held that Baltimore News American for whom the work was being performed, "owned" the work as a result of a *force majeure* clause which existed in its contract with Providence Gravure. By that clause Baltimore News American could remove the work from

[39] *Re Toronto Photo-Engravers' Union No. 35-P etc., supra,* footnote 35. See also *Globe & Mail Ltd., Telegram Publishing Co. Ltd., Toronto Star Ltd. & Toronto Mailers Union #5* unreported award dated January 13th, 1966, aff'd *Regina* v. *Fuller et al., Ex parte Earles* v. *McKee* (1967), 62 D.L.R. (2d) 156, 70 D.L.R. (2d) 108 where the arbitrator appears to assume such a clause can justify on an individual basis, an employee's refusal to cross such a picket line.

Providence Gravure in the event the latter could not perform for reasons which included interruptions caused by labour disputes. Thus the arbitrator could conclude that the work which the employees had refused to perform came from the Baltimore News American and did not actually "emanate" from offices where an authorized strike existed. As a result the clause could not be relied on to sanction the employees' refusal. In short, the clause was designed to operate when the Toronto Star, by performing struck work had allied itself with the primary employer—which on the facts it had not done. It is true that by performing this work the Toronto Star had functionally integrated itself with the primary's business and thus an appeal to its employees would be properly regarded as primary. However, the hot cargo clause was limited by its very terms to the ally context and as such would be inapplicable to such appeals.

In the course of his award, however, the arbitrator did allow that:

> It would seem that a different situation would have arisen had Providence Gravure's obligation to print "Maryland Living" continued and had it attempted to meet this obligation despite the strike by contracting-out the work. In that case, while the work would remain ultimately that of the Baltimore News American, it might, arguably, be said to be done by the subcontractor on Providence Gravure's account, and from the point of view of the subcontractor's employees, might be said to "emanate" from Providence. In such circumstances, the employees of the subcontractor might well be entitled to rely on a provision such as that in the last sentence of Art. 2, s. 1 in refusing to handle the work . . . .[40]

In such circumstances as hypothesized, the Toronto Star would in fact become an ally of the struck employer and the hot cargo clause would be operative so as to justify the employees' refusal to perform such work. Alternatively had the clause been defined to coincide with the functional integration theorem instead of the ally doctrine (this being a reflection of the American origin of the clause) it would have shielded the employees from liability to the Toronto Star for their refusal to perform such work assignments. In either case the employees would be simply responding both on an individual and collective basis to their rights as set out in the agreement. Construed as a consensual agreement to restrict management's right to assign work to its employees as it deems necessary, such provisions would afford a complete justification for the employees' refusal to perform such assignments. This would be so regardless of who induced the refusal and notwithstanding that there may have been a common motive underlying their conduct.

Put in such a context, the conclusion reached in *Re Otis*

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[40] *Ibid.*, at pp. 321-322.

Elevator which renders void any attempt *a priori* to reach an agreement respecting the right of the union and its members to respect certain picket lines or demark what work will or will not be performed and under what conditions, subverts the legitimate economic, social and philosophical aspirations of labour unions. In addition it suffers a basic defect in its assumption that the overriding statutory bar on refusals to work during the currency of a collective agreement conflicts with these provisions. Rather such hot cargo clauses, viewed as jurisdictional work clauses, demarking in part the permissible range of assignments which can properly be given to the employees, are similar in purpose to seniority, classification and assignment provisions found throughout most collective agreements. As such they simply delimit specified instances of when and what species of work assignments are within management's prerogative to require his employees to perform. So defined there is no inherent conflict between such clauses and sections 36, 63 and 65 of the Act or with the no-strike clause of the agreement unless and until the employer repudiates his agreement and requires his employees to choose between the Act and their agreement.

To allow the employer to succeed by such tactics is to permit him to recoup by litigation or arbitration that which he had waived and forfeited at negotiation, namely the right to require his employees to adhere to his legitimate instructions including an order to cross a primary picket line or work on "hot cargo". It would be to allow the employer to deny the plain language of his agreement. Where such clauses on their face can operate consistently with the statutory scheme and will in fact do so for so long as the employer lives up to them, there can be no basis to negate such clauses on doctrines of statutory supremacy and illegality. So long as such clauses are drawn in a manner to satisfy the functional definition of what remains primary the employer should be estopped from denying his consent to such conduct. By his own actions he should not be able to make unlawful and actionable that which by his promise he had previously sanctioned as legitimate. In short, both under the agreement[41] and the statute, such clauses and the con-

[41] At arbitration there may well be grounds to argue that where, as here, the disputed clause and the statutory bar to strikes during the life of the agreement can, and in fact, do live together until the employer, by his own conduct, precipitates the conflict, that there is no "illegality" in the sense of the clause derogating from the statute. If this were the case, there is strong authority for the proposition that in such circumstances the arbitrator must not have reference to the statutory provision but determine his award solely on the terms of the agreement before him. *R.* v. *Krever et al. Ex. P. International Chemical Workers Union, Local 161*, [1968] 1 O.R. 447, 66 D.L.R. (2d) 597; *Re Board of Education for Etobicoke and C.U.P.E., Local 808*, [1973] 1 O.R. 437. For a specific discussion regarding

duct they embrace should as a matter of legal principle and labour policy be permitted as primary as that term has been defined.

(ii) *Common Ownership and Control In Matters Pertaining To Labour Relations.*

The first head of the ally doctrine focuses upon the secondary employer who actively assists the struck employer through the specific labour conflict by performing work which would otherwise have been done by the striking employees. This second aspect, inspired by an earlier decision of the National Labor Relations Board,[42] would hold that:[43]

> Common ownership and control—without any evidence of a straight line operation—are sufficient either to constitute a separate entity as an ally or to constitute two affiliates as a single employer. The necessary control is [actual] common control of labour policies . . . .
>
> Although an "integrated" or "straight line operation" is not essential for treating two employees as one, or as allies, where the requisite common ownership and control are present, it may be a substitute for common control of labor policies if there is common ownership. In fact, integration of operations in itself may be sufficient to give rise to an ally relationship.

Perhaps more than any other criteria this has received the widest recognition by those Canadian courts anxious to escape from the principle prohibiting absolutely all forms of secondary site pressure. Indeed so enthusiastically have our courts embraced this concept that when invoking it they have done so without enunciating any limits which are said in the American jurisprudence to properly envelop it. Rather the reported Canadian authorities have simply adumbrated the series of connecting links which exist on the facts of each particular case between the primary and secondary employers as justifying the picketing of the latter. Of even greater concern however, is the realization that as articulated, in almost every case, the doctrine is simply irrelevant to and often in conflict with the functional analysis advanced here to determine the legitimacy of the pressure in issue.

The premise which is said to support the economic and social coercion of all those who, as a matter of economic reality or legal fiction, are under common ownership and control with the primary employer is that embraced in the dictum of Mr. Justice Rand in the *Aristocratic Restaurants Ltd.* case.[44] There the learned Justice

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the jurisdiction of an arbitrator to make reference to statutory provisions in determining his award see P. C. Weiler, The Arbitrator, The Collective Agreement and The Law (1972), 10 Osgoode Hall L.J. 141.

[42] *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)* (1949), 87 N.L.R.B. 54.

[43] R. Goetz, *op. cit.*, footnote 14, at pp. 665-667.

[44] *Supra*, footnote 26.

held that it is legitimate for a union to exert otherwise lawful pressure against the total economic strength of the primary employer. What must be realized however is that such a dictum articulated in the abstract and out of the context of the case itself is simply too pervasive. Applied literally such a doctrine of common ownership and control would allow a union to extend the arena of industrial conflict to any corporate entity or subdivision thereof over which the primary had effective financial control. To the contrary, Rand J.'s remarks must be confined to the context of that case where the union was held to be entitled to picket restaurants of the primary in addition to the one at which it held bargaining rights. In such a context the union should be entitled to apply pressure to those parts of the primary's enterprise which, as with the first head of the ally doctrine, directly contribute to his economic ability to withstand the primary pressure. Specifically the union should be permitted to picket the other restaurants only if and to the extent that they are functionally connected to or integrated with the primary restaurant.

It would have been an entirely different case if the union had attempted to exert pressure against a business operation[45] owned by Aristocratic Restaurants which was wholly independent of and unconnected to the *type of business* carried on at the struck premises. As such, if it were a functionally disparate business from the primary even though related by corporate superstructure, an effective strike of the operations of the primary would leave such a business unaffected. It should, as a matter of determining the legitimate extension of secondary consequences flowing from an industrial dispute, be irrelevant whether two functionally unconnected businesses are part of the same corporate conglomerate. Such a consideration is at odds with what must be taken to be the legislative intention of limiting the secondary impact of labour disputes to those economically or functionally integrated with the primary strike. The only rationale which would support a determination that any pressure exerted against those who are in common ownership and control with the primary is the theory advanced by Mr. Justice Rand that as such they will add to the total economic strength that the primary has available to it to withstand the union pressure. If, however, one accepts such an all pervasive premise of "economic strength" as supportive of this doctrine, there would

[45] Whether such a venture be a distinct corporate subsidiary of the parent Aristocratic Restaurant Ltd. or simply a division with a single corporate enterprise should, as a matter of fortuitous structuring, be irrelevant to a determination which focuses upon the functional realities of the pressure applied. To recognize the legal niceties of corporate structures for reasons of corporate liability, tax and securities law does not require that those same considerations obfuscate the economic imperatives of a labour dispute.

be no logical basis to distinguish those entities which are within the common ownership and control of the primary from those in which the primary has a financial interest, however marginal, which nevertheless by their continued operation contribute to the primary's total economic wealth. Simply recognizing the extension of labour conflict which would be warranted by a primary-secondary dichotomy based on such criteria is to demonstrate and confirm that such a doctrine is simply untenable.

Notwithstanding the irrationality of the principle (even if it were arbitrarily limited to those companies which were also in common ownership and control with the primary), this factor of corporate configuration has been relied upon by at least five different courts in Ontario as offering at least a partial basis by which the *Hersees* decision could be distinguished. In *Tenen Investments Ltd.* v. *Weuller*,[46] the first decision to make a break in what was otherwise an uninterrupted and submissive compliance with the *Hersees* doctrine, Mr. Justice McDermott, in a most obscure and confusing passage seems to have distinguished the *Hersees* decision because of the corporate nexus which existed between the primary and picketed employers. However the reasons for judgment are simply too inarticulate and imprecise to allow the case to be cited as authority for the principle of "common ownership and control". Indeed on its facts the case might more properly be characterized as one of performance of struck work or common situs picketing. In any event the case does represent the first occasion in which the court acknowledged the corporate relationship as a basis by which the *Hersees* doctrine could be circumvented.

The second judgment in which the *Hersees* case was distinguished was that of Mr. Justice Fraser in *Lescar Construction Co. Ltd.* v. *Wigman*.[47] In what is a somewhat more direct and lucid passage Fraser J. cited the close corporate relationship between the primary and secondary employers as justifying, in part, the picketing of the latter. In *Lescar Construction Co. Ltd.*, when the primary, Nick Painting was lawfully struck by the Painters' Union, its principal, Nick Tsvetanov, merely assigned the work to another of his companies, H. & I. Painting. As the court observed:[48]

> It is a reasonable inference that in substance, if not in law, both companies were Nick Tsvetanov in corporation guise.

Having made such an inference, Mr. Justice Fraser could conclude:[49]

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[46] 66 CLLC 14,151 (Ont. H.C.).
[47] [1969] 2 O.R. 846, 7 D.L.R. (3d) 210.
[48] *Ibid.*, at p. 212.
[49] *Ibid.*, at p. 213.

> In the instant case the question is whether having regard to all the circumstances because the sub-contractor changed his corporate garb, the plaintiff became entitled to have the court exercise those powers by enjoining picketing that would otherwise be legal. I think not.

However, express reliance upon the corporate relationship as justifying the picketing of the "secondary", required the court to confront a decision of Kirby J. in *North Fork Timber Co.* v. *Mackenzie*.[50] On the facts of this case although the five shareholders who held a majority of the shares of the primary company also held controlling interest in the picketed secondary, Kirby J. enjoined the picketing as being unlawful. However, in his reasons for judgment Mr. Justice Kirby did not discuss whether such a nexus would or should, without more, permit the picketing of the neutral beyond acknowledging the existence of the nexus. Notwithstanding Kirby J.'s failure to analyze the legal effect of the corporate connection, Mr. Justice Fraser, in the *Lescar Construction* case felt constrained to confront and to distinguish the decision. He did so on two independent grounds. Firstly he found that on the facts before him the picketing remained at the site where it had commenced and not as in *North Fork Timber* at some distinct physical location occupied by the neutral. Secondly he concluded that on the facts before him the employees of the secondary were brought in to do the work formerly done by the striking employees which was not the case in *North Fork Timber*.[51] If in fact the first reason was the critical distinction between the two cases the *Lescar Construction* decision could be cited as explicit judicial recognition of the common situs doctrine. If, on the other hand, the second factor were the determinative one, the case would stand as authority for the "performance of struck work" aspect of the ally doctrine. Moreover, to the extent Mr. Justice Fraser's reasons for judgment do raise the common situs and ally principles, the case does not resolve the issue of whether a corporate relationship alone could permit what would otherwise be prohibited as secondary picketing of the related employer.

This issue was thrown up again in the more recent case of *Domtar Chemicals Ltd.* v. *Leddy et al.*[52] Here the employees of Domtar's salt mine, where salt was dry mined and sold for industrial purposes only went out on a legal strike. In the course of that strike, the union picketed Domtar's salt plant where it operated a wet mining and evaporation process. This plant was physically situate a mile and a half away, and was under completely separate local management. To the extent the two operations were, as the court found them to be, completely independent and under separate

[50] (1964), 45 D.L.R. (2d) 79 (Alta S.C.).
[51] *Lescar Construction Co. Ltd.* v. *Wigman*, *supra*, footnote 46, at p. 213.
[52] [1973] 3 O.R. 408, 37 D.L.R. (3d) 73.

management, the case is on all fours with *North Fork Timber*. As a matter of labour policy it should be irrelevant to a determination of the propriety of the pressure applied to the secondary operation whether the corporate structure selected by Domtar called for two separate legal entities or two divisions of one. Of more relevance is the fact that in both cases the secondary business was not in any manner functionally integrated with the primary. There was no evidence to suggest the salt plant depended on the salt mine for its supply. The latter's product was sold for industrial purposes only.

To distinguish the *North Fork Timber* case so as to sanction the picketing of the salt plant by the striking mine employees, Carter Co. Ct J. relied on the most curious fact that in the case before him the same local union represented the employees at both businesses. What relevance such a conclusion can have to a resolution of the permissible limits of extending the secondary consequences of labour disputes is difficult to even hypothesize. There is no rational connection between the propriety of pressure applied at the secondary site and what union, if any, has bargaining rights at those premises. The corporate legal niceties aside, in terms of the economic realities, the *North Fork Timber* and *Domtar Chemical* decisions would appear to be irreconcilable. To repeat, it should not, to the extent the courts are prepared to strip the corporate veil in this context, be relevant to the propriety of union tactics that in the former case the nexus was five shareholders holding a majority interest in two independent corporate entities while in the latter it was a corporate agglomeration of two independent operations. Rather what is relevant to both is the absence of a functional connection between the operations of the primary and picketed employees. In the result by adopting a kind of common ownership and control theory and by failing to adequately confront the logic inherent in the *North Fork Timber* conclusion, the court in *Domtar Chemicals* permitted the union to enmesh a business in a manner and to a degree far different from that which it would have been, had it been restricted to those kinds of pressures associated with the primary strike.

In the most recently reported decision involving secondary pressures, *Nedco Ltd.* v. *Nichols et al.*[53] the court was again faced with the fact of common corporate ownership and control existing between Northern Electric, the primary, and Nedco the alleged neutral. In upholding the picketing of the latter, both at premises shared with the primary and at its separate and independent place

[53] [1973] 3 O.R. 944. The Saskatchewan Court of Appeal reached the same conclusion on similar facts in *Nedco Ltd.* v. *Clark et al.*, 73 CLLC 14,192.

of business, the court failed to define the minimum or fundamental links necessary to sustain the picketing of a related corporate enterprise. Rather it simply itemized those connections integral to its conclusion in the case before it. The court stated:[54]

> In the present instance we have what is clearly a labour dispute between Northern and the Union to which the pickets belong. In the course of this dispute, Nedco is picketed. Nedco was admittedly formed by Northern for the purpose of taking over what was formerly a division of Northern work, it is staffed largely by former Northern employees, many of the directors and officers of each company hold positions in the other and Nedco is wholly owned by Northern. At the Lakeshore premises the companies share a building, in normal times ingress and egress are afforded to employees and customers of both companies by the same entrances and exits and free access is had by the personnel of each company to the premises of the other within the building. Services and facilities are shared by the companies and their employees and although the subsidiary acts as distributor for many suppliers in addition to Northern, some 16 per cent of its business consists of distributing Northern's items. In some remote or small localities Nedco delivers and bills for Northern. The balance sheet and earning statement of Nedco is published only in the form of a statement issued by Northern, consolidating the affairs of Nedco with those of Northern and its other subsidiaries so that neither the employees nor the public have access to any statement of affairs of Nedco per se.

To the extent the court relied on the corporate nexus between Northern Electric and Nedco, the decision is suspect. Such a consideration should be, as demonstrated, simply irrelevant to the determination of whether one can legitimately exert economic pressures against Nedco. However, to the extent that Nedco acted as a distributor of Northern products and was vertically integrated with the latter, it would, regardless of its corporate relationship, have been materially affected by a legal strike at Northern Electric. To the extent a legal strike could successfully close the operations of the primary, Nedco would have been unable to distribute such products, its employees unable to deliver them. Applying the test of functional connection the union should have been authorized to picket at *any* premise occupied by Nedco. and entitled to persuade the latter and its employees not to distribute the product of which, if the strike were successful, they would have been deprived.

That the proper focus is the nature of the integration of operations between Nedco and Northern is confirmed when one realizes the seminal case of *Irwin-Lyons Lumber* in fact rested upon an integration of operations which existed between the two companies.[55] The fact that the primary and secondary companies were engaged in a straight line operation of cutting and sawing

[54] *Ibid.*, at p. 952.

[55] *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.), supra,* footnote 42.

(primary) and transporting the logs to the mills (secondary) justified an appeal to the employees of the logging company to refuse to transport any of the primary product. It is true that the National Labor Relations Board did allude to the common corporate ownership and control that existed between the two companies and that subsequent cases have discounted the need to establish a straight line or integration of operations between the corporations which are under common ownership and control. However such decisions are, for the reasons already stated, open to criticism. Indeed, even when limited to cases where there is common ownership and *actual* control over labour relations, the doctrine puzzles those seeking to justify it.[56] Both from the legislative debates[57] as to what was to be prohibited, and from what is acknowledged by all to be legitimate consequences of an effective strike, it is impossible to justify the extension of industrial conflict which follows from this doctrine. Only the clearest of legislative expression would warrant any other conclusion. Even supported by such an expression the principle is so sweeping in its effect that it would have to be restricted by arbitrary distinctions which would determine the extent of the contribution to the economic strength of the primary necessary to support the exertion of pressure against such related enterprises. So analyzed the doctrine of common ownership and control would be unsupported by and indeed derogate from the underlying rationale common to and supporting all other permitted forms of economic suasion as embraced by the concept of functional integration.

III. *The Common Situs Doctrine.*

As explained earlier, the geographical location at which the pressure is applied should be irrelevant to a determination of its propriety in the sense that picketing at the secondary site may be of exactly the same character and effect as that at a primary site. In addition, there may be instances where, according to the functional analysis, picketing at the primary site may, depending upon the kind of pressure applied, be properly deemed secondary and prohibited. The example offered above involved pressure at the primary site which induced the secondary employees whose business brought them in contact with the primary not only to refrain from performing their services as they related to the primary products, but to completely withhold their services from their employer unless and until the latter terminated his dealings with the primary. A second instance where primary site picketing might properly be

[56] Goetz, *op. cit.*, footnote 14, at p. 666.
[57] *Supra*, footnote 11.

regarded as secondary, would occur in the context of a common situs wherein two unrelated employers conduct their business from the same premises. Conversely the common situs doctrine may sanction as primary, pressure of a certain character notwithstanding it is, in a sense, applied at the premises of the secondary, because those premises are shared with the primary. As with the first example, whether such pressure at the common situs is to be regarded as primary or secondary should depend upon whether the business of the neutral is affected beyond that which is functionally integrated to the primary's.

Although such cases as *Nedco Ltd.* and *Falconbridge Nickel Mines Ltd.* were on their facts arguably cases which might fall within the scope of the common situs doctrine the judgments of those cases focused upon other principles. To the extent Osler J. in the *Nedco* v. *Nichols* case relied on the corporate ties between Northern Electric and Nedco he did not pursue, other than to describe, the existence of a common situs at one of the two picketed premises. Similarly in *Nedco* v. *Clark*, Culliton C.J.S. of the Saskatchewan Court of Appeal, having cited with approval the conclusion reached by Osler J. in *Nedco* v. *Nichols* and the reasons therefore, explicitly refrained from passing on the effect that should be given to the existence of the common situs and the reserved entrances which existed at one of the two picketed premises. In *Falconbridge Nickel Mines Ltd.*, by focusing on the "performance of struck work" head of the ally doctrine again the court did not have to concern itself with the issue of common situs. However, in at least one case, *Refrigeration Supplies Co. Ltd.* v. *Laverne Ellis*[58] the decision rendered by the court appears to be properly analyzed as an application of the common situs doctrine. In this case, the International Association of Machinists in the course of a legal strike against Franklin Co. which did business in Galt, picketed the plaintiff's place of business situate in Guelph when Franklin moved some of its office staff into the premises of the plaintiff. On this evidence and because the plaintiff warehoused some of the primary's products, the court found the primary was carrying on one aspect of its business from the plaintiff's place of business. This fact and the fact that the two companies were subsidiaries of a common parent justified, in the court's opinion, the picketing at the plaintiff's premises. The court articulated its reasons as follows:

> I do not propose to go further than to indicate that the picketing of the place where the Franklin Company, one of a group of companies, including the plaintiff which are controlled by a parent company, so called, is definitely carrying on business which in my view, permits the

[58] [1971] 1 O.R. 190, 14 D.L.R. (3d) 682.

> union to picket the plaintiff's premises, even though the effect may be, if they permit the Franklin Company to continue to carry on business at those premises, to destroy its own business. If the plaintiff were an independent company, and if the Franklin Company were not carrying on business in its premises, I would have granted the interim injunction as asked.[59]

Two aspects of this passage merit attention. In the first place it is not at all clear the extent to which the relationship between the two corporations supported the court's determination as to the propriety of the picketing in issue. In the concluding sentence of the quoted passage the two factors of common situs and corporate relationship are offered on a conjunctive basis to support the court's conclusion, while the thrust of the remarks preceding it appear to focus upon and to emphasize the common situs aspect of the case. It is clear from what has been said before that properly the corporate relationship should have been irrelevant to the determination of this issue. Indeed, some have suggested that the thrust of the quoted passage when read in conjunction with a later citation to *Aristocratic Restaurants* case supports the conclusion that the court in fact relied upon the common situs principle to uphold the picketing in front of the plaintiff's place of business.[60]

However, and assuming it is the common situs principle which justified the picketing at the premises of the secondary, it may not be correct to say, as the court boldly declares, that such picketing may continue for so long as the situs is common to the primary and neutral employers "even though the effect may be . . . to destroy its [the neutral's] own business". Such an assertion is simply too sweeping. It is true that the sharing of premises with a primary employer may subject the neutral to a picket line being established in front of his premises. However, the propriety of this pressure would, the common situs notwithstanding, remain to be tested by precisely the same definition of primary pressure that should be used to test any form of union suasion. With such a definition the critical issue remains the nature of the neutral's functional dependency upon or operational integration with the primary's business. If by the nature of its operations the neutral's business were distinct from and would be unaffected by any interruption in the primary's operations (by strike or otherwise) any appeal to the employees, suppliers or customers of the neutral to sever in any manner their relations with the primary would be properly deemed secondary and prohibited even and although there was a common situs. The decisive test should lie in the consequences. Proof of such interference would be determinative. By

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[59] *Ibid.*, at pp. 191-192.
[60] Paterson, *op. cit.*, footnote 3, at p. 100.

way of contrast if the neutral were, as in Nedco Ltd. a distributor for the primary, a picket line in front of the common situs could properly induce employees of the neutral to refuse to handle the primary products. Thus in *Refrigeration Supplies Ltd.* the picketing should be permitted as primary so long as the consequences were limited to an interruption of the primary's business carried on at the common situs and an interference with that part of the neutral's business which was functionally connected with the primary's. So defined, the common situs doctrine, like the principle of performance of struck work, is significant not as a distinct legal theorem supported by independent rationale. Rather its significance is as a rubric to demark a factually common set of circumstances which illustrate the validity of a more fundamental and basic proposition used to articulate the primary-secondary dichotomy. Again, it should be the nature of the pressure exerted at the common situs and neither its location nor the intention of those exerting it[61] which is determinative of its validity.

From its judgment the court in *Refrigeration Supplies Ltd.* does not appear to envisage any limits being placed on common situs picketing. By way of contrast other courts have attempted to reconcile and balance the competing interests of the primary employees to publicize their dispute and the neutral to be free from illegitimate secondary consequences associated with that dispute. In *Johnston Terminals Ltd.* v. *Office & Technical Employees*[62] McIntyre J. of the British Columbia Supreme Court permitted the union to picket in front of the plaintiff's warehouse having established that the primary employer, Dominion Glass, was carrying on part of its business from the warehouse. In allowing the picketing of what was in fact a common situs the court declared that:[63]

> In the case at bar pickets carried signs indicating their strike was against Dominion Glass. This would seem a reasonable means of indicating that the strike was not against the plaintiff or any of its other customers. There is no evidence of any illegal act or illegal intent on the part of the union picketers. There is no evidence of an intent to injure or interfere with plaintiff's save, of course, its dealings with Dominion Glass or any of its other customers.

To the extent the court tested the propriety of common situs picketing by a determination of whether the pressure applied interfered with that part of the secondary's business which was integrated with the primary's. the case is supportive of the functional analysis. That is precisely the kind of interference or pressure which would be occasioned by an effective primary strike. To the extent the

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[61] *Seaboard Advertising Co. Ltd.* v. *Sheet Metal Workers International Ass'n, Local 280,* 71 CLLC 14,091 (B.C.S.C.).
[62] (1972), 23 D.L.R. (3d) 600.
[63] *Ibid.,* at p. 605.

court focused on the intention of those exerting the pressure in its analysis, it would, for the reasons elaborated earlier derogate from and conflict with that analysis.

A second and perhaps the most widely cited attempt to telescope the permissible limits of common situs picketing is that of the National Labor Relations Board in its *Sailors' Union of the Pacific (Moore Dry Dock Co.)* decision. In what is regarded as a classic passage, the Board delineated the criteria required to be observed by those picketing at a common situs in the following terms:[64]

> When a secondary employer is harbouring the situs of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and situs qualifies both rights. In the kind of situation that exists in this case, we believe that picketing on the premises of a secondary employer is primary if it meets the following conditions: (a) the picketing is strictly limited to times when the situs of dispute is located at the secondary employer's premises (b) at the time of the picketing the primary is engaged in his normal business at the situs (c) the picketing is limited to places reasonably close to the location of the situs and (d) the picketing discloses clearly that the dispute is with the primary employer.

Again, to the extent these criteria do not explicitly limit the union's ability to entangle the secondary in the dispute only to the degree the latter's business is functionally integrated with the primary's, they are deficient. Further, it should be recalled that the first of the four Moore Dry Dock conditions is, in the American jurisprudence, a statutory prerequisite to any *secondary site* pressure directed to employees. It is for this very reason that the common situs doctrine so defined is of such significance in their collective bargaining regime. However, for so long as no analogous statutory provision interferes with the logical symmetry of the functional analysis this first criterion would merely define the common situs context and not the validity of all secondary site pressure of which it is but one instance. Further, to the extent the litmus test of what is secondary and prohibited is a determination of the factual consequences of the pressure, the fourth condition may be superfluous though inoffensive to the functional analysis. Such deficiencies aside, to the extent both decisions represent serious attempts to attain a more refined and equitable balance between the competing interests of the primary employees and the neutral, they are to be preferred to the simplistic and crude resolution enunciated by the court in *Refrigeration Supplies Ltd.* v. *Ellis.*

Accepting the validity and scope of the common situs doctrine

[64] (1950), 92 N.L.R.B. 547, at p. 549. The doctrine so defined was approved by the United States Supreme Court in *Local 761, Int'l Union of Electrical, Radio & Machine Workers* v. *N.L.R.B.* (1961), 366 U.S. 667.

as it has been defined here should render superfluous such derivative doctrines as the roving situs and reserved gates principles. In the former, the issue is raised whether, within the perimeters set down by *Moore Dry Dock* or *Johnston Terminals,* a union may picket at the places of delivery where and when the primary employer's ships, trains or trucks come to rest. Those secondaries to whom the deliveries are made should not be affected to a greater extent by an ambulatory picket seeking to interfere with his ability to trade in the primary product than they would by a strike which curtailed production of the primary product. As such, the pressure should be primary and legitimate quite apart from the common situs rationale. Although there appears to be some judicial authority to the contrary in the case of *Williams et al* v. *Amalgamated Meat Cutters and Butcher Workmen of North America*[65] that decision, prohibiting picketing of a primary's truck, was based on the court's determination that such a roving situs could not be said to be a "place of business, operation or employment" within the meaning of the then sub-section (1) of section 3 of the Trade Unions Act.[66] To the extent such a statutory definition of permissible primary picketing was founded on a geographic criterion, it is irrelevant to our analysis.

According to the reserved gate theory a primary employer may attempt to divide what is otherwise a common situs into separate primary and secondary sites (gates) and localize the dispute to a particular entrance of the shared premises. This is achieved by designating that particular entrances be used exclusively by primary employees and others be reserved for secondary employees. By definition this doctrine also suffers from its locative or geographic focus. Indeed as with much of what has been examined here, the theory has its underpinnings in the American statutory provision prohibiting secondary site appeals to employees except as sanctioned by the ally doctrine. Thus even in the context of the *Nedco* cases, where Northern Electric attempted to segregate the entrances for the primary and secondary employees, following the functional analysis the primary employees would be entitled to appeal to the Nedco employees at their reserved gate to the extent the latter are induced to refuse to perform only that work which is functionally integrated to the primary's business. In the *Nedco* decision this would have legitimated secondary site appeals at the reserved gate to induce the plaintiff's employees to cease their distribution of Northern Electric's products. Governed by such an analysis, rather than by American labour legislation, the reserved

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[65] (1963), 40 D.L.R. (2d) 885 (B.C.S.C.).
[66] *Supra,* footnote 4.

gate tactic employed by Northern Electric should not, as the latter anticipated, insulate the secondary from all secondary site appeals.

IV. *Consumer, Publicity and Informational Picketing.*

From such a functional analysis of what the legislature must have intended, as well as from the express statements made in the course of debate on the propriety of secondary appeals[67] it should follow naturally that appeals directed at the consuming public not to use or buy the offending product, should properly be regarded as legitimate primary pressure. Simply, such appeals are of an identical character to the pressure emanating from a primary strike, which if effective would deprive the public of the ability to use or purchase such products. So analyzed, appeals to consumers, as appeals to secondary employees, should be restricted to persuading such persons to refuse to purchase the primary product. Only in the instance where the secondary's merchandise was restricted to the primary product could the primary employees appeal to the public to refuse to do business entirely with the secondary employer. The critical element in determining the validity of such pressure would remain the nature and character of the appeal and not whether the appeal was directed at consumers or secondary employees.

It is true that consumer or informational picketing which is designed to be and is in fact ignored by the secondary employees may be qualitatively more akin to a simple exercise of free speech and as such can be affirmed on that ground alone. So characterized there is little to distinguish between appeals directed at consumers to refrain from dealing in the struck product whether such an appeal is launched by newspaper advertisement, radio appeal, billboard signs or picketing. Although such picketing has in fact been properly justified on grounds of free speech[68] one should avoid the conclusion that as a consequence a consumer or informational picket is for that reason a unique or exceptional mode of union pressure. More properly such consumer or informational picketing or boycotting, properly confined, is merely a further illustration of primary pressure as defined by the functional integration theorem between the primary, the secondary and the public. Again, to the extent this doctrine has achieved a special status in the American jurisprudence, this can be traced to an explicit statutory proviso

[67] *Supra*, footnote 11.

[68] *Aristocratic Restaurants Ltd.* v. *Williams et al., supra*, footnote 26; *Attorney General of Canada* v. *Whitelock* (1973), 37 D.L.R. (3d) 757; *Channel 7 Television Ltd.* v. *N.A.B.E.T., supra*, footnote 7, per Hall J.A., at p. 441.

in the secondary boycott section of the National Labor Relations Act.[69]

What follows from the above is that on the facts raised by *Hersees* the court should have focused on whether Hersees' employees or the public or both were induced to discontinue all dealings with that retailer or whether simply to cease handling and purchasing in the primary product which was carried by him. To the extent the picketing actually interfered with only that part of the secondary's trade which was vertically integrated with the struck employer's business, it should have been upheld as primary. This should be so regardless of whether it was employee or consumer directed, regardless of its location and regardless of the intention of the picketers. So analyzed, where the secondary's trade or business was totally integrated with that of the primary, so that its merchandise was restricted exclusively to the products of the primary, the union could properly attempt to induce consumers not to buy at all, or employees to completely withhold their services, from the secondary. By way of example, employees on strike against Imperial Oil should properly be able to appeal to customers of Esso Service stations to refrain from doing any business with such secondaries owing to their complete functional integration with Imperial Oil. One would arrive at the same conclusion by an application of the common ownership and control doctrine if it were properly restricted to the integrated operation context. Were it otherwise, and if one applied the latter doctrine where there was only the factor of common ownership and control (in the sense of total economic strength) existing between the primary and retailer one would reach the anomalous conclusion of allowing picketing of those stations while prohibiting any pressure in front of others which were operated by independent businessmen. To accept this as the basis to distinguish permitted from prohibited pressures is to rely on the fortuitous corporate marketing structure which the *Nedco Ltd.*, *Lescar Construction* and *Tenen Investment* cases, by looking through the corporate veil, sought to avoid. To resolve the legality of the union's tactics by such distinctions would be economically irrational and legally indefensible.

Although such an analysis of consumer boycotts flies in the face of the *Hersees* decision, reference may usefully be made to the recent case of *Nadrofsky Steel Erecting Ltd.* v. *Doyle*.[70] Although the functional analysis was not averted to by the court, its conclusions raise serious questions as to the continuing viability

[69] Lesnick, The Gravamen of the Secondary Boycott, *op. cit.*, footnote 14, at pp. 1414, 1420, 1424. But see Goetz, *op. cit.*, footnote 14, at p. 700 for a refutation of the analogy drawn between primary situs and consumer directed picketing.

[70] [1973] 3 O.R. 515.

of the *Hersees* doctrine. In this case the defendants, members of the local Trades Council sought to induce a general contractor, Crawford, to require all his subcontractors to enter collective agreements with unions affiliated with their council. Upon Crawford's refusal, the union caused the project to be picketed. As a result the plaintiff, subcontractor's employees ultimately refused to report for work notwithstanding that the plaintiff had in fact signed collective agreements to cover all his employees. Although such recognition picketing would *prima facie* appear to run afoul of both the legislative intent supporting sub-section (2) of section 63 and section 67 and the decision in *Hersees*, Mr. Justice Hughes ignored the former and distinguished the latter. The distinction relied upon was twofold. In the first place, he allowed that the pickets did not in fact persuade the plaintiff's employees not to cross the picket line but "simply refused to order them to do so".[71] Such a fiction simply fails to respond to the social realities of the labour dispute. Secondly, the court declared that the plaintiff could not be compared to the retailers affected in the *Hersees*' context. In the court's opinion, the latter could not "in any sense" be described as parties to the dispute. Beyond that simple assertion there is simply no foundation in law[72] or logic to support it. Indeed to the contrary it is more likely that *Nadrofsky Steel* was more capable of fully discharging its contractual obligations at the construction site regardless of whether the union could legally close the primary's operations, because as a matter of functional integration, he probably had a far more tenuous connection to the dispute than a retailer such as Hersees. The latter because of its direct vertical integration with the primary, would in all likelihood be seriously affected by a legal strike of the manufacturer. By ignoring this critical functional relationship the court in *Nadrofsky Steel* not only implicitly undermined the *Hersees* decision but ventured to the other extreme by sanctioning as primary that which the legislature must have intended to prohibit as secondary.

Conclusion.

One begins with the premise that both from its language and legislative history section 67 of the Ontario Labour Relations Act did not anticipate nor attempt to comprehensively resolve the myriad of possible secondary pressures deployed by trade unions. As a

[71] *Ibid.*, at p. 518.

[72] Indeed, the contemporaneous case of *J. S. Ellis & Co. Ltd.* v. *Willis et al.*, *supra*, footnote 2, which would appear to be on all fours with *Nadrofsky* and which was not even discussed by the court, could be cited as authority for exactly the opposite proposition than that advanced in the *Nadrofsky* judgment.

consequence one is required to ascertain the legislative intent by focusing rather less on what in fact was prohibited and rather more on what in fact was permitted. One must reject the notion that the legislature sought to protect "secondaries" from the effects of a primary strike or picket line. To the contrary the permitted consequences of a strike, depending on the functional relationship between the primary and secondary, may include the latter's being unable to carry on any aspect of its business. Recognition of this fact leads to the logical conclusion that in enacting section 67 the legislature must not have intended to prohibit trade unions from inflicting exactly the same economic consequences through identical mediums (employees, suppliers, distributors) albeit by different processes. That is, as a result of an effective legal strike the employees, suppliers and distributors of the secondary will be unable to perform their normal services in so far as they relate to the primary products. By way of contrast as a result of the secondary site pressures here examined these persons would be simply unwilling to perform those services. Though in the former they are unable and in the latter unwilling to handle the offending products, nevertheless the effect on the secondary, assuming the pressure is otherwise legitimate, is the same.

The pragmatic effect of delineating the primary-secondary dichotomy with such an analysis would be to allow the union to enmesh all those who are vertically and horizontally integrated with the primary employer in an economic or functional manner to the extent of their integration. The analysis allows one to logically and rationally test the legitimacy of any form of union pressure. It explains the status and propriety of the doctrinal trilogy of the ally, common situs and consumer picketing principles found in the American jurisprudence. Most critically it should offer to the courts in Ontario and in jurisdictions with similar legislation a comprehensive and logical mode of analysis which will enable them to escape in a rational and consistent fashion from the suffocating grasp of the *Hersees* principle when testing the validity of what are increasingly popular forms of union suasion. To date by mechanically reacting in a vague and contradictory manner to the specific factual contexts before them, the courts are again subverting the legislative scheme. Ironically on this occasion the subversion evidenced by the *Nadrofsky Steel*, *Refrigeration Supply* and common ownership and control cases has gone to the other extreme by permitting some forms of union suasion which the legislature must certainly have intended to prohibit.