

Update

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SUPREME COURT OF CANADA PROTECTS CONSUMER LEAFLETING BY UNIONS

On 9 September 1999, the Supreme Court of Canada released two decisions which unanimously ruled that union members who are involved in a labour dispute with their employer can engage in peaceful consumer leafleting at secondary sites. The Court ruled that this conduct is protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms* as part of employees' constitutionally guaranteed freedom of expression.

The two cases are:

- ***UFCW Local 1518 v. KMart Canada Ltd*** which originated in British Columbia;

and

- ***Allsco Building Products Ltd. v. UFCW Local 1288P*** which originated in New Brunswick.

The legal principles are discussed fully in the *KMart* case and are applied more briefly in *Allsco*. The two cases raised factual situations which differed in important respects. In the *KMart* case, the wording in the legislation clearly prohibited consumer leafleting. In *Allsco* case, the wording in the legislation was less restrictive and did not necessarily prohibit leafleting.

In *KMart* the Court found that the definition of picketing in the B.C. *Labour Relations Code* prohibited peaceful leafleting by unions and so

violated the freedom of expression under the *Charter*. The infringement could not be justified and so the provision in the statute was struck down. The government was given six months to redraft the statute to comply with the Court's decision.

In *Allsco*, the Court found that the provisions in the N.B. *Industrial Relations Act* did not necessarily prohibit peaceful leafleting. The legislation in fact stated that a union and its members could express their views freely as long as they did not do so in a manner that was coercive, intimidating, threatening or intended to have undue influence on any person. The legislation, then, could be interpreted to permit consumer leafleting and so it did not violate the *Charter*. The Supreme Court of Canada overturned the injunction on the basis that the courts below had simply erred by applying the legislation to prohibit consumer picketing.

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Factual Background to the Cases**1. UFCW Local 1518 v. KMart Canada Ltd.**

Kmart operates 11 stores in British Columbia. UFCW Local 1518 represents employees at two of the stores (the “primary employer”). During a labour dispute with the primary employer, members of the union distributed leaflets at other KMart stores (the “secondary employers”). Groups of between 2 and 12 individuals went to the secondary sites. They stood between 2 and 20 feet from the entrance to the stores and distributed two different kinds of leaflets, one describing the employer’s alleged unfair labour practices and one urging customers to shop elsewhere. The distribution of leaflets did not interfere with employees at the secondary sites and did not interfere with the delivery of supplies. The leafleting was carried out peacefully and did not impede public access to the stores. There was no evidence of verbal or physical intimidation.

The BC *Labour Relations Code* defines “picketing” very broadly as attending at or near a place of business for the purpose of persuading or attempting to persuade any one not to enter the premises, not to deal in or handle the person’s products or not to do business with the person. The *Code* provides that picketing can only be conducted when union members are lawfully on strike or locked out and can only take place at the immediate site of the strike or lock out.

On an application by KMart, the BC Labour Relations Board found that the union had contravened the *Labour Relations Code* and ordered it to refrain from picketing at the secondary sites. The Board rejected the union’s argument that the definition of picketing violated s. 2(b) of the *Charter*. The Board dismissed the union’s application for reconsideration although it unanimously found that the definition of picketing in the *Code* was too broad. The union’s application for judicial review was dismissed. Its appeal to the BC Court of Appeal was also dismissed.

2. Allsco Building Products Ltd. v. UFCW Local 1288P

Allsco is a manufacturer of vinyl windows, doors, and other building products and is the distributor of a brand of vinyl siding in Canada’s Atlantic region. UFCW Local 1288P is the bargaining agent for about 100 employees at Allsco’s manufacturing plant in Moncton. Four other businesses were also involved in the legal action. Three of these non-Allsco businesses sell building materials and, in particular, each sells Allsco products. The fourth business builds modular homes and trailers and Allsco is a supplier of the vinyl building products it uses. These non-Allsco businesses have no collective bargaining relationship with UFCW Local 1288P.

Allsco began a legal lock out of the union’s members in February 1996. Between May and July 1996, union members distributed leaflets outside the premises of the non-Allsco businesses. The leafleting took place as follows. Only one or two union members engaged in leafleting at the same time. They approached vehicles and offered leaflets to the occupants. They did not trespass on the property of the non-Allsco businesses. They did not carry any picket signs, did not parade back and forth, and did not conspicuously display any item that indicated that the union was involved in a labour dispute. They did not block any vehicles from entering or exiting the premises. The leaflet asked the readers to “please think twice” about buying Allsco products, explained that the employees had been locked out, explained some of the harsh working conditions at Allsco, and indicated that by not buying Allsco products the consumer would give the employer the message to go back to the bargaining table. Leafleters did not verbally ask anyone not to do business with the non-Allsco businesses. They did not ask suppliers to refrain from making deliveries to the non-Allsco businesses. They did not ask employees of these businesses not to go to work.

The New Brunswick *Industrial Relations Act* provides that members of a union which is

lawfully on strike or locked out can, only at the employer's place of business, persuade or try to persuade anyone not to enter the employer's place of business, not to deal in or handle the products of the employer or not to do business with the employer. However, the Act also provides that public expressions of sympathy or support, "otherwise than by picketing" on the part of trade unions or others not directly concerned in the strike or lock out do not contravene the Act. It also provides that a union and its members can express their views freely as long as they do not do so in a manner that is coercive, intimidating, threatening or intended to have undue influence on any person.

Allsco and the four other businesses applied to the New Brunswick Court of Queen's Bench for and received an injunction prohibiting leafleting outside the premises of the non-Allsco businesses. The basis for the injunction was that the union was engaged in secondary picketing in violation of s. 104 of the *Industrial Relations Act*. The Court of Queen's Bench found that s. 104 violated freedom of expression under s. 2(b) of the *Charter of Rights and Freedoms* but that the violation was justified under s. 1 of the *Charter*. The New Brunswick Court of Appeal unanimously dismissed the union's appeal and agreed that the infringement of freedom of expression was justified under s. 1 of the *Charter*.

What the Supreme Court of Canada Ruled

1. Freedom of Expression for Employees

In its unanimous decisions, the Supreme Court of Canada emphasized the importance of freedom of expression for employees. The Court stressed that freedom of expression is fundamental to the functioning of any democratic society and so must be restricted only in the clearest of cases. The Court also repeated its statements from earlier decisions which held that a person's employment is an essential part of their sense of identity, self-worth and well-being; that employees' conditions of work are highly

significant to their well-being; and that the relationship between employees, particularly retail employees, and their employers is inherently unequal.

The Court stated that:

"It follows that workers, particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. For employees, freedom of expression becomes not only an important but an essential component of labour relations. It is through free expression that vulnerable workers are able to enlist the support of the public in their quest for better conditions of work. Thus their expression can often function as a means of achieving their goals." [*KMart*, para. 25]

and that:

"It is obvious that freedom of expression in the labour relations context is fundamentally important and essential for workers. In any labour dispute it is important that the public be aware of the issues." [*KMart* para. 30]

The Court stressed that leaflets and posters have been and continue to be a very important means to distribute information and seek support for a cause. Because it is relatively inexpensive, leafleting is particularly important for vulnerable or less powerful members of society.

The Court indicated that the public has the right to know the facts about a labour dispute and indicated that leaflets are important to employees because employers and unions do not have the same resources to convey their position to the public:

"The public has a right to know the factual background and nature of a labour dispute. Indeed it is often the weight of public opinion which will

determine the outcome of the dispute. Information regarding the factual background and the position of the parties may be very properly disseminated by them. For example, this may be achieved by a party purchasing space in newspapers or billboards or by purchasing time for announcements to be made by radio or television. In most labour disputes, it is far more likely that the employer will be able to afford and utilize these means of putting forward its position. Fairness dictates that employees should be able to put forward their position to the public by distributing leaflets in the manner adopted by the [union] in this case.” [KMart, para. 46]

Finally, the Court compared consumer leafleting by unions to consumer boycotts organized by political, human rights, social, religious and economic interest groups, indicating that attending at a specific location to conduct a consumer boycott “has been a traditional right enjoyed by many non-labour groups.”

As a result, the Court has in strong language recognized the importance of consumer leafleting by union members and has recognized it as conduct which falls squarely within the *Charter*’s protection for freedom of expression.

In *Allsco*, the Court clearly stated that “a legislative prohibition on peaceful leafleting by unions and union members clearly constitutes a *prima facie* infringement, under s. 2(b) of the *Charter*, of the freedom to express a particularly valuable form of information” [para. 19].

2. Consumer Leafleting Distinguished from Conventional Picketing

To determine whether restrictions on consumer leafleting could be justified under s. 1 of the *Charter*, the Court drew a distinction between consumer leafleting and “conventional picketing”. It was necessary to make this

distinction because in an earlier decision, *RWDSU v. Dolphin Delivery* (1986), 33 D.L.R. (4th) 174, the Supreme Court of Canada indicated that restrictions on conventional secondary picketing may be justified under the *Charter*. In *Dolphin Delivery* the Court stated that while picketing can be used in a labour dispute by employees against their own employer, it is reasonable to limit secondary picketing so that the conflict does not escalate beyond the actual parties to the labour dispute.

In *KMart* the Court indicated that lawful restrictions can be placed on conventional picketing at secondary sites because a picket line operates as an automatic “signal” that people should not cross the line. In this respect picket lines have a coercive effect that goes beyond the ability of picketers to persuade people and convey information. While the exercise of freedom of expression through picketing is protected, the coercive “signal” aspect of picketing can be restricted.

By contrast, the Court indicated that consumer leafleting does not trigger a “signal” effect and does not have the same coercive component as a traditional picket line. Consumer leafleting simply seeks to persuade members of the public to take a particular course of action and, if it is conducted properly, it is not illegal at common law.

In *Allsco*, the Court indicated that because employees were allowed to express their views freely without coercion, intimidation, or undue influence, the legislature intended to distinguish between conventional picketing and other forms of peaceful expression. In that case, then, the prohibitions in the Act were interpreted to apply only to forms of persuasion that are coercive, intimidating, threatening or intended to cause undue influence. They were interpreted not to prohibit peaceful persuasion.

In *KMart*, the Court expressly noted that the parties had not challenged the decision in *Dolphin Delivery* even though the Court’s discussion upholding restrictions on secondary

picketing was not essential to the ruling in that case. As a result, the analysis in the present two cases proceeded on the basis that restrictions on secondary picketing may be justified under s. 1 of the *Charter*. *KMart* and *Allsco*, then, do not change the law as it relates to conventional secondary picketing. The cases do, however, carve out consumer leafleting as a qualitatively different kind of activity which unions can lawfully pursue at secondary sites.

In concluding that consumer leafleting can be distinguished from conventional picketing, the Court in *KMart* summarized its position as follows:

“In deciding whether the consumer leafleting activity in question is acceptable, it will be important to determine whether consumers are able to determine for themselves what course of action to take without being unduly disrupted by the message of the leaflets or the manner in which it was distributed. Consumers must retain the ability to choose either to stop and read the material or to ignore the leafleter and enter the neutral site unimpeded. Did the prospective customer turn away because of the accurate and rational arguments put forward in the leaflets, the persuasive discourse of the leafleter or because of the intimidating manner in which the activity was conducted?”
[*KMart*, para. 56]

The Court cautioned, however, that consumer leafleting could be considered equivalent to conventional picketing and so could be restricted if (1) those distributing the leaflets carried placards; (2) if the leafleters were so numerous that they impeded people from entering or exiting the premises; or (3) if the leaflets were directed towards the workers at the secondary sites rather than the consumers. The Court then summarized the characteristics of the leafleting in the cases which made it acceptable:

“In this case, the leafleting conformed with the following conditions:

- (i) the message conveyed by the leaflet was accurate, not defamatory or otherwise unlawful and did not entice people to commit unlawful or tortious acts;
- (ii) although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only;
- (iii) the manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful or tortious;
- (iv) the activity did not involve a large number of people so as to create an atmosphere of intimidation;
- (v) the activity did not unduly impede access to or egress from the leafleted premises;
- (vi) the activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to the neutral sites.”
[*KMart*, para. 58]

It is clear that whether leafleting crosses the line and becomes impermissible persuasion will have to be considered on the facts of each case. For ease of reference, the characteristics of permissible leafleting described by the Court are summarized at the end of this Update.

3. The Government Cannot Justify a Prohibition on Consumer Leafleting

Finally, the Court in *KMart* concluded that the complete prohibition on consumer leafleting could not be defended as a reasonable limit that could be justified in a free and democratic society. The Court ruled that the complete prohibition on leafleting did not minimally impair the freedom of expression but was instead a broad sweep that caught more conduct than was justified by the government’s objective of minimizing the impact of labour disputes on third

parties. The definition of picketing in the legislation was therefore struck down.

What is the Significance for Unionized Employees in Ontario?

Unlike the legislation which was at issue in the two cases before the Supreme Court of Canada, neither the Ontario *Labour Relations Act* nor the *Canada Labour Code* contains provisions which define picketing or which prohibit particular forms of persuasive activity.

Instead, secondary picketing in Ontario can be restricted when an employer or other business applies for an injunction under s.102 of the *Courts of Justice Act*. The relevant parts of s. 102 provide as follows:

102. (1) In this section, “labour dispute” means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(2) Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice.

(3) In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury or persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful.

Under the *Courts of Justice Act*, then, the court has the jurisdiction to impose restrictions on “an act in connection with a labour dispute.”

If an employer sought an injunction in relation to union members who were leafleting consumers, what would be at issue is how the court should interpret “an act in connection with a labour dispute”. Following the analysis in *Allsco Building Products Ltd.* it is arguable that this phrase should be interpreted so that it does not restrict peaceful consumer leafleting. This is the interpretation which would be most consistent with the *Charter* and it should be preferred over an interpretation which would run afoul of the *Charter*.

Accordingly, it should be possible for unionized employees in Ontario to rely upon the decisions of the Supreme Court of Canada to protect their right to engage in peaceful consumer leafleting. It must be stressed, however, that leafleting by unions and their members must fall within the Court’s description of permissible leafleting.

GUIDELINES FOR CONSUMER LEAFLETING BY UNIONS

What is permitted?

- Union members involved in a labour dispute with their employer can peacefully distribute leaflets to consumers at secondary sites of the employer.

What are secondary sites?

- Examples of secondary sites include other stores operated by the employer, other divisions operated by the employer, or other businesses that sell or distribute products made by the employer.

How must the leafleting be conducted?

- Leaflets can be handed out by a small number of people standing near the entrance to the secondary site.
- Leafleting must not involve a large number of people so as to create an atmosphere of intimidation.
- Leafleters must not block the entrance and must not impede consumers or suppliers from entering or leaving the premises.
- Leafleters must not prevent employees of the secondary sites from entering or leaving the premises.
- Leafleting must be done peacefully. There must be no physical or verbal intimidation or violence.
- Leafleters must not carry placards.

What can be said in the leaflets?

- Leaflets can accurately set out information such as:
 - ▶ the nature of the union's dispute with the primary employer;
 - ▶ the union's position in the labour dispute;
 - ▶ the nature of the terms and conditions at the primary employer;
 - ▶ the nature of alleged unfair labour practices conducted by the employer.
- Leaflets can ask consumers to boycott the employer and shop elsewhere.
- Leaflets must be directed towards consumers only, and must not be directed towards employees of the secondary sites.
- Leaflets must indicate that the union is in a dispute only with the primary employer.
- Leaflets must be accurate. They must not be defamatory or otherwise unlawful.

- Leaflets must not entice readers to engage in any unlawful or tortious conduct.

Excerpts from the Consumer Leaflets in the Two Cases

One of the leaflets distributed by UFCW Local 1518 at KMart stores in BC read, in part, as follows:

ATTENTION K-MART SHOPPERS!!!

DID YOU KNOW THAT:

K-MART locked out over 140 employees, preventing them from working in their K-MART stores in Campbell River and Port Alberni in an attempt to stop the employees from attaining the basic needs within a first collective agreement.

...

U.F.C.W. LOCAL 1518, AND THE LABOUR MOVEMENT OF BRITISH COLUMBIA ARE ASKING YOU:

PLEASE DO NOT SPEND YOUR CHRISTMAS \$\$\$\$ AT K-MART

SHOP AT THEIR COMPETITOR'S STORES!!

FOR THE PAST SIX MONTHS, OVER 100 MEMBERS OF THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1518, HAVE BEEN ON STRIKE, AT THE K-MART STORES IN CAMPBELL RIVER AND PORT ALBERNI.

...

We are asking for your assistance by boycotting this giant multinational called K-Mart. By doing so, we hope to move one step closer to eliminating the exploitation of employees who work for K-Mart and return our striking members back to work with dignity, respect, and a fair collective agreement.

Because Christmas is the most profitable time of the year for K-Mart, we are asking you: PLEASE DO NOT SPEND YOUR CHRISTMAS DOLLARS AT K-MART!

All that the striking members want for Christmas is a fair and decent collective agreement with K-Mart!

We want to thank you for your help, and wish you the best this season has to offer.

The leaflets also stated that 95 percent of the workforce were women and part-time employees and that the workers were seeking their first collective agreement. They stated that the collective

bargaining issues included not only wages and working conditions, but also employment equity and job security.

The leaflets distributed by UFCW Local 1288P in *Allsco Building Products Ltd* are described by the Court as follows:

The leaflet requested that the person reading the leaflet “[p]lease think twice” before purchasing Allsco products or the vinyl siding that Allsco distributed, on the basis that Allsco had locked UFCW Local 1288P members out of their jobs. The leaflet asked its reader to help union members get back to work, by not buying Allsco products, or by the reader asking his or her contractor not to buy from Allsco. The leaflet stated that, by not buying Allsco products, the reader of the leaflet would help the union send a simple message to the owners of Allsco, namely, in the words of the leaflet:

Come back to the bargaining table. Treat the employees who helped you build your company with respect and dignity. Give us back the ability to support our families and watch them grow.

The leaflet stated that working conditions at Allsco were harsh, with many union members earning less than \$7.00 an hour, and with a health-and-safety audit having found that Allsco scored 6 out of 100. The leaflet stated that the workers had been denied water during the month of July, and had been kept from going to the bathroom as necessary.