# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild,* 2023 BCCA 77

Date: 20230216
Dockets: CA48629; CA48630

Docket: CA48629

Between:

**Vancouver Shipyards Co. Ltd.**

Appellant
(Plaintiff)

And

**Canadian Merchant Services Guild, Trevor Lang, Zulema Sanabria, Randy Smigel and Persons Unknown**

Respondents
(Defendants)

- and -

Docket: CA48630

Between:

**Vancouver Drydock Company Ltd., in its own capacity and its capacity as general partner for Vancouver Drydock Company Limited Partnership**

Appellant
(Plaintiff)

And

**Canadian Merchant Services Guild, Trevor Lang, Zulema Sanabria, Randy Smigel and Persons Unknown**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 27, 2022 (*Vancouver Shipyards Co. Ltd. v. Canadian Merchant Services Guild*, 2022 BCSC 1791, Vancouver Dockets S227024; S227171).

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| Counsel for the Appellants: | G. Litherland<br>N.C. Toye |
| Counsel for the Respondents: | S.I. Banister, K.C. |
| Place and Date of Hearing: | Vancouver, British Columbia<br>December 21, 2022 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>February 16, 2023 |

***Summary:***

*The applicants seek leave to appeal the dismissal of their applications for injunctions to enjoin picketing by the respondent union and its members near their places of business. The respondent union was on strike against Seaspan ULC, the parent company of the applicants. The underlying dispute was subsequently resolved so that the appeal is moot. However, the applicants seek leave to argue what they submit is an important legal issue of general application; whether an "unlawful act" is a required element of the tort of inducing breach of contract. Held: Application dismissed. The circumstances of this case do not raise an important question of broad interest. The law applicable to injunctions to enjoin secondary picketing is generally well settled. By advancing the appeal on a different foundation from that relied on below, the appellants are asking this Court to reconsider an exercise of discretion which was based on a different factual and legal context. It is not worthwhile to use scarce judicial resources to consider a hypothetical question.*



**Reasons for Judgment of the Honourable Mr. Justice Butler:**

[1] The appellants, Vancouver Shipyards Co. Ltd. ("Shipyards") and Vancouver Drydock Company Ltd. ("Drydock"), apply for leave to appeal an order of Justice Macintosh made on September 27, 2022. The order dismissed the appellants' application for an injunction to enjoin the respondents from continuing to picket locations near the appellants' places of business. The Canadian Merchant Services Guild, the primary respondent, is the federally certified bargaining agent for a group of employees—tug boat captains and engineers—in the tug and barge operation of Seaspan ULC. Seaspan wholly owns Shipyards and Drydock. The other respondents are officers of the Guild.

[2] Not long after the order was made, Seaspan and the Guild settled the underlying labour dispute and the picketing stopped. Accordingly, the appeal is now moot. Although the concrete dispute has been resolved, the appellants submit, based on the principles set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, that the Court should exercise its discretion to hear the appeal.

[3] The respondents made no submissions on the issue of mootness, but argue that leave to appeal should not be granted. I agree and, for the reasons that follow, dismiss the application for leave to appeal.

**Background**

[4] At the time of the hearing before the chambers judge, tug boat captains and engineers, who are Guild members working for Seaspan, were in a lawful strike against Seaspan. The unionized employees of Shipyards and Drydock are represented by provincially certified unions, not the Guild, and were not on strike.

[5] Seaspan has offices at 10 Pemberton Avenue in North Vancouver. Shipyards has an office nearby at 50 Pemberton Avenue. There were two picket locations in dispute at the hearing. Workers for Shipyards and Drydock were refusing to cross these pickets, and as a result, the appellants' shipyard and drydock operations could not operate.

[6] The first picketing location impacted Shipyards. The strike began on August 25, 2022. Guild members initially picketed at 10 Pemberton Avenue, on private property adjacent to the Seaspan office. By letter, sent on August 23, Seaspan had permitted the pickets to be on Seaspan property. Seaspan revoked this consent on August 26. Seaspan said that the pickets were outside the permitted area on Pemberton, and asked that all pickets be moved to public property. The Guild moved the tent sheltering picketers to the north side of the intersection of Pemberton Avenue and McKeen Avenue. A Seaspan representative said the new location was satisfactory. However, employees of both Seaspan and Shipyards enter work via the McKeen/Pemberton intersection. On September 2, Seaspan wrote to the Guild, noting that Shipyards' workers were refusing to cross the picket line to attend work. Seaspan invited the picketers to move back to their original location at 10 Pemberton Avenue, provided they did not picket anywhere to the north of that location. The Guild did not accept this invitation, and the pickets remained at McKeen and Pemberton as of the date of the hearing before the chambers judge.

[7] The second picketing location impacted two facilities described as "Vancouver Drydock" and the "W building". As its name suggests, the first of these is used by Drydock for the repair of ships, while the second is used by Shipyards to construct sections of new ships which are later transported to the main Shipyards

site. Seaspan tugs perform work for Drydock and Shipyards from both facilities. On September 8, 2022, the Guild set up a picketing location on a roadway called Victory Ship Way, a common access point for workers at both facilities.

[8] The picketing at both locations was peaceful and orderly. There was no evidence of nuisance, intimidation, defamation or misrepresentation. No evidence established an excessive number of pickets, or any blocking of traffic. The chambers judge rejected the appellants' claim that the Guild increased its pickets at times when Shipyards or Drydock workers would be going to work. Rather, he found that at such times, there were more people around the pickets because Shipyards and Drydock workers who would otherwise be going to work were arriving at the site and mingling with Guild members.



**Reasons for Judgment Under Appeal**

[9] The chambers judge noted that the appellants objected to the admissibility of evidence attributed to Scott Shaw, Senior Director of Employee Relations and Wellness for Seaspan. The evidence attributed to him was set out in the affidavit of Shawn Sly, a business agent for one of the provincial unions that has a collective agreement with both Shipyards and Drydock. He had attended a B.C. Labour Relations Board hearing at which Mr. Shaw testified that he worked in a unit called "Shared Services", which provided labour management services to all of Seaspan's subsidiaries, including Shipyards and Drydock. Seaspan objected to the evidence on the grounds that Mr. Sly did not state in the affidavit that he believed the statements from Mr. Shaw to be true. The judge ruled that the evidence was admissible because: (1) neither Seaspan nor the appellants denied or contradicted the evidence; (2) the evidence came from the parent company of the appellants, not an unrelated third party; and (3) the Guild was under time constraints in preparing affidavits in response to the injunction application.

[10] The judge considered the evidence attributed to Mr. Shaw as well as other evidence about the corporate relationship between the companies and the nature and location of their business activities. He concluded that the labour management

relationships of Seaspan, Vancouver Shipyards and Vancouver Drydock are not wholly independent of one another and that Seaspan has a hand in the labour management of Shipyards and Drydock.

[11] Before considering the test for determining whether injunctive relief should be granted, the chambers judge referred to *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 and *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333*, 2002 BCCA 641, which he considered to be the leading cases addressing applications to restrain picketing in light of the constitutional protection afforded to free expression. He noted that in *Pepsi-Cola*, the Court found that secondary picketing is legal at common law, unless it involves tortious or criminal conduct. The chambers judge assumed, but did not decide, that the two picketing sites in issue were secondary rather than primary picketing locations. In making that assumption, he observed that in light of the work Seaspan and the Guild performed at those sites, they could be primary sites. He noted that it was clear on the evidence that the sites were not those of third parties entirely independent from Seaspan.

[12] The chambers judge referred at some length to Justice Donald's reasons addressing the tort of inducing breach of contract in the context of picketing in *Prince Rupert*. He held that the *Prince Rupert* decision recognizes that peaceful, non-tortious picketing is protected by the *Charter* as freedom of expression, and that peaceful picketing cannot, in itself, constitute the unlawful means required for the tort of inducing breach of contract.

[13] On the test for obtaining an injunction, the chambers judge held, based on the *Pepsi-Cola* and *Prince Rupert* decisions, that the appellants could not demonstrate a fair question to be tried, let alone a strong *prima facie* case, as there was simply no evidence of unlawful means.

**Issues on Appeal**

[14] The notices of appeal allege that the chambers judge erred in concluding that the appellants failed to establish a serious question to be tried or a strong *prima facie* case because:

a) An "unlawful act" is not a required element of the tort of inducing breach of contract;

b) In the alternative, if an "unlawful act" is a required element of the tort of inducing breach of contract, the appellants' picketing at Victory Ship Way was an "unlawful act"; and

c) The judge failed to consider whether the appellants had established a fair question to be tried or a strong *prima facie* case that the respondents committed the tort of conspiracy to injure.

[15] The appellants' notices of appeal also allege that the chambers judge erred in admitting in evidence the affidavits of Shawn Sly, filed September 20, 2022, and of Denyse Dehler, filed September 20, 2022. However, the appellants made no submissions on this ground of appeal in oral argument or in their memoranda of argument. Similarly, the appellants did not pursue arguments based on the alleged failure to consider the claim based on the tort of conspiracy to injure. I regard these grounds as very weak, and I am of the view that this application is to be decided based on the other grounds of appeal.

[16] In the applicants' leave materials, counsel indicated that a tentative agreement had been reached between the parties and that it had not been ratified as of November 8, 2022, but that the vote was expected in mid-November. The applicants argued that if the strike was resolved, the Court should exercise its discretion to hear the appeal. The respondents made no submission on mootness in their memorandum of argument.

[17] Prior to the hearing of this application, the Court directed an inquiry to the parties as to whether the labour dispute was settled, and if so, whether the respondents would make submissions on mootness. The parties advised that they had entered into a memorandum of understanding on October 14 to renew the collective agreement and end the strike. The respondents indicated that they were not taking a position on the issue of mootness as the memorandum of understanding contained a term that permitted the applicants to pursue the appeal and provided that:

> …In the event that such an appeal is pursued, the Guild agrees that it will not object or oppose the appeal on the basis that it is moot.

[18] For the benefit of future litigants, I would observe that parties should advise the Court when they have arrived at agreements concerning the pursuit of appeals that are moot. The Court should not have to make inquiries to determine whether an appeal (or application for leave) is moot and, if so, why parties have not made submissions on that issue.

## Law

### Test for Leave to Appeal

[19] The onus is on the appellants to establish that leave should be granted: *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 at 11 (C.A. Chambers).

[20] The test is (as per *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A. Chambers)):

1) Whether the point on appeal is of significance to the practice;

2) Whether the point raised is of significance to the action itself;

3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

4) Whether the appeal will unduly hinder the progress of the action.

[21] These criteria are considered under the overarching "rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).

**Legal Principles on Mootness**

[22] An appeal is moot where it raises a hypothetical or abstract question. This means that the decision of the court will have "no practical effect" on the rights of the parties: *Borowski* at 353.

[23] If an appeal is moot, the court may still exercise its discretion to hear the case. The exercise of discretion is guided by the extent to which the three underlying rationalia of the mootness doctrine are present: *Borowski* at 363. These have been summarized by this Court in *Forjay Management Ltd. v. 625536*, 2021 BCCA 171 at para. 19 as follows:

1) Whether, despite the disappearance of the concrete dispute, an adversarial context continues to exist, such that there remains an assurance that the case will be fully argued before the court;

2) Whether judicial economy would be advanced, in some way, by hearing a case notwithstanding that the concrete dispute has been resolved; and

3) Whether, in hearing a moot case, the court will be straying into the legislative sphere rather than acting as an adjudicative body.

[24] The second *Borowski* factor of concern for judicial economy will be addressed if "the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" (*Mapara v. Ferndale Institution*, 2014 BCCA 49 at para. 34), including where:

a) the court's decision will have some practical effect on the rights of the parties even without the effect of determining the controversy that gave rise to the action;

b) the appeal raises an issue of a recurring nature but of necessarily brief duration that might otherwise evade review; or

c) the appeal raises an issue of public importance where a resolution is in the public interest.



## Positions of the Parties

### Appellants

[25] The appellants submit that the appeal has merit. They argue that an independent "unlawful act" is not a required element of the tort of inducing breach of contract, based on *Super-Save Enterprises Ltd. v. Del's Propane Ltd.*, 2004 BCCA 183. They submit that the chambers judge erred in relying on Justice Donald's statement in *Prince Rupert* that peaceful picketing cannot, in itself, constitute the unlawful means required for the tort of inducing breach of contract. They argue that the statement was not binding on the chambers judge as it was *obiter*, and was not concurred with by the two other members of the division. They argue that *Pepsi-Cola* does not prevent third parties who are impacted by picketing from relying on economic torts. The appellants also cite *Great Canadian Railtour Company Ltd. v. Teamsters Local Union No. 31*, 2012 BCCA 238 in support of their legal interpretation of Justice Donald's comments in *Prince Rupert*.

[26] Alternatively, the appellants argue that even if an "unlawful act" is a required element of the tort of inducing breach of contract, the chambers judge erred in failing to conclude that the respondents' actions constituted an "unlawful act". They argue that picketing an innocent third party can be tortious. The appellants argue that their appeal is of significance to the action and the practice.

[27] With regard to mootness, the appellants argue that there is an exception to the mootness doctrine for disputes of a very short duration that would otherwise escape appellate review, such as labour disputes. The appellants argue that this case raises an important legal issue with general application that may also have a practical effect on the parties' rights in the future. The appellants argue that the

question raised here is whether, in circumstances of secondary picketing, an independent unlawful act is a required element of the tort of inducing breach of contract. This is of particular importance to the parties as they operate under the federal labour regime and the *Canada Labour Code*, R.S.C. 1985, c. L-2, unlike most provincial labour codes, does not have provisions dealing with secondary picketing. Leaving that question aside, they state that the law in this area is unsettled.

**Respondents**

[28] The respondents note that in *Verchere v. Greenpeace Canada*, 2004 BCCA 242, this Court confirmed that use of "unlawful means" is an element of the tort of inducing breach of contract. The respondents argue that the question of "unlawful means" was not raised before the Court in *Super-Save*, which did not involve a labour dispute. They point out that *Verchere* was decided after *Super-Save* and has not been overturned. The respondents also argue that the "unlawful" requirement is consistent with and necessary to give effect to the Supreme Court of Canada's ruling in *Pepsi Cola* that all picketing is *prima facie* legal. They note that picketing necessarily involves some economic disruption to third parties, and so without an "unlawful means" requirement almost all picketing would be tortious. The respondents also argue that the appellants are not innocent third parties, but rather entities that are related to Seaspan. Further, they submit that even if "unlawful means" is not generally required for the tort of inducing breach of contract, it should be required in the context of picketing. The respondents argue that the chambers judge's reliance on *obiter* statements of Justice Donald does not matter, as the statements were legally correct.

[29] On the appellants' argument that the respondents did use "unlawful means" in picketing, the respondents claim that this ignores the chambers judge's finding of fact that the appellants are not innocent third parties.

## Analysis

### Leave to Appeal is Necessary

[30] Under s. 13(2)(a) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*], an appeal may not be brought to the Court from a limited appeal order, unless leave to appeal is granted by a justice. “Limited appeal orders” are defined in Rule 11 of the *Court of Appeal Rules*. Rule 11(a)(v) provides that an order granting or refusing relief under Part 10 [Property and Injunctions] of the *Supreme Court Civil Rules* is a limited appeal order. This Court has previously held that leave is required to appeal an interlocutory injunction: *Gateway Casinos LP v. B.C. Government and Service Employees’ Union*, 2007 BCCA 465.

### Leave to Appeal and Mootness Analysis

[31] The parties agree, and I accept, that this appeal is moot. The underlying dispute between Seaspan and the Guild is settled and the picketing is at an end. The *Borowski* factors are therefore relevant to the question of whether this Court should grant leave to appeal. The first *Borowski* factor is not engaged. There remains an adequate adversarial context. Counsel for the Guild remains actively involved to oppose the application for leave (although not on the mootness issue) and has an interest in opposing the appellants’ arguments on the two main grounds of appeal. The third *Borowski* factor is not an issue here. Accordingly, the second *Borowski* factor, whether judicial economy would be advanced by hearing the case, is a key consideration in determining whether it is in the interests of justice for this Court to grant leave to appeal on a moot issue.

[32] The appellants submit that this case falls in the category of those cases which, although moot, are of a recurring nature but brief duration. I acknowledge that the issue in this case falls within the category of labour disputes that can be evasive of review, as acknowledged in *Borowski* at 360–361. However, I would adopt the observations of the Court in *Telus Communications Inc. v. Telecommunications Workers Union*, 2006 ABCA 397 at paras. 3–4. The Court in *Telus* acknowledged

that courts have considered moot labour disputes on the basis that such disputes are generally brief and thus prone to elude appellate review. However, it noted that:

> [4] Not all labour cases fall within this rubric. The exercise of discretion in the labour context rests primarily on one factor; whether an important question of broad interest can be said to arise in the circumstances. …
>
> [Emphasis added.]

[33] In *Telus*, the Court quashed an appeal of a chambers judge's order applying *Pepsi-Cola* to picketing on the basis of mootness. In doing so, the Court stated:

> [8] This issue rests entirely on the discretionary application of well-established legal principles to facts found by the chambers judge, and cannot be said to have broader application beyond the specific controversy, long since laid to rest. The discretion exercised by the chambers judge turned on those findings. …

[34] I am of the view that the circumstances of this case do not clearly raise an important question of broad interest of either general application or particular interest for the parties. It is not in the interests of justice to grant leave to appeal, given the appeal's lack of significance to the practice and level of merit. I arrive at this conclusion for two reasons. First, the law in this area is generally well settled. Second, the appellants are asking this Court to consider a different case than the case they presented in the court below, such that the issues that they propose on appeal are hypothetical. The question of whether injunctive relief should be granted under the principles in *Pepsi-Cola* is highly contextual and fact dependant. By advancing the appeal on a different foundation from that relied on below, the appellants are asking this Court to reconsider an exercise of discretion which was based on a different factual and legal context. That is not the role of this Court.

***Significance to the Practice***

[35] An appeal is unlikely to be of significance to the practice if the area of law is well settled: *Re Canadian Petcetera Limited Partnership*, 2009 BCCA 255 at para. 19 (Chambers). This analysis overlaps the question of whether the court's decision will have some practical effect on the rights of the parties, under the second *Borowski* factor.

[36] The proper approach to injunction applications concerning secondary picketing is well settled. As noted in *Telus*, and by this Court in *Prince Rupert* and *Great Canadian Railtour*, the principles to be applied when considering when secondary picketing may be conducted legally are set out in *Pepsi-Cola*. The Court adopted the "wrongful action" approach as it allows for a proper balance between traditional common law rights and *Charter* values: *Pepsi-Cola* at para. 74. Under that approach, secondary picketing is legal, absent tortious or criminal conduct. At paras. 103–107, the Court noted that this approach will capture most of the situations which are liable to take place in a labour dispute. It also stressed the need for flexibility in order to allow the common law to develop sensitively and maintain an appropriate balance between the need to preserve third party interests and to protect *Charter* rights. In *Great Canadian Railtour*, this Court held that the picketing at issue does not have to involve the commission of a tort. It emphasized the need for flexibility in allowing courts to fashion appropriate remedies responsive to particular circumstances.

[37] As the Court noted in *Telus*, these cases concern the discretionary application of well established legal principles to facts as found by a judge in chambers. While the law in this area is well established, the difficulty in each case arises from the application of the principles to the particular circumstances. The application of these principles is always an exercise of discretion.

[38] The appellants concede that the principles to be applied are well established. However, they submit that the Court should hear this appeal in order to resolve uncertainty in the law arising from Justice Donald's comments in *Prince Rupert* and the chambers judge's reliance on that decision. Further, they argue that the question of whether an independent wrongful act is a required element of the tort of inducing breach of contract is an unsettled issue of law in the secondary picketing context. In making this argument, they emphasize the Court's statement in *Pepsi-Cola* that rights arising out of contracts or business relationships receive protection under the "wrongful action" approach through the tort of inducing breach of contract.

[39] It is my view that neither of these submissions is persuasive. With respect to the first argument, there is no question that the comments of Justice Donald relied on by the chambers judge were *obiter*. This was noted in *Great Canadian Railtour*, where the Court also emphasized that an injunction may be granted where the wrongful action alleged is neither tortious nor criminal in and of itself. It is clear from the majority decision in *Prince Rupert* that the injunction application in that case failed because there was no evidence of a breach of contract. Accordingly, the statements of Justice Donald regarding the elements of the tort do not have the force of binding authority and no appeal is needed to clarify that issue.

[40] The appellants' second argument has more merit. There may be a need to clarify how to apply *Pepsi-Cola* to a claim based on inducing breach of contract in a situation of secondary picketing and, specifically, whether an unlawful or wrongful act is an element of this tort. However, I would also note that there are statements in *Pepsi-Cola* that support the view expressed by Justice Donald in *Prince Rupert*. At paras. 111–112, the Court stated that an applicant should not be allowed to maintain injunction proceedings "where it has merely been the target of peaceful secondary picketing". The Court also recognized that some economic harm is anticipated even to "innocent third parties" as a necessary cost of resolving industrial conflict: at para. 45. Further, as I will explain in considering the merits factor, the discrepancy between the appellants' arguments before the chambers judge and on appeal mean that this issue is not properly raised on appeal.

***Merit***

[41] On merit, the test is "[w]hether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court": *A.L.J. v. S.J.M.* (1994), 46 B.C.A.C. 158 at para. 10 (C.A. Chambers). There is some overlap between this test and the *Borowski* criterion that the appellant must raise an issue of public importance where a resolution is in the public interest. However, on a leave to appeal application, the bar is usually "relatively low": *Bartram v. Glaxosmithkline Inc*., 2011 BCCA 539 at para. 16 (Chambers).

[42] As I have noted, there remains a possible issue regarding the application of the principles in *Pepsi-Cola* to a claim that picketers have committed the tort of inducing breach of contract. However, that issue does not clearly arise here for two related reasons. First, the case presented in the court below was quite different from the case the appellants now wish to argue. Second, the chambers judge did not, nor did he need to, make the findings of fact that would be required to properly consider this issue. Any decision on an application for an injunction involving picketing in the labour context is context specific and depends on the findings and claims advanced before the chambers judge. The appellants now seek to advance arguments on appeal that would make the decision of this Court abstract or hypothetical.

[43] In the court below, the appellants sought the injunction to restrain picketing at both the Pemberton and Victory Way sites. The applications were based on the appellants' notices of civil claim, which alleged that the actions of the Guild defendants were wrongful because the predominant purpose of the picketing was to interfere with the contractual or economic interests of the appellants. The particular unlawful acts alleged included: conspiring with each other to injure the appellants in their business, contractual or economic relations; unlawfully preventing or interfering with the appellants' employees, agents, customers, suppliers and others conducting business with the appellants, or causing the appellants' loss, damage or expense; unlawfully interfering with the appellants' contractual or economic interests; inducing breaches of contracts between the appellants and their employees, contractors and others; and inducing, supporting, encouraging, condoning, procuring the commission of particularized unlawful acts and breaches.

[44] On appeal, the appellants do not contest the chambers judge's dismissal of their application with respect to the picketing at the Pemberton site. Instead, they say that the judge erred in dismissing the application with respect to the Victory Way site. They do not point to findings of fact made by the judge that distinguish the two sites or why the rulings should be different for each site. It may be that the appellants now concede that the picketing at the Pemberton site was primary, not secondary, or it may be that they are of the view that it was clear that the actions of

the picketers at the Pemberton site were not tortious. However, no concession was made below and the chambers judge was simply asked to conclude that the applicants had met the onus of establishing a *prima facie* case of tortious acts based on what occurred at both sites.

[45] Second, in the court below, the appellants argued in their notices of civil claim that the respondents unlawfully interfered with the "business, contractual or economic relations" of the appellants and others. The appellants now direct their arguments to the elements of the tort of inducing breach of contract. They say that this Court should accept the elements of the tort of inducing breach of contract as set out in *Super-Save*, a case that did not involve injunctive relief in the context of a labour dispute. They argue that the subsequent decision in *Verchere* should be distinguished on the basis that it was about the tort of "interference with contractual relations", not inducing breach of contract. I would note that the Court in *Verchere* was clear that the same cause of action is "variously called" inducing breach of contract and interfering with contractual relations: at para. 28. In addition, the appellants set out the legal basis of their injunction claim as "interference" with their contractual interests, or actions which "interfere" with the ability of customers, suppliers and other affiliated third parties to fulfil their contractual obligations. In other words, they now wish to limit the basis for their argument in a way that is contrary to the claims they made in the court below.

[46] The appellants are attempting to advance a new, somewhat hypothetical, case on appeal. This Court does not have the benefit of the reasoning of the chambers judge on the issues the appellants now wish to argue. Further, the chambers judge was not asked to make findings of fact that would likely have impacted the issues the appellants now raise. Notably, he did not have to decide whether the picketing at each site was primary or secondary. Additionally, he did not have to decide whether the appellants are "innocent third parties", which would have been an important contextual finding required for his exercise of discretion. The appellants adopted something of a "kitchen sink" approach in the court below. The appellants asked the judge to consider all of the picketing activity at both sites in the

context of allegations of interference with economic relations, conspiracy to injure and inducing breach of contract. The appellants did not ask the chambers judge to examine the elements of individual economic torts separately, but now ask this Court to do so in the absence of necessary findings by the court below.



***Significance to the Action***

[47] This point may include the significance of the appeal to the parties (see *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCCA 419 at para. 12 (Chambers)) but other caselaw distinguishes between significance to the parties and significance to the action itself (see *Columbia National Investments Ltd. v. Abbotsford (City)*, 2007 BCCA 368 at para. 24 (Chambers)).

[48] As the underlying dispute has been settled, the appeal has no significance to the action. In other cases, this Court has taken into account the fact that picketing or labour protests have ceased and agreements have been reached between the parties in refusing leave to appeal: *Carrier Lumber Ltd. v. Prince George Truckers Assn.*, 2005 BCCA 286 at para. 6 (Chambers). In *Canada Post Corp. v. Canadian Union of Postal Workers*, [1993] B.C.J. No. 3065 (C.A. Chambers), Justice Rowles dealt with an application for leave to appeal a province-wide injunction order made against alleged illegal picketing by a union. A new collective agreement had been signed before the hearing of the appeal, and the strike had ended. Justice Rowles dismissed the application for leave, highlighting relevant factors including the absence of a live controversy and the uniqueness of the situation before the Court. It is my view that the present case is similar in that the dispute has settled and the underlying circumstances are unlikely to be repeated.

***Whether the Appeal will Hinder the Progress of the Action***

[49] As discussed above, this appeal is moot, and so this factor is not engaged.

**Disposition**

[50] The fact that this appeal is moot, and the extent to which a number of factors under the *Borowski* analysis are engaged, are relevant to the question of whether

leave to appeal should be granted. I am of the view that this appeal does not raise a clear question of broad interest. This area of law is settled, the appellants have not put forward a case of sufficient merit to warrant scrutiny by a division of the Court, and the appeal is not of significance to the action.

[51] The application for leave to appeal is dismissed.

"The Honourable Mr. Justice Butler"