RECENT DEVELOPMENTS IN CANADIAN LAW: LABOUR LAW

*Michael MacNeil**

I. INTRODUCTION

Canadian workers are currently facing a set of circumstances that have the potential to alter radically their material and political circumstances. These include the implementation of the *Free Trade Agreement* with the United States, the increasing mobility of capital caused by advances in transportation and communications technology (and made desirable from the perspective of multinational companies by the lower costs of production in developing countries), the increasing concern over the size of government deficits with its effect on the government's social and economic policies, the continuation of a long period of relatively high unemployment, the trend toward privatization of many activities which had been previously carried out by government, and changes to the law by which the rights of workers and their employers are defined.

There have been many changes, both major and minor, to the law which defines the rights of workers. These changes include: the increased willingness of governments in the past decade to resort to *ad hoc* back-to-work legislation in apparent contradiction of the general labour legislation which gives workers the right to strike, the use of a variety of means to curtail the effectiveness of strikes (especially by the designation of essential workers in the public sector), the implementation of wage control legislation, the removing of a variety of rights which had been previously granted to labour, and the imposition of draconian penalties for illegal strikes.[1] The legal issue which is now receiving most attention by many observers of the labour scene, however, is the introduction of the *Canadian Charter of Rights and Freedoms*[2] in 1982, and the subsequent judicial decisions, especially of the Supreme Court of Canada, which have begun to shape the constitutional contours of worker rights in the *Charter* era.

---

* Department of Law, Carleton University.

[1] For an excellent account of these developments, *see* L. Panitch & D. Swartz, THE ASSAULT ON TRADE UNION FREEDOMS (Toronto: Garamond Press, 1988). *See also* H.J. Glasbeek, *Labour Relations Policy and Law as Mechanisms of Adjustment* (1987) 25 OSGOODE HALL L.J. 179.

[2] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

In the last article which I wrote on recent developments in labour law for this journal,[3] I focussed on the way in which decision-making power is allocated among the various actors in the industrial relations system, including employees, unions, employers, labour boards, arbitrators, courts and legislatures. This is again a central focus of this study. Although I am using this approach in my review of recent developments of labour law, I am aware that there are other approaches, such as investigating the political, economic, social and cultural forces that determine both the substance and process by which law governs (or fails to govern) employment relationships. Another major issue is the breadth of topics that can be covered. It is now well recognized that collective bargaining is only a sub-system of the general regulation of employment relationships. The range of statutory provisions dealing with discrimination, workers' compensation, pensions, unemployment insurance, occupational health and safety, employment standards, and the common law of employment are no less important. Nevertheless, it is the collective bargaining system that forms the heart of this review, if only out of a desire to keep it to manageable proportions. Nevertheless, I have not constrained myself from looking at developments in other areas, especially in assessing the impact of the *Charter* on labour.

In an article of this sort, there are too many jurisdictions, cases and statutes for a comprehensive review of developments to be undertaken. Hence, I have been selective both with respect to the issues covered and to the decisions or statutes discussed. In addition to assessing the impact of the *Charter* on labour, there is a discussion of appropriate forums for resolving collective bargaining disputes, a review of Supreme Court of Canada decisions on federalism issues in labour law, an analysis of developments in judicial review and a consideration of the role of courts in controlling picketing and illegal strikes through injunctions and contempt powers.

II. Labour and the Charter

A. *Overview*

In analysing the impact of the *Charter* on workers, there are a number of matters that must be considered. The first question is whether the law makes any difference at all to the material circumstances of workers. It can be argued that the factors identified in the first paragraph of this article are much more important in determining the material circumstances of workers, and that any rights given or taken away as the result of constitutional litigation are ultimately of little consequence. Harry Arthurs argues that it not clear that law,

---

[3] M. MacNeil, *Recent Developments in Canadian law: Labour Law* (1986) 18 Ottawa L. Rev. 83.

especially judge-made law, has the power to regulate labour relations. The legal system has not developed a sufficiently subtle mechanism of control to enable it to regulate the complex socio-political phenomenon of collective action.[4]

Another view is that the role of law in labour relations is to legitimate the structures of capitalism in the late twentieth century. Private property and private contract are the dominant intellectual and ideological constructs of the collective bargaining institution. The legal system is the principal means of propagating the ideology of absolute private property and of freedom of contract between juridically equal people.[5] Workers are given a set of rights which makes the existence of class structures palatable, but which ultimately serves the interests of capital by stabilizing production. Thus, the grant of the right to strike provides a mechanism whereby workers can vent legally their discontent, and be made to feel that they exercise some degree of control over the process by which vital decisions are made about their workplace. This right to strike, however, is limited by the many conditions concerning timing, notification, the targets of picketing and so on, such that the strike is ultimately controlled and channelled to ensure that its radical potential is never fully realized.

A variant on this line of argument posits the central role of law as shaping the ultimate strategies and ideology of the labour movement. William Forbath's historical study of the impact of law on the development of the American labour movement claims that judicial review and administration of labour legislation and harsh suppression of industrial conflict helped make broad legal reforms seem futile, and helped channel efforts away from broad inclusive unionism toward a narrower, more cautious form of unionism.[6] Moreover, the constant effort to challenge court-made labour law led labour to embrace "a law-inspired, laissez-faire rights" discourse that helped displace a more radical vocabulary of reform.[7]

Another view claims that the rights which have been accorded to workers are the result of a continuing struggle. These rights, including the system of certification, protection from unfair labour practices and the imposition of a duty to bargain on employers, are concessions that have been wrested from capital and are worth fighting to retain. From this perspective, the *Charter* can be seen as providing a potential source of empowerment for workers, who can turn to courts to ensure that legislatures do not encroach on fundamental guarantees of the

---

[4] H.W. Arthurs, *The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter* (1988) 13:2 QUEEN'S L.J. 17 at 21-23.

[5] Glasbeek, *supra*, note 1.

[6] W.E. Forbath, *The Shaping of the American Labor Movement* (1989) 102 HARV. L. REV. 1109.

[7] *Ibid.* at 1116.

right to collective bargaining and its central features such as the right to strike, picket, and choose freely bargaining representatives. There is, however, a recognition that the enhancement of workers' rights cannot be achieved solely through a strategy of *Charter* litigation. Such litigation can be, at best, merely a part of a much broader political strategy.

It is within these various perspectives that an attempt will be made to assess the impact of the *Charter* on workers. It is clear that such an assessment must involve more than a mere analysis of the results of particular cases. Rather one must also consider the likely responses to these decisions given the economic and political environment to which the balance of power between worker, union, employer and government is subject. Political power, the legitimating role of law, the crisis of capitalism, and ideology are all significant factors that serve to determine the impact of the *Charter* on labour.

B. The Supreme Court Decisions

There is a tendency in considering the legal position of workers under the *Charter* to focus solely on collective bargaining. While it is true that collective bargaining plays a major role in Canada in determining the welfare of workers, it is also true that many rights of workers have their source in legislative guarantees, and that many benefits conferred on workers are not directly related to collective bargaining. In assessing the impact of the *Charter* on labour, it is important to focus not only on collective bargaining, but on the effect of the *Charter* on a wide range of workplace-related issues.

The Supreme Court of Canada has already dealt with a significant number of cases that are of direct concern to workers and there are a number of cases pending which may have an impact on the employment relationship. Three cases address the question of whether the *Charter* places any limitations on the power of governments to limit the right to strike.[8] Three cases deal with the extent to which picketing by legally striking union members can be restricted without violating constitutionally guaranteed rights.[9] The Court has upheld the right of

---

[8] *Ref. Re Public Service Employees Relations Act (Alta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [hereinafter *Alberta Reference* cited to S.C.R.]; *Public Service Alliance of Canada* v. *Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249 [hereinafter *P.S.A.C.* v. *Canada* cited to S.C.R.]; *Saskatchewan* v. *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 & 955*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277 [hereinafter *Saskatchewan* v. *R.W.D.S.U.* cited to S.C.R.]. These cases will be referred to collectively as the right-to-strike trilogy.

[9] *Retail, Wholesale and Dept Store Union, Local 580* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.]; *British Columbia Gov't Employees' Union* v. *A.G. British Columbia*,[1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 [hereinafter *B.C.G.E.U.* cited to S.C.R.]; *Newfoundland Association of Public Employees* v. *A.G. Newfoundland*, [1988] 2 S.C.R. 204, 53 D.L.R. (4th) 39 [hereinafter *N.A.P.E.* cited to S.C.R.].

laid-off workers to collect unemployment insurance benefits when the layoff was caused by a striking union of which they were members and to which they contributed union dues that helped to finance the strike pay of the workers.[10] The Court has affirmed the right of governments to ensure a common day of rest for workers by prohibiting retail stores from opening on Sundays, even though it may discriminate against some individual employers on the basis of their religious beliefs.[11] The Court has affirmed the constitutionality of workers' compensation systems which prohibit injured workers from pursuing a civil action in court against their negligent employer.[12] Finally, the Court has stated that an adjudicator enforcing the prohibition on unjust dismissal in the *Canada Labour Code*, has the authority to provide a remedy for an unjustly dismissed employee which infringes on the freedom of expression of the employer.[13]

There are also many issues which have been addressed by lower courts, some of which may ultimately be decided by the Supreme Court of Canada. These include the right of employers, with government sanction, to retire mandatorily employees;[14] the rights of civil servants to engage in political activities;[15] many facets of the collective bargaining system now in place, such as the exclusive representation rights awarded to unions upon certification;[16] union security provisions[17] and the rights of unions to spend union dues on non-collective bar-

---

[10] *Hills* v. *A.G. Canada*, [1988] 1 S.C.R. 513, 88 C.L.L.C. 14,011 [hereinafter *Hills* cited to S.C.R.].

[11] *Edwards Books and Art Ltd* v. *R.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 [hereinafter *Edwards Books* cited to S.C.R.].

[12] *Ref. Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 1 S.C.R. 922.

[13] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, 93 N.R. 183 [hereinafter *Slaight Communications* cited to S.C.R.].

[14] *Harrison* v. *Univ. of British Columbia*, [1988] 2 W.W.R. 688, 21 B.C.L.R. (2d) 145 (C.A.) [hereinafter *Harrison* cited to W.W.R.]; *Douglas/Kwantlen Faculty Association* v. *Douglas College*,[1988] 2 W.W.R. 718, 21 B.C.L.R. (2d) 175 (C.A.) [hereinafter *Douglas College* cited to W.W.R.]; *Stoffman* v. *Vancouver General Hospital*, [1988] 2 W.W.R. 708, 21 B.C.L.R. (2d) 165 (C.A.) [hereinafter *Stoffman*]; *McKinney* v. *Univ. of Guelph* (1987), 63 O.R. (2d) 1, 46 D.L.R. (4th) 193 (C.A.) [hereinafter *McKinney* cited to O.R.].

[15] *Fraser* v. *A.G. Nova Scotia* (1986), 74 N.S.R. (2d) 91, 30 D.L.R. (4th) 340 (S.C.T.D.) [hereinafter *Fraser* cited to N.S.R.]; *Ontario Public Service Employee's Union* v. *A.G. Ontario* (1988), 65 O.R. (2d) 689, 52 D.L.R. (4th) 701 (H.C.) [hereinafter *Ontario Public Service Employees' Union* cited to O.R.]; *Osborne* v. *R.* (1988), 52 D.L.R. (4th) 241, [1988] 3 F.C. 219 (A.D.) [hereinafter *Osborne* cited to D.L.R.].

[16] *Arlington Crane Service Ltd* v. *Ontario (Ministry of Labour)* (1988), 67 O.R. (2d) 225, 89 C.L.L.C. 14, 109 (H.C.).

[17] *Re Bhindi and B.C. Projectionists' Union, Local 348* (1986), 29 D.L.R. (4th) 47, 4 B.C.L.R. (2d) 145 [hereinafter *Bhindi* cited to D.L.R.]; *Saskatchewan Joint Bd, Retail, Wholesale and Dept Store Union* v. *Remai Invt Co. Ltd* (1987), 87 C.L.L.C. 16,052 (Sask. Lab. Rel. Bd).

gaining purposes;[18] the right of government to exclude particular groups of employees from collective bargaining;[19] discriminatory provisions of the *Unemployment Insurance Act* which deny benefits to spouses and close family members of employers,[20] to those over the age of sixty-five,[21] and which grant child care benefits to adopting fathers but not to natural biological fathers.[22]

We will look more closely at decisions rendered by the Supreme Court of Canada before considering generally the impact of the *Charter* on workers.

1. *Right to Strike*

The Supreme Court of Canada's decision that the restriction or prohibition of strikes does not violate the guarantee of freedom of association in subsection 2(d) of the *Charter* appears to be a major blow to trade unions. Given the increased tendency in recent years for legislatures to limit strikes,[23] unions had looked to the *Charter* as a source of control on the power of the state to intervene in the collective bargaining process.

The Court dealt with three different cases challenging limits on the right to strike. In the *Alberta Reference*[24] the unions were challenging the constitutional validity of several provincial statutes which prohibited striking by various groups of public employees such as police officers, firefighters, health care workers and some members of the provincial civil service. They also challenged the validity of provisions which limited the areas subject to collective bargaining and which imposed a particular form of arbitration on disputes involving essential employees. In *Saskatchewan* v. *R.W.D.S.U.*[25] the union was challenging an *ad hoc* piece of legislation which prohibited striking or lock-outs arising out of a dispute between dairy owners and their

---

[18] *Lavigne* v. *Ontario Public Service Employees Union* (1989), 67 O.R. (2d) 536, 31 O.A.C. 40 (C.A.) [hereinafter *Lavigne* cited to O.R.].

[19] *Hutton* v. *A.G. Ontario* (1987), 62 O.R. (2d) 676, 46 D.L.R. (4th) 112 (H.C.); *Cuddy Chicks Ltd* v. *Ontario Lab. Rel. Bd* (1988), 66 O.R. (2d) 284, 88 C.L.L.C. 14,053 (Div. Ct) [hereinafter *Cuddy Chicks* cited to O.R.].

[20] *Druken* v. *Canadian Employment and Immigration Comm'n* (1988), 88 C.L.L.C. 17,024, 8 C.H.R.R. D/4379 (Can. Human Rights Trib.) [hereinafter *Druken*]. This case is not strictly a *Charter* case, but rather, was decided under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. However, it involves principles similar to those in s. 15 of the *Charter*.

[21] *Tetreault-Gadoury* v. *Employment and Immigration Comm'n of Canada* (1988), [1989] 2 F.C. 245. 88 C.L.L.C. 14,050 (A.D.) [hereinafter *Tetreault-Gadoury*].

[22] *Schachter* v. *Canada* [1988] 3 F.C. 515, 18 F.T.R. 199 (T.D.) [hereinafter *Schachter*].

[23] *See* Panitch & Swartz, *supra*, note 1.

[24] *Supra*, note 8.

[25] *Ibid.*

employees. In *P.S.A.C.* v. *Canada*[26] the union was challenging federal wage restraint legislation which denied not only the right to strike but also the right to bargain collectively for a specified number of years.

In each, the leading opinion was given by LeDain J., joined by LaForest and Beetz JJ., with a concurring opinion by McIntyre J. Partially or wholly dissenting opinions were given by Dickson C.J.C. and Wilson J. LeDain's opinion was extremely brief and adopted the argument that freedom of association does not include the freedom to pursue the goals of the association. He indicated that to guarantee a right to strike for unions would also entail the rights of other groups to engage in their preferred activities and that this would put too great a fetter on the regulatory role of the state. He also adhered to a belief in the essentially individualistic nature of the guaranteed *Charter* rights. Freedom of association was regarded as basically an instrumental right, important not on its own, but as a means of enabling the exercise of other fundamental freedoms. These other freedoms were found to be exercised primarily by individuals. He further claimed that the right to bargain collectively or strike were the creation of legislatures and hence were not fundamental. These rights were the result of a balance of interests in an area which, it is claimed, the courts have no special expertise. This reflects the pluralistic argument more fully developed by McIntyre J.

McIntyre J. gave a much fuller explanation of his approach to freedom of association. It is noteworthy that he gave considerable attention to American jurisprudence and academic writing, although the United States constitution has no explicit guarantee of freedom of association and ignores completely the various international instruments which explicitly guarantee freedom of association.

McIntyre J. took the position that freedom of association, at its most expansive, permitted individuals to do those acts in association which they were legally permitted to do alone. He used the example of an individual permitted to play golf alone. In such a case, the state could not legislatively interfere with the right to golf in a twosome or a foursome without violating the individual's freedom of association. He concluded that trade unions are not guaranteed a right to strike, because individuals who refused to work would not be acting legally — they would be in breach of their individual contracts of employment. Alternatively, the act of striking could be viewed as having no individual equivalent, and hence not be protected.

McIntyre J. attempted to justify the correctness of his opinion on a number of bases. First, he claimed that the rights guaranteed by the *Charter* were essentially individualistic in nature and that freedom of association should not be regarded differently. Second, he asserted that collective bargaining was concerned primarily with economic issues, but that the *Charter* was designed to protect political, not economic

---

[26] *Ibid.*

rights. Third, he adopted a conception of political pluralism, claiming that the appropriate role of the state was to act as a neutral arbitrator between the competing and relatively equal groups of employers and trade unions.

Assessing the consequences of these decisions on collective bargaining and labour relations is difficult. The decisions certainly affirmed the right of legislatures to restrict or abolish the right to strike. The fact that the right to strike was held not to be fundamental may promote a political climate that encourages even more restrictions on the right to strike.[27]

There are several other issues that have not been resolved definitively. First, it may still be possible that if unions strike for explicitly political purposes, this may come within the scope of freedom of expression or freedom of association. If so, the courts would then have to undertake a section 1 analysis. Second, it is not clear whether collective bargaining, as opposed to the right to strike, may be protected by the *Charter*. While LeDain J.'s opinion failed to differentiate between striking and collective bargaining as trade union activities, neither of which were protected, McIntyre J. suggested that the two could be separated with the former regarded as a right which is not fundamental and the latter possibly being subject to constitutional protection. In *P.S.A.C.* v. *Canada* McIntyre J. held that the particular restrictions on collective bargaining resulting from the federal wage restraint program did not violate subsection 2(d), but that more extensive restrictions possibly could do so. With both Dickson C.J.C. and Wilson J. agreeing that freedom of association applied to collective bargaining, this meant that there was a three to three split on the issue, thus leaving the matter still to be resolved.

2. *Picketing*

The Supreme Court of Canada has rendered three significant decisions on the extent of constitutional protection for picketing. In *Dolphin Delivery*[28] the Court rejected arguments that prohibitions on secondary picketing constituted an infringement on the freedom of expression of the picketers. The Court was willing to concede that picketing was a form of expression, but held that a common law tort applied by a court to a dispute between two private parties did not amount to governmental action, and hence was not subject to *Charter* review. Even if awarding the injunction had been characterized as governmental action, it was held that the restrictions on freedom of expression arising from the ban on secondary picketing were reasonable and hence justified under section 1 of the *Charter*. The basis for this

---

[27] This is discussed more fully *infra* at 505 *et seq*.

[28] *Supra*, note 9.

conclusion was that the state was justified in taking steps to protect the economic interests of parties who could be affected by a labour dispute when those parties were not themselves involved in the dispute. Thus, the economic interests of an employer could take precedence over the freedom of expression of individuals, at least where that freedom was being exercised by workers in an attempt to increase their bargaining leverage.

In *B.C.G.E.U.*[29] it was held that the Court was entitled, on its own motion, using its criminal contempt powers, to grant an *ex parte* injunction to prohibit picketing around the court house by legally striking court workers. Although this amounted to governmental action which interfered with the freedom of expression of the workers, assuring unimpeded access to the courts was considered a sufficiently important objective to justify limiting the freedom. In other words, courts were entitled to take whatever measures necessary to ensure that the public had absolute, free and unrestricted access to the courts.

It is interesting to note that McIntyre J., held in *Dolphin Delivery* that picketing involved a form of expression, but he also held that this particular picketing did not constitute a form of constitutionally protected expression. In his view, picketing which had an illegal purpose could not be regarded as a form of expression. Hence, there was no need to carry out a section 1 analysis.

In a similar case from Newfoundland, the Court not only held that there was a power in courts to restrain such picketing, but also held that any union disciplinary action taken against a member who crossed such a picket line was unlawful and improper.[30] This was so even though the union had the right to strike, and those workers who refused to report to work would not appear to be in contempt of court.

The overall result of these decisions appears to have affirmed the *status quo*. Courts have retained extensive powers to intervene in labour disputes in order to limit the scope of union action. The result has been to reduce the effectiveness of unions' striking action. The recognition of picketing as a form of expression does permit constitutional review of restrictions on that picketing when the restriction is based on statutory or judicial contempt powers as opposed to common law torts. However, it appears that courts do not perceive picketing to be a very important form of expression in comparison to its potential economic impact if consumers and other employees heed the call of the picketers. Unions have failed to make any substantial gain through resort to *Charter* litigation and are vulnerable to the characterization of their activities as unimportant compared to the impact of the picketing on their targets. This may serve to legitimate and invite further restrictions on picketing by legislatures.

---

[29] *Supra*, note 9

[30] *N.A.P.E.*, *supra*, note 9.

3. *Sunday Closing Legislation*

The Supreme Court of Canada has decided two cases involving challenges to provincial legislation which limited the rights of retailers to keep their businesses open on Sundays. In the first case, *R.* v. *Big M Drug Mart Ltd*,[31] the court struck down the Alberta *Lord's Day Act* on the ground that it involved an infringement of freedom of religion. The Court decided that the very purpose of the legislation was based on religious motivations, and therefore it could not be justified under section 1 of the *Charter*. In *Edwards Books*,[32] however, the Court decided that the Ontario *Retail Business Holidays Act* did not have a discriminatory purpose, but rather only a discriminatory impact. The Court carried out an analysis under section 1 of the *Charter* which led to the conclusion that the statutory prohibitions on Sunday openings were constitutionally valid. In arriving at this conclusion, the Court characterized the legitimate purpose of the statute as ensuring a common day of rest for workers so that they would be able to have opportunities to experience the fulfillment offered by engaging in leisure activities with family and friends. This was a pressing and substantial concern which the majority of the Court believed was both rational and minimally disruptive of the rights of individuals who were consequently affected by the denial of the opportunity to open their businesses on a Sunday.

This decision emphasizes the latitude that the Court is willing to give to legislatures in protecting the interests of workers. Nevertheless, the ultimate impact will depend on what legislatures do with this authority. The pressure on governments to allow retail businesses to open on Sunday may be so great that they will succumb to the demands of retailers and remove this traditional protection for workers. There is evidence that this is exactly what is happening in a number of provinces.[33]

4. *Unemployment Insurance Benefits for Striking Workers*

The *Unemployment Insurance Act* excludes strikers and locked out workers from claiming unemployment insurance benefits.[34] However, workers who are unemployed as the result of a work stoppage can claim a benefit if they can prove that they are not participating in, financing or directly interested in the labour dispute, and if they do

---

[31] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

[32] *Supra*, note 11.

[33] Ontario, for instance, has amended the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, *as am.* S.O. 1989, c. 3, to allow municipalities to permit retail businesses to open on Sundays.

[34] R.S.C. 1985, c. U-1, s. 31(1).

not belong to a class of workers some of whom are on strike.[35] The denial of benefits to striking workers is claimed to be based on concern for maintaining the neutrality of the state in labour disputes, and concern for fairness by not forcing an employer who pays unemployment insurance premiums to finance a strike against itself.

In *Hills*[36] the Supreme Court of Canada was required to interpret these provisions of the *Unemployment Insurance Act*. The applicant for unemployment insurance benefits was an office employee who was laid-off when the production employees commenced a strike. He was a member of a local of the United Steelworkers of America which also represented the production workers, albeit through a different local. His claim for unemployment insurance benefits was originally denied on the ground that he had contributed to the financing of the strike, because a portion of the dues paid to his local were forwarded to the union's head office where, in turn, a portion was paid into a strike fund from which the striking production workers drew strike pay. The Court engaged primarily in an exercise of statutory interpretation in order to come to the conclusion that this did not amount to financing of the strike by the laid-off applicant. However, the Court also relied on the concept of freedom of association as guaranteed by the *Charter* to reinforce its decision. Mme Justice L'Heureux-Dubé, writing for the majority, claimed that to interpret the provisions of the *Unemployment Insurance Act* in any other fashion would be to discourage workers in several different bargaining units at the same workplace from choosing to be represented by the same union. This would amount to a fetter on workers' freedom of association. In other words, the Court recognized that workers as a group and, by majority vote, should be free to choose their bargaining representatives without subtle pressures caused by discriminatory provisions of benefit conferral statutes such as the *Unemployment Insurance Act*.

From one perspective this decision appears to be a minor victory for labour. Workers who, up until this decision was rendered, would have been denied benefits are now entitled to them. Workers will not be penalized for choosing a particular bargaining representative who also happens to represent fellow employees in a different bargaining unit. However, a closer examination of the decision leaves doubts about the long-range efficacy of the decision for workers. In deciding that the applicant's payment of union dues, a portion of which ultimately was used to finance the strike which caused his layoff, did not constitute financing of the strike, Mme Justice L'Heureux-Dubé emphasized the bureaucratic nature of large trade unions and the lack of any evidence that the applicant had agreed voluntarily that any portion of his dues would be used for maintaining a strike fund. This view of

---

[35] S. 31(2).
[36] *Supra*, note 10.

view of the trade union as a large, impersonal, bureaucratic and potentially coercive organization may have long-range negative effects on trade unions in cases where there is a conflict between the rights of the union as an entity and the rights of individuals.

5. *Workers' Compensation and Limiting the Right to Sue*

The introduction of workers' compensation legislation in the early part of this century marked the end of a notorious judicial opposition to the rights of workers to be compensated for workplace injuries. The common law had established a number of significant barriers to successful litigation by workers, including such defences as the fellow servant rule which held that if a worker was injured due to the negligence of a fellow worker the employer would not be held vicariously liable; the defence of contributory negligence whereby if a worker was at all negligent in causing the accident by which he was injured, he was completely barred from recovering damages despite the negligence of the employer; and, finally, the defence of voluntary assumption of risk. The statutory scheme of workers' compensation provided workers with payments for injuries incurred in the course of employment without consideration of questions of fault or common law legal liability. These payments originally represented significantly less than the full amount of the loss suffered by the worker but, over the years, amendments to the schemes have led to greater compensation for losses. The scheme is financed by the imposition of a levy on all employers, the size of which varies with the level of injuries of the particular industry in which the employer is engaged. In return for obtaining the guarantee of payments, workers were required by statute to forego the right to take a civil action against employers, even though they may have been entitled to payment for the full amount of their loss.

A number of court actions were commenced since the coming into force of the equality provisions of the *Charter* that claimed that the denial of an insured worker's right to sue amounted to discrimination and unequal treatment. In a decision handed down on 24 April 1989, the Supreme Court of Canada rejected these arguments.[37] In a brief oral judgment, it held that the situation of workers and their dependents is in no way analogous to any of the categories under which discrimination is prohibited under section 15, and hence there is no violation of equality guarantees.

The result is that for workers' compensation statutes, the extensive statutory scheme continues to have effect. From the perspective of labour in general it can be argued that this outcome is beneficial. The danger of allowing workers to obtain an alternative remedy from the

---

[37] *Supra*, note 12.

courts is that it may eventually undermine the extensive statutory benefits that are currently provided. Employers may grudgingly pay workers' compensation premiums if they know that this is the full extent of their liability for workplace injuries. If they are also required to pay civil damage awards, employers will likely apply great political pressure on governments to reduce the burden of premiums which ultimately means reducing the general level of benefits that are available under the scheme.

6. *Remedial Authority of Adjudicators*

The true extent of rights granted by the legislature or the common law to workers is measured best in terms of the effectiveness of the remedies that are made available to workers when those rights have been breached. This is especially so when considering the types of protection that are offered to workers in terms of job security. The traditional common law viewpoint was that, unless the contract of employment explicitly indicated otherwise, employees did not really have any job security. An employer would be entitled to dismiss an employee at any time for cause and for any reason provided that the employer gave reasonable notice of the termination of employment, or payment of wages in lieu. Courts would never reinstate an employee who was wrongfully dismissed. Instead they would award damages depending primarily on the amount of wages that would have been earned during a period of reasonable notice.

This common law position has been modified in two important ways. Most employees who are covered by collective agreements will have the protection of provisions which prohibit an employer from dismissing an employee except for just cause. It is now commonly accepted that arbitrators have the jurisdiction to reinstate an employee where she or he believes that there has been a failure by the employer to demonstrate just cause. Reinstatement of the employee may be accompanied by the awarding of lost wages, or it may involve a lesser penalty for the dismissal.[38]

The second major development has been the creation of a variety of statutory limitations on employer rights to dismiss employees for particular reasons. These include unfair labour practice provisions of labour relations statutes, prohibitions on discrimination in human rights codes and prohibitions on retaliatory action by employers against employees who have exercised rights or performed duties under a variety of different statutes. The most comprehensive of these statutory

---

[38] It is interesting to note that this latter power is the result of legislative overruling of a decision of the S.C.C. *See, e.g., Labour Relations Act*, R.S.O. 1980, c. 228, s. 44(9) which overruled *Port Arthur Ship Building Co. Ltd* v. *Arthurs* (1968), [1969] S.C.R. 85, 70 D.L.R. (2d) 693.

protections is contained in section 61.5 of the *Canada Labour Code*,[39] which establishes a right of employees to be protected generally from unjust dismissal, even though not covered by a collective agreement.

The decision of the Supreme Court of Canada in *Slaight Communications*[40] deals with the remedial authority of an adjudicator who is authorized to determine whether an employee has been unjustly dismissed contrary to the *Canada Labour Code* and to provide an appropriate remedy. The adjudicator had concluded that the complainant had been unjustly dismissed and had ordered the payment of damages. As well, he had required the employer to provide a letter of reference on stated terms for the employee and to refuse to provide any other information about the employee other than what was contained in the letter of reference. The employer sought review of the decision on the ground that it violated its freedom of expression as guaranteed by subsection 2(b) of the *Charter*. The Court held that the order of the adjudicator did indeed involve an infringement of the employer's freedom of expression, but concluded that such infringement was justified under section 1 of the *Charter*.

In coming to that conclusion, the Court emphasized the unequal bargaining power that exists between employer and employee, and the desirability of allowing the legislature to attempt to ameliorate that imbalance of power, even when it results in the infringement of *Charter* rights. The right of the employer to express itself freely about the employee is no greater than the right of the employee to be protected from the potentially abusive power of the employer.

This decision reiterates the broad remedial authority that can be assigned legitimately to those charged with the enforcement of rights granted by statute to workers. It, like several other decisions, leaves discretion to the legislative and administrative branches of government in dealing with the inequalities of power between workers and employers. This means that although the *Charter* itself does not grant any substantive protections to workers, it will not be permitted to be used as an instrument of oppression against workers.

C. Lower Court Decisions

1. *Spending Union Funds and Union Security Clauses*

Canadian unions have often recognized that the promotion of workers' interests demands that they engage in activities in addition to the negotiation and administration of collective agreements. These activities may include education, lobbying, campaigning on behalf of particular causes or candidates, or making contributions to political

---

[39] R.S.C. 1985, c. L-2, *as am.* R.S.C. 1985 (1st Supp.), c. 9, ss. 15-16.
[40] *Supra*, note 13.

parties. One of the significant features of the system of industrial relations in Canada is that unions are given exclusive bargaining rights to represent employees in a defined bargaining unit. The wishes of the majority bind the minority. In addition, unions may negotiate union security clauses which either require that all workers covered by the collective agreement become or remain union members, or which require all persons to pay dues to the union, even if they do not wish to become union members. This development has been sanctioned in some jurisdictions by legislation which affirms the validity of these arrangements or which actually requires that collective agreements contain a form of union security provision if the union so requests it.[41]

There have been several attacks on the validity of union security clauses, and on some kinds of union expenditures over the objection of individuals represented by the union but who are not union members. The case that has received the greatest attention is *Lavigne*,[42] in which Lavigne, a community college teacher, financially supported by the National Citizens' Coalition, challenged the right of the union to spend its funds on a number of non-collective bargaining purposes, such as contributions to political parties, opposition to the construction of a domed stadium and support for the pro-abortion movement. The Court of Appeal referred to the trial decision of White J. which held that freedom of association included a right not to associate, and that the expenditure of union funds to which Lavigne was required to contribute against his wishes, amounted to a violation of Lavigne's freedom of association. He required the union to set up a means by which objecting workers could be reimbursed for any portion of their union dues which were used for such non-collective bargaining purposes. He held, however, that the union was justified in collecting and using dues for collective bargaining purposes, on the basis that benefits were being conferred on all members of the bargaining unit for which it was legitimate to require that they pay.

The Court of Appeal, however, decided that the union's decision concerning what it should do with its funds was a private matter that should not be subject to *Charter* scrutiny.[43] The failure of the government to take positive steps to control the actions of private parties which may violate constitutional rights is not a violation of constitutional rights.

The Court also held that freedom of association, even if it did include a right not to associate, had not been violated. The compelled

---

[41] *See, e.g., Labour Relations Act*, R.S.O. 1980, c. 228, ss. 43 and 46. This *Act* requires the inclusion in a collective agreement, at the union's request, of a clause requiring the employer to deduct union dues from all members at the bargaining unit, whether or not they are union members. This is commonly referred to as the Rand formula.

[42] *Supra*, note 18.

[43] *Ibid.* at 536.

payment did not curtail or interfere with any aspect of Lavigne's freedom of non-association. He was not forced to become a member of the union, participate in its activities, or join with others to achieve its aims. The compelled payment did not identify him personally with any of the political, social or ideological objectives which the union may financially support. Nor did it force him to adapt or conform to the views advocated by the union.

In addition to challenging the expenditure of union funds, several cases have challenged the validity of union security clauses which either require an employee to become a union member, or which require the employer to hire only union members.[44] Courts have been consistent in holding that to the extent that these clauses are the result of collective bargaining, they are within the private sphere and therefore not subject to *Charter* scrutiny. Their opinion is not changed by the fact that legislation may give explicit permission to unions and employers to include such terms in the collective agreement, or by the fact that the power of unions to enter into collective agreements containing such terms developed from the grant of exclusive bargaining rights through relevant labour relations statutes.

It is ironic that, in defending collective bargaining and union actions from *Charter* review, union lawyers have resorted to arguments which seek to characterize unions and collective bargaining as essentially private institutions. In effect, this is an adherence to market forms of ordering and market legitimation ideology which are crucial to the maintenance of structures of capitalism. Ultimately, such an approach characterizes unions as economic actors whose role is primarily in the private and not the public sphere. On the other hand, to paint unions as public actors whose activities could be subject to *Charter* scrutiny also invites courts to intervene on behalf of individually claimed rights and places unions in an unenviable position.

On a more practical level, one can argue that current forms of union security provisions in Canada may result in future disservice to the trade union movement. Because unions are assured a secure financial base, they are not as active as they could be in educating members and raising the consciousness of workers as the necessary means of maintaining a militant and powerful organization.[45] On the other hand, in order for unions to act as effective representatives, especially in the face of concerted employer opposition to unionization, it may be imperative that unions have a form of protection. It will be very difficult for unions to win the right to unionization through bargaining in a first contract situation if the employer remains implacable in opposition. It would appear to be in the immediate interest of unions to have such protection, but it is more difficult to assess the long-term impact of retaining the *status quo*.

---

[44] *Supra*, note 17.

[45] Panitch & Swartz, *supra*, note 1 at 113-15.

2. *Other Collective Bargaining Issues*

The Supreme Court of Canada's deferential attitude towards legislative control of collective bargaining and its vision of freedom of association as constitutive in nature has been reflected in a range of decisions of lower courts and tribunals. In *Re Professional Institute of the Public Service of Canada and Comm'r of the Northwest Territories*[46] it was decided that section 42 of the *Public Service Act* of the Northwest Territories, defining an employees' association as an association of public service employees incorporated by an ordinance, violated subsection 2(d) of the *Charter*. The *Act* would have precluded the complainant union from representing or seeking to represent employees of the territorial government. By imposing the requirement of incorporation in order to obtain certification, and then refusing the complainant union the right to incorporate under territorial law, the establishment and maintenance of the organization was said to have been disrupted. Although the pursuit of certification is not itself a protected activity under the *Charter*, if a law requires that the union organize itself in a particular way, freedom of association of the members is violated if certification is refused. On the other hand, the government is not required to recognize a particular union as the representative of a portion of the employees in a bargaining unit that wishes to be represented by that union.[47]

The constitutional validity of imposed first contract arbitration was affirmed by the Manitoba Queen's Bench, rejecting the employer's claim that its freedom of association was infringed.[48] Just as workers have no right to strike, employers have no right to lock-out. The decision was also justified on the Court's understanding that the right-to-strike trilogy determined that freedom of association in no way protected collective bargaining. It also stated that the right not to associate did not apply to an employer's interest in not associating with a union, and that the guarantee of liberty in section 7 of the *Charter* did not apply to economic or commercial rights.

The legislature has not only the right to prohibit strikes, but it can also prohibit employees from working during a strike, even though both the employees and employer would prefer a continuance of

---

[46] (1987), 43 D.L.R. (4th) 472 (N.W.T.S.C.), *rev'd*, [1988] N.W.T.R. 223, [1988] 5 W.W.R. 684 (C.A.). The Court of Appeal reversed the trial judgment by judicially amending the provision in question although the Court of Appeal agreed with the Supreme Court that the unamended version of the section in question would violate subsection 2(d) of the *Charter*.

[47] *Miller* v. *N.W.T. (Comm'r)*, [1988] N.W.T.R. 246, 51 D.L.R. (4th) 292 (S.C.).

[48] *Metro. Stores (MTS) Ltd* v. *Man. Food & Commercial Workers, Loc. 832*, [1988] 5 W.W.R. 544, 88 C.L.L.C. 14,052 (Man. Q.B.). The case also affirmed the right of the legislature to require employers to act fairly, reasonably and in good faith in the administration of the collective agreement.

work.[49] As well, Parliament is not required to enact protection which would give employees a right to continue working during a strike if they so desired and the employer continues operations.[50]

A number of decisions have dealt with the extent to which collective agreement provisions or unilateral employer policies can themselves be found to be in violation of the *Charter*. A consensus seems to be developing that the *Charter* does not normally apply to such forms of industrial or private law-making. In *Dolphin Delivery*[51] it was held that the *Charter* does not apply to private activity. In particular, common law prohibitions against secondary picketing, even though they constituted an infringement on freedom of expression, were held not to be subject to review for *Charter* violation. Other cases have specifically addressed the question in the context of collective agreements and employer policies. In *Bhindi*[52] it was held that the closed-shop provision in the collective agreement did not attract *Charter* scrutiny on the basis of two reasons. First, because the collective agreement is a private contract, the *Charter* does not apply; and second, legislative provisions explicitly allowing closed-shop agreements do not transform the closed-shop provision into government action. In *Lavigne*,[53] the Ontario Court of Appeal held that legislation giving the union the right to have a union shop clause inserted in the collective agreement was not sufficient reason to hold that there was governmental action.

Whether *Charter* scrutiny is required merely because one of the parties to a collective agreement is a government agent is still an open question. In *McKinney*[54] it was held that even if an organization is a branch of government or is sufficiently controlled by government to be considered its agent, the *Charter* will not apply if the impugned action is essentially of a private, commercial, contractual or non-public nature. University policies requiring faculty members to retire at age sixty-five and individual contracts of employment were held not to be directly reviewable for *Charter* violations.[55] In *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Bd.*[56] it was held that a school board policy promulgated under permissive powers given to the board by legislation was not law and therefore was not subject to *Charter* review. The Court came to this conclusion despite finding that, generally speaking, the school board

---

[49] *Lavigne*, *supra*, note 18.
[50] *Thys* v. *Can. Post Corp.* (1989), 89 C.L.L.C. 16,020 (Can. Lab. Rel. Bd).
[51] *Supra*, note 9.
[52] *Supra*, note 17.
[53] *Supra*, note 18.
[54] *Supra*, note 14.
[55] *See Harrison*, *supra*, note 14.
[56] (1987), 58 O.R. (2d) 545, 36 D.L.R. (4th) 115 (Div. Ct).

was a governmental actor.[57] In *Roy* v. *Hackett*[58] the Ontario Court of Appeal held that section 14 of the *Charter* applied to an arbitration proceeding. The Court noted that the employer was an agent of the Crown and that the arbitration board was a quasi-judicial body subject to the rules of natural justice, which arise when there is a question of providing translation services pursuant to section 14 of the *Charter*.

Charter scrutiny may also be appropriate where there is government action in the formation of the collective agreement in the form of review by an administrator acting under statute with the power to approve or disapprove of the agreement reached by the parties.[59]

Another case demonstrating judicial deference to private spheres of decision-making is *Re Tomen and Federation of Women Teachers' Associations of Ontario,*[60] where it was held that certain by-laws passed by the Ontario Teachers' Federation were not subject to *Charter* review. These by-laws required teachers to be a member of a particular affiliate of the Federation depending on their sex, the level of instruction (elementary or secondary school), or the religious status of the school (public school or secondary school). Teachers were required by statute to be members of the Federation. The Federation itself had been created by statute, but not its constituent affiliates. The case is important for collective bargaining purposes because branches of each of the affiliates were given statutory authority to bargain for the teachers that they represented. The by-law was described as a non-governmental matter, passed by the Board of Governors of the Federation to regulate internal membership among its five affiliates. It was further claimed that compulsory membership in a particular affiliate was not dictated by the government, and that this private law of the Federation did not have a public impact. Despite the non-application of the *Charter*, it was open to the complainants to initiate a complaint under the provincial human rights statutes which are concerned with the control of private decision-making powers.

These decisions are important not only for defining the scope of the *Charter*, but for providing an insight into the judicial view of collective bargaining as a private or public activity. The attempt to separate private spheres of activity, in which individuals and groups may operate without constitutional interference, from spheres of public action, in which *Charter* scrutiny is legitimate, reflects long-standing liberal notions about proper relations between the state and the individual. The state's function of promoting the public interest will be subject to *Charter* scrutiny where it interferes with individual rights, but the exercise of individual rights and power which may substantially affect the liberty of others (perhaps in even more substantial ways than

---

[57] *See Lavigne, supra,* note 18; *see also Douglas College, supra,* note 14.
[58] (1987), 62 O.R. (2d) 365, 45 D.L.R. (4th) 415 (C.A.).
[59] *Douglas College, supra,* note 14.
[60] (1987), 61 O.R. (2d) 489, 43 D.L.R. (4th) 255 (H.C.).

state action) is nevertheless permitted without constitutional limitation. In the private sphere, unions and employers are regarded as equals at the bargaining table. Hence, to the extent that mandatory retirement or other similar issues are regarded as crucially important to one or the other party, the parties may bargain in order to arrive at a solution that accommodates their conflicting interests. The problem, however, is that the employer, in the absence of an agreement, is regarded as having the right to impose unilaterally a mandatory retirement age, unless a human rights statute controls individual discriminatory conduct.[61]

Another issue that has yet to be clearly resolved is the jurisdiction of labour relations boards, arbitrators and similar tribunals to deal with *Charter* issues. Section 24 of the *Charter* specifies that courts of competent jurisdiction have the authority to provide a remedy for *Charter* violations. Subsection 52(1) of the *Constitution Act* states that the Constitution is the supreme law of the land and that any law that is inconsistent with its provisions is of no force and effect. Labour relations boards have been instructed in the past to consider constitutional challenges to their jurisdiction based on the division of federal/provincial powers, and it would seem that they could be considered courts of competent jurisdiction when dealing with the constitutionality of a section of the labour relations statute that they are being asked to apply.[62] In any event, in the process of interpreting and applying statutes, tribunals are required to apply the law in a general manner, and if a particular statutory provision is in conflict with the *Charter*, the tribunal would be authorized to declare the particular provision to be of no force or effect in accordance with section 52 of the *Charter*.[63] There are conflicting court decisions on whether arbitrators have a similar power to consider *Charter* challenges.

Moore v. *British Columbia*[64] decided that an arbitrator had jurisdiction to determine whether the dismissal of a government employee for refusing to process a claim for abortion expenses violated *Charter* guaranteed freedoms of religion and conscience. The British Columbia Court of Appeal also decided that an arbitrator had jurisdiction to decide whether a collective agreement provision permitting employers to require employees to retire at the age of sixty-five was in violation of the *Charter*.[65]

---

[61] The issue of mandatory retirement is considered in more detail *below*, at 500 *et seq.*

[62] *See Cuddy Chicks*, *supra*, note 19, wherein it was held that the Ontario Labour Relations Board had the jurisdiction to determine whether sections of the Ontario *Labour Relations Act* excluding agriculture employees from the certification provisions of the *Act* were in violation of s. 15 of the *Charter*.

[63] *Tetreault-Gadoury*, *supra*, note 21, affirming the right of boards of referees under the *Unemployment Insurance Act* to consider the constitutional validity of s. 31 of that *Act*, which denied unemployment insurance benefits to persons over the age of sixty-five.

[64] [1988] 3 W.W.R. 289, 23 B.C.L.R. (2d) 105 (C.A.) [hereinafter *Moore*].

[65] *See also Douglas College*, *supra*, note 14.

In *United Nurses of Alberta, Local 115* v. *Foothills Prov. Gen. Hosp. Bd*,[66] on the other hand, an Alberta court determined that an arbitration board was not a court of competent jurisdiction because it did not have the jurisdiction to provide a remedy for the alleged breach of the *Charter*. The grievance alleged that the employer's right to demand the removal from a union bulletin board of any material it felt was damaging to the employer's interest violated the freedom of expression of the union and its members. The desired remedy was a declaration that the alleged offending section was inoperative. However, a provision of the collective agreement specified that an arbitration board could not amend, alter or change the terms of the collective agreement. The case differs from *Moore* in that in the *Moore* case the arbitrator could provide a remedy for the *Charter* violation by reinstating the employee under the just dismissal provisions of the collective agreement. Nevertheless, in *Re Algonquin College and Ontario Public Service Employees' Union*[67] the Ontario Divisional Court stated that only a traditional court could be a court of competent jurisdiction for purposes of section 24 of the *Charter*, even though the arbitrator would have been able to provide a remedy of reinstatement had he held that the mandatory retirement policy of the employer was in violation of section 15 of the *Charter*. However, it should be noted that arbitrators have in the past claimed the jurisdiction to refuse to enforce a provision of a collective agreement that was contrary to legislative requirements. Although this is an issue that is likely to be determined ultimately by the courts, arbitrators and labour relations boards are stating their position on the issue. First, the *Charter* may have no direct application to collective agreements or employers' actions if the collective agreement or the action is viewed as essentially private in nature. Second, while arbitrators may have jurisdiction to interpret collective agreements and to ensure that collective agreement provisions are in conformity with the general law, they may not have jurisdiction to determine the constitutional validity of that general law.[68] On the other hand, if the employer is a Crown agent, then the *Charter* may apply directly to the collective agreement, in which case the arbitrator may have jurisdiction to determine the validity of the collective agreement provision or the exercise of a managerial prerogative.[69]

---

[66] [1987] 5 W.W.R. 762, 53 Alta L.R. (2d) 212 (Q.B.).

[67] (16 April 1987), (Ont. Div. Ct) [unreported], *aff'g* (1985), 19 L.A.C. (3d) 81 (Ont. Arb. Bd).

[68] *Re Hammant Car & Engineering Ltd and United Steelworkers, Local 8179* (1986), 23 L.A.C. (3d) 229 (Ont. Arb. Bd). *See also Bell Can.* v. *Can. Tel. Employees' Association* (1987), 28 L.A.C. (3d) 257 (Can. Arb. Bd).

[69] *Re Ontario Council of Regents for Colleges of Applied Arts & Technology (St. Lawrence College) and Ontario Pub. Serv. Employees Union (Blair)* (1986), 24 L.A.C. (3d) 144 (Ont. Arb. Bd).

3. *Mandatory Retirement*

The Supreme Court of Canada has already granted leave to appeal and heard arguments in May 1989, on the validity of mandatory retirement.[70] It has become a relatively common practice in Canada for employers to require employees to retire at a set age, usually sixty-five. This development is connected with the growth of both government and private pension schemes. Nevertheless, there are some workers who would prefer to work beyond the age of sixty-five, either because they are dissatisfied with the level of pension benefits or because they prefer the stimulation of productive employment over the pursuit of leisure activities.

The labour movement is divided with respect to the desirability of challenging mandatory retirement schemes. There is a fear that the elimination of mandatory retirement may undermine the efforts of unions to improve pension benefits and to provide for employees the opportunity to retire at an age at which they can derive maximum enjoyment from their leisure time. There are conflicts between older and younger union members on this issue. There is also a concern about the ability of trade unions to appeal to new members. Despite this, trade unions have been arguing in a number of fori, especially in arbitrations, that mandatory retirement is a violation of equality rights under the *Charter*. The cases that were heard recently by the Supreme Court of Canada, however, arose from complaints initiated by doctors, professors and community college teachers. The British Columbia and Ontario Courts of Appeal have taken different approaches dealing with these cases. While they both agreed that mandatory retirement amounted to discrimination on the basis of age, they disagreed as to whether the provincial human rights statutes which exempt mandatory retirement from prohibited grounds of discrimination are reasonably justified. The British Columbia Court held that there was no reasonable justification while the Ontario Court held that there was reasonable justification.

If the Supreme Court of Canada upholds the Ontario decision, thereby retaining the *status quo*, unions will continue to operate in an environment with which they are familiar. Advocates of universal social benefits conferred on the assumption of a set retirement age will be better able to defend attacks on universality.[71] On the other hand, even if the Court decides that mandatory retirement is constitutional, there may continue to be growing political demands for the amendment of provincial human rights statutes to prohibit mandatory retirement. This

---

[70] *Douglas College, Harrison, Stoffman, supra*, note 14, leave to appeal granted on 21 April 1988, [1988] 4 W.W.R. at lxxii (S.C.C.); *McKinney, supra*, note 14, leave to appeal granted on 21 April 1988, 46 D.L.R. (4th) at 193n (S.C.C.).

[71] A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT L. REV. 473.

is a highly possible scenario, given the changing demographic profile of Canada, especially the increase in the proportion of Canadians over the age of sixty-five. Indeed, a number of provinces have already prohibited mandatory retirement schemes by employers.[72]

4. *Unemployment Insurance and Equality Rights*

Various provisions of the *Unemployment Insurance Act* extend benefits to defined classes of workers. Other workers who claim to be in a substantially similar position, but who are denied these benefits, have launched actions complaining of the denial of the equal benefit of the law as guaranteed by section 15 of the *Charter*. For instance, workers over the age of sixty-five claim that if they continue to work and are subsequently laid off, there is no good reason why they should be denied the right to claim benefits.[73] This is particularly true if the level of pension benefits to which they are entitled is insufficient to maintain a decent standard of living. Similarly, in granting a man who adopts a child the right to take time off from work to look after the child, is there any reason to deny a similar opportunity to biological fathers when a child is born?[74] Finally, the prohibition of employees who are spouses or close family members of the employer from collecting unemployment insurance benefits appears to be discrimination on the basis of family status.[75] Attacks on these three aspects of the legislation have been successful before the Federal Court, the first two on the basis of the *Charter*, the latter on the basis of a complaint made under the *Canadian Human Rights Code*. There is a serious issue in these cases concerning the remedial power of courts to order the government to extend benefits in situations where it had not originally intended to do so. Nevertheless, assuming that the government considers itself bound by these decisions, some fascinating issues arise concerning the possible impact.

Unemployment insurance is, in fact, one area where there is evidence of the impact. The federal government, in its recent announcement of proposed changes to the *Unemployment Insurance Act*

---

[72] *See, e.g., The Human Rights Code*, S.M. 1987-88, c. 45; *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, ss. 7 and 38; *An Act Respecting the Abolition of Compulsory Retirement*, S.Q. 1982, c. 12. These *Acts* now prohibit mandatory retirement unless it can be demonstrated that it is necessary from the perspective of safety. *See also* REPORT OF THE ONTARIO TASK FORCE ON MANDATORY RETIREMENT: FAIRNESS AND FLEXIBILITY IN RETIRING FROM WORK (Toronto: The Task Force, 1987).

[73] *Tetreault-Gadoury, supra*, note 21.

[74] *Schachter, supra*, note 22.

[75] *Druken, supra*, note 20. In *Goldstein* v. *Canada (Min. of Employment and Immigration)* (1988), 51 D.L.R. (4th) 583, 89 C.L.L.C. 14,013 (Ont. H.C.), however, it was held that this provision did not violate s. 15 of the *Charter*.

has indicated its intention to extend benefits as required by these court decisions.[76] In the process of doing so, however, it has decided not to require the addition of new funding to pay for these benefits, but rather to reduce the level of benefits in other areas. This includes increasing the amount of time that an employee must work before becoming eligible for benefits, increasing the penalties and reducing the level of benefits for "voluntary" quitters, and reducing the maximum length of time for which benefits can be collected.[77] These changes do not necessarily increase the measure of equality in our society. There is no strong evidence to indicate that the new recipients of benefits are in greater need than those who will no longer be entitled to the benefits that they would otherwise have had.

5. *Political Rights of Civil Servants*

The employment relationship is normally characterized by a hierarchy of control, with the employer retaining the power or authority to impose on workers a wide range of rules relating to the time, place and character of work to be performed. This control may extend to aspects of an employee's life away from the workplace. The employer's interests in loyalty and image may justify the employer in disciplining an employee for conduct away from the work place which may nevertheless taint the reputation of the employer. This may extend to limiting the right of the employee to criticize the employer. For government employees, this may go one step further and justify the government in limiting the political activities of its employees, primarily on the ground that such political activity may jeopardize the neutrality of the public service. Such neutrality is seen as absolutely essential for the effective and fair carrying out of government policy.

The result for government employees is a substantial interference with what other Canadians regard as a fundamental right. In 1987, the Supreme Court of Canada rejected a challenge to such restrictions in Ontario which attempted to argue that the provincial government had exceeded its legislative powers by prohibiting provincial government employees from canvassing on behalf of federal political candidates or from expressing their views on any matter that formed part of the platform of a federal political party.[78] The Court held that the legislation was within the powers granted to provincial legislatures by subsections

---

[76] Employment and Immigration Canada, SUCCESS IN THE WORKS: A POLICY PAPER: LABOUR FORCE DEVELOPMENT STRATEGY FOR CANADA (Ottawa: Employment and Immigration, Canada, 1989) at 10, states that proposed amendments to the *Unemployment Insurance Act* to provide new parental benefits and to permit persons over the age of sixty-five to claim unemployment insurance benefits are in part designed to meet the requirements of the *Charter*.

[77] *Ibid.* at 11.

[78] *O.P.S.E.U.* v. *A.G. Ontario*, [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1.

92(1) and 92(4) of the *Constitution Act, 1867*[79] to amend their provincial constitutions, and to make laws respecting the establishment and tenure of provincial offices and the appointment and payment of provincial officers. Dickson C.J.C., in a concurring opinion, would also have characterized the laws as coming under the provincial head of power in subsection 92(13), "property and civil rights in the province". This is because what is being regulated is the employment relationship of civil servants. The Court did not consider arguments based on the *Charter*.

There has been a division of opinion concerning the constitutionality of restrictions on political activities in several recent cases which consider *Charter* arguments. There is a general agreement that these restrictions constitute an infringement on *Charter*-guaranteed freedoms of expression and association, but there is disagreement as to whether such infringements are justifiable under section 1 of the *Charter*. In *Osborne*[80] the Federal Court of Appeal held that the restrictions in federal legislation prohibiting civil servants from working for a candidate were impermissibly vague. In *Fraser*[81] the Court held that although the purpose of the restrictions was valid, they infringed the *Charter*-guaranteed rights more than was necessary. In *Ontario Public Service Employees' Union*[82] Mr Justice Eberle of the Ontario High Court held that the restrictions were justified under section 1. This included restrictions not only on the actions of individual workers, but also on the right of unions representing such workers to make contributions to political parties.

If the Supreme Court of Canada undertakes to hear these cases, and decides that some or all of the restrictions on political activity by civil servants violate the *Charter*, what will be the impact on workers? It is unlikely that there would be a sudden large scale mobilization of civil servants working on behalf of parties. For those workers who do become politically active, is there any reason to assume that this will have a significant impact on the policies adopted by particular parties and eventually be legislated? Although victories for workers generally arise through political rather than judicial activity, it is unlikely that there would be a major change in the nature of government policies towards this particular group of workers.

D. The Charter: Good or Bad for Workers?

There has been an intense debate about the wisdom of granting extensive powers of judicial review to the courts under the *Charter*. This debate has focussed on a wide range of issues such as the impact

---

[79] (U.K.), 30 & 31 Vict., c. 3.
[80] *Supra*, note 15.
[81] *Supra*, note 15.
[82] *Supra*, note 15

on institutional structures, the capacity of particular organs to make the best decisions, the impact of judicial review on democracy, the ways in which the *Charter* can be conceived as a force for national unity, the extent to which the *Charter* is a manifestation of the need for legitimization of existing constitutional structures, the conflict between individual rights and collective goals, and the extent to which the *Charter* leads to the judicialization of politics and the politicization of law.

In the area of labour law there has also been a great deal of debate about the merits of the *Charter* and how it should be applied to existing industrial relations institutions and practices. One claim is that the *Charter* can be an instrument of liberation for workers, promoting to an extent never before constitutionally-guaranteed, the goals of equality and respect for individual dignity.[83] Others agree that the *Charter* has the capacity to protect fundamental features of the collective bargaining system, such as the right of workers to choose freely trade unions as bargaining representatives and the right to strike and picket. There is less confidence that constitutional protection for these kinds of activities is likely to lead to any substantial improvement in the material condition of workers. Geoffrey England, for example, claims that further major reforms to the regulation of collective bargaining are needed, and that these reforms probably cannot be imposed on legislatures by courts, even in the unlikely event that the courts were so predisposed to improving the circumstances of workers.[84] Some authors argue that the best thing that the judiciary can do for workers in applying the *Charter* is to ensure that the system of collective bargaining remains outside the penumbra of *Charter* protections.[85] Others argue that collective action must defer to individual rights to the extent that it cannot be justified under section 1.[86] Others view the decisions of the courts to leave in the hands of legislatures, rights surrounding strikes, picketing and collective bargaining as inevitable, given the ideological perspective of the courts.[87] Nevertheless,

---

[83] The leading advocate of this position is D.M. Beatty, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE (Kingston, Ont: McGill-Queen's University Press, 1987).

[84] G. England, *Some Thoughts on Constitutionalizing the Right to Strike* (1988) 13:2 QUEEN'S L.J. 168.

[85] P. Cavalluzzo, *Freedom of Association — Its Effect Upon Collective Bargaining and Trade Unions* (1988) 13:2 QUEEN'S L.J. 266; J.M. Weiler, *The Regulation of Strikes and Picketing Under the Charter* in J. Weiler & R. Elliot, eds, LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1986) 211.

[86] P.A. Gall, *Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword* in Weiler & Elliot, eds, *ibid.* at 245.

[87] J. Fudge, *Labour, the New Constitution and Old Style Liberalism* (1988) 13:2 QUEEN'S L.J. 61; Arthurs, *supra*, note 4; M. MacNeil, *Courts Liberal Ideology: An Analysis of the Application of the Charter to Some Labour Law Issues* (1989) 34 MCGILL L.J. 86.

they suggest that the courts' decisions, rather than merely affirming the *status quo*, may serve as an invitation to the legislatures to dismantle much of what benefits workers.

There has been much debate as to whether the Supreme Court of Canada has reached the correct decision, especially in the right-to-strike trilogy and in the *Dolphin Delivery* decision. For those who believe in the transformative power of the *Charter*, it has been necessary to demonstrate that the *Charter* has a determinate meaning and that the judges have merely got it wrong.[88] The great weight of academic opinion, even from those who do not share a faith in the transformative power of the *Charter*, is that the language of the *Charter* by no means compels a conclusion one way or the other, but that the decision of the Court is by no means surprising given the ideological perspective and historical record of courts in general, in the context of labour relations.[89]

There are some who find solace in the Supreme Court of Canada's right-to-strike trilogy. Paul Cavalluzzo, for instance, a well-known lawyer representing trade unions, claims that the future under the *Charter* is not nearly as bleak as many trade unionists fear.[90] He claims on the basis of present evidence, that the *Charter* will not hamper significantly the activities of trade unions. He claims, that the legislature is the main fighting ground for legal change. From the perspective of a number of other commentators, such as Andrew Petter,[91] this is most appropriate since any significant gains for the socially and economically disadvantaged have historically been won through political and legislative action rather that through litigation.

It can also be argued that by leaving collective bargaining rights to be decided in the political arena, labour is in a worse position than if there had been no *Charter* in place, or no decisions had been made on the fundamental nature of the rights to strike and bargain collectively. For example, Judy Fudge claims that "[t]he decisions both clear the avenue for political attack since fundamental rights are not involved

---

[88] *See, e.g.*, D. Beatty and S. Kennett, *Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies* (1988) 67 CAN. BAR REV. 573. *See also* England's analysis of the reasoning in the right-to-strike trilogy, *supra*, note 84.

[89] Arthurs, *supra*, note 4 at 19, for example, states that:

> It is true, of course, that the Supreme Court has, in principle, acknowledged the existence of such rights, even if it did not actually vindicate them. Therefore, it can still make a new beginning, if it wished to do so, without doing violence to its own traditions of rational discourse. However, those who call for or anticipate such a development must be inspired by faith; they are surely not instructed by historical experience.

[90] *Supra*, note 85.

[91] *Supra*, note 71.

and legitimates the use of private power."[92] As Michael Mandel puts it, to say that rights are not fundamental in our era is like saying that they do not exist.[93]

Geoffrey England claims that the right-to-strike trilogy accords paramountcy to the market legitimation attribute of collective bargaining, relegating the justice attribute to second place. By granting to the state the exclusive task of determining the extent of the right to strike and to bargain collectively, it can be expected that the state will, if economic conditions make it necessary to ensure the long term survival of capitalism, take whatever steps it deems necessary to undermine the power of trade unions, including the dismantling of collective bargaining structures. On the other hand, the decision may impair the legitimation process that was abetted by the recent judicial attitudes calling for curial deference to decisions of labour boards and arbitrators:

> At a time when society's expectations for justice and equality are being spurred on by the *Charter*, the highest court of the land may have made working people believe that they and their unions have been relegated to second-class status by their exclusion from the *Charter*.[94]

Harry Arthurs doubts that a judicial course of deference is likely to last. While he believes that the direct effects of the *Charter* on industrial relations will be of minor importance in comparison to such factors as demographics, de-industrialization, free trade, fiscal policies, television and political trends, it may nevertheless have a substantial, indirect impact. The *Charter* is likely to have a major influence on legal culture in general, with the effect of transforming or redrawing the boundaries of legal categories, not in the image of social relations, but in the idiom of abstract constitutional expressionism. The invocation of the supremacy of law over politics inherent in the *Charter*'s grant of extensive powers of judicial review to the courts may make it less likely in the future that courts will defer to labour relations tribunals and arbitrators in administering the body of labour law. Arthurs is not claiming that these are necessary or logical extensions of *Charter* reasoning. Rather, he sees them as likely practical conclusions which will be reached by a judiciary newly restored to primacy in our political and legal cultures. Ultimately there may be a substitution of litigation for conflict which will not bring about merely a change of procedures but a change of outcomes that will not favour labour. As Arthurs puts it:

> Unless labour wins much more consistently before the Courts than it has ever done, or is likely to do, the decline of politics, of Parliament and

---

[92] Fudge, *supra*, note 87 at 111.

[93] M. Mandel, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (Toronto: Wall & Thompson, 1989) at 196.

[94] England, *supra*, note 84 at 211-12.

> of the administration will leave it particularly exposed. Under the *Charter* labour has lost the natural advantage of numbers, but gained neither explicit recognition of its agenda nor legitimation of its status. This was a poor exchange.[95]

Thomas Kuttner supports Arthurs' claim that the *Charter* is likely to lead to the undermining of labour relations boards as the pre-eminent protectors of the values of collective bargaining.[96] He claims that it is inevitable that these boards will play an ever-diminishing role in the nurturing of collective bargaining as a vibrant institution in our society. He predicts that the *Charter* will serve as the vehicle for constant incursions on the validity of collective bargaining legislation. With collective bargaining not regarded as a fundamental value, it will succumb to claims that various aspects of the collective bargaining system do infringe on fundamental individual rights.

Why would labour follow a course of litigation that so many considered would lead inevitably to these decisions with their potential for undermining the legitimacy of collective bargaining and the right-to-strike? Mandel suggests a number of answers including the inability of labour to produce a centralized litigation strategy, the extent to which unions defer to the advice of their legal counsel and other experts and the allure of the *Charter* as a means of providing a complete victory, especially given the hard knocks involved in real political action. Mandel states that "[e]ven where the results are easily predicted, the *Charter* has a way of being unavoidable."[97]

E. The Impact of the Charter on Labour

Before attempting to analyze these *Charter* developments employing the framework set forth in the introductory remarks, it would be appropriate to summarize some of the conclusions so far reached. In assessing the impact of the *Charter* on labour, there is little cause for rejoicing, but on the other hand, there is still scope for labour to fight its battles in other forums. In those cases in which labour has sought to rely on the *Charter* as a source of protection for rights that already have been won, the rate of success has been minimal. The major battle to protect the right to strike from government encroachment was lost.[98] It also appears that the right to bargain collectively and the forms which that may take are matters that do not involve

---

[95] Arthurs, *supra*, note 4 at 27.

[96] T. Kuttner, *Constitution as Covenant: Labour Law, Labour Boards, and the Courts from the Old to the New Dispensation* (1988) 13:2 QUEEN'S L.J. 32.

[97] *Supra*, note 93 at 203.

[98] It may still be open to unions to argue that political strikes or days of protest involving work stoppages are constitutionally protected, although given the ideology of the court, it is unlikely that they would uphold such a right under s. 1.

constitutional guarantees. Although the three cases on picketing put forth the proposition that picketing involves the constitutionally protected freedom of expression, they concluded nevertheless that there was no protection in the particular circumstances. There is still scope for protecting some forms of picketing, but it appears most likely to be in the context of non-labour oriented protest.[99]

The only other case in which labour sought to rely on *Charter* protections to support of its claims was the *Hills* case. While successful in claiming unemployment insurance benefits for laid off workers, the Court's perception of unions as large, impersonal, bureaucratic institutions is not likely to augur well for its treatment of claims by unions for protection in an era where courts see their role as one of protecting the individual from such organizational bureaucracy.

Labour has fared somewhat better in its defence of the *status quo* from those who seek to use the *Charter* as an instrument to strike down various aspects of the statutory web of employee protection. This is demonstrated by the Supreme Court of Canada decisions upholding the validity of workers' compensation schemes with their limitation on access to courts, holding that legislatures are justified in limiting the hours in which a retail store can be open to ensure a common day of rest for workers, and upholding the wide remedial authority granted to adjudicators to enforce statutory employment rights.

The lower court decisions which have insisted that the structure of the collective bargaining system remains a matter to be settled by the legislature can be seen as a victory against those who seek to use the *Charter* as an instrument to dismantle rights which workers currently enjoy. Nevertheless, the vision of collective bargaining as not involving fundamental rights leaves the labour movement exposed to the political and economic forces that demand a reduction in the power of labour so as to enable Canada to remain competitive. Can we maintain, in the face of a free trade agreement with the United States, a distinctive labour relations system, or will the legislatures, through a series of gradual amendments to labour codes, continue to take back rights from workers?

Other lower court decisions which have affirmed rights that workers might otherwise not have had must be more closely examined. For instance, if mandatory retirement is prohibited, the impact may be significant on those workers who wish to continue working and are thus able to do so. Substantial benefits may be granted to other workers as well, in the form of improved opportunities for early retirement so that employers can continue to renew their labour force. On the other hand, there is the spectre of employers introducing more rigorous

---

[99] *See Halifax Antiques Ltd* v. *Hildebrand* (1985), 69 N.S.R. (2d) 375, 22 D.L.R. (4th) 289 (S.C.T.D.) upholding the right of tenants to picket in front of a business owned by their landlord in protest against their eviction.

performance monitoring systems and of younger workers being denied job opportunities that would have opened up otherwise. These negative impacts may be more detrimental, in total, than the advantages that are gained.

Similarly, decisions respecting unemployment insurance benefits, which held that various groups of employees were being denied equal benefit of the law, may be a victory for those particular groups. However, the end result for labour is that resources available for unemployment insurance benefits will not be increased, but rather will be reallocated among potential claimants. There is no guarantee that this will result in a transfer from those less in need to those more in need.

This leads to the question of whether the *Charter* and judicial decisions really make any difference in our system of industrial relations. It is undoubtedly true that a number of economic and political factors are likely to play a major role in determining the nature and functioning of our systems of industrial relations. It may not matter much whether courts declare that the right to strike is fundamental. If they do not, the legislatures are left in the position where they can intervene, when convenient, to remove the right to strike. If courts do view strikes as constitutionally protected, they will still enter upon a section 1 analysis in which great weight is placed on protecting third parties from possible harm. In any event, if legislatures are concerned that strikes would cause undue harm, there is every reason to suspect that they would be willing to invoke the override powers in section 33 of the *Charter*.[100]

At a more fundamental level, however, law generally and the *Charter* in particular do matter to workers. The twentieth century in Canada has seen the juridification of labour relations and the implementation of a wide range of benefit conferral and protective statutes for workers. The juridification of labour relations has a number of sources.

It can be traced in part to the role of the judiciary in controlling labour disputes through the development of common law torts and the granting of injunctions. It also has its source in legislative attempts to diffuse the latent power of workers inherent in their ability to withdraw their labour. This is evidenced by the introduction of the *Industrial Disputes Investigation Act*[101] in 1907, which used mandatory conciliation procedures to delay and, in many instances, to undermine the effectiveness of strikes. This movement towards juridification was further solidified by the introduction of American style labour relations

---

[100] The first invocation of s. 33, other than the blanket override used by the province of Quebec, was by the Saskatchewan government when it attached a notwithstanding clause to a back-to-work statute affecting provincial government employees.

[101] S.C. 1907, c. 20.

legislation during the 1940's which created procedures by which unions could be certified as exclusive bargaining representatives, could force an employer to bargain with them, and by which employees could be protected from unfair labour practices. This was accompanied by tight controls as to when strikes could take place, and continuing control, usually by courts but in some cases by labour relations boards, of the use of picketing and other measures by which unions sought to maximize their bargaining power.

The effect of this juridification was that union strategies focussed on winning victories against employers by favourable labour relations board decisions or by exerting pressure for greater statutory protection in situations where they believed they could not win against employers on the basis of existing rights.[102] With the introduction of the *Charter*, it was hoped that *Charter* litigation would provide a source of more rights. Unions and labour become players within the system where the rules were stacked against them. The judicial hostility to collective action and the emphasis of the *Charter* on individual rights and as an instrument to protect the private sphere from state action have forced unions to state their claims in a manner that maximizes the likelihood of success. Thus, picketing is characterized as an individual act of expression and collective bargaining is characterized as an activity taking place in the private sphere of market ordering. This legalized form of discourse, imposed on workers as a result of claiming *Charter* rights or in defending existing rights from *Charter* attack, serves to legitimize a particular conception of collective bargaining — one which ultimately may not best serve the interests of labour.

On the other hand, there does appear to be a recognition in some *Charter* cases of the inequality of power between worker and employer. However, this recognition does not extend to a recognition of inequalities between unions and employers.[103] The court is comfortable with the notion of the state taking measures to protect the individual worker, but it is not at all convinced of the desirability of enhancing the power of workers generally by recognizing a constitutional status for the institutions of collective bargaining and striking. The failure to have achieved that status will make it very difficult for the labour movement to be successful in the future in enhancing collective rights. It may mean, however, that labour strategies are more likely to be successful when aimed at enhancing individual worker rights.

In the final analysis, judicial decisions under the *Charter* pave the way for unions to focus on political processes as a means of improving the situation of workers. However, the political strategies

---

[102] Examples include lobbying for the right to include Rand formula provisions in collective agreements, first contract legislation and prohibitions on professional strike breakers.

[103] For a discussion of this issue, *see* MacNeil, *supra*, note 87.

that are most likely to be successful, given the judicial antipathy towards collective action, are ones that concentrate on improving individual employee rights rather than ones which directly improve the collective bargaining rights of unions.

III. The Appropriate Forum for Resolving Employment Disputes

The institutional competence of courts, arbitrators and labour boards has been a continuing issue in Canadian legal scholarship. There is general agreement that courts were originally hostile to the interests of organized labour, breeding great distrust of courts within unions. The growth of consensual arbitration and the choice of most jurisdictions to use administrative-style labour relations boards as the favoured device for resolving disputes and administering labour relations policy are in part attributable to the prior judicial record, and the corresponding need for institutions that would be acceptable to all parties in the industrial relations environment. There was also a belief in the ability of these boards to provide not only better quality decision-making but also a more efficient and speedier decision-making process. The courts, nevertheless, have retained a major role in the regulation of collective bargaining and industrial relations policy. Their wide power of judicial review, their continuing jurisdiction over industrial conflicts through both criminal and civil remedies and their power to rule on individual rights, contribute to the deep penetration of judicial decision-making into the conduct of labour relations in Canada.

A. Courts and Collective Agreement Disputes

The decision of the Supreme Court of Canada in *St Anne Nackawic Pulp and Paper Co.* v. *Canadian Paper Workers Union, Local 219*[104] includes a discussion of the appropriate forums for administering labour relations policy. The case arose from an illegal strike in which the employer commenced a court action seeking both damages and an injunction. The Court held that the issue of damages should be settled through arbitration rather than by the courts, but that the courts could grant injunctions to order illegally striking workers from persisting in their actions. Although the Court had awarded damages in similar circumstances in earlier cases, its jurisdiction to do so had not been challenged.[105] In recognizing the limited role of courts in interpreting and enforcing collective agreements, Estey J. stated:

> The legislature created the status of the parties in a process founded upon a solution to labour relations in a wholly new and statutory framework

---

[104] [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1 [hereinafter *St Anne Nackawic* cited to S.C.R.].

[105] *Winnipeg Teachers' Assoc'n* v. *Winnipeg School Division No. 1*, [1976] 2 S.C.R. 695, 59 D.L.R. (3d) 228.

> at the centre of which stands a new forum, the contract arbitration tribunal. Furthermore, the structure embodies a new form of triangular contract with but two signatories, a statutory solution to the disability of the common law in the field of third party rights. These are but some of the components in the all-embracing legislative program for the establishment and furtherance of labour relations in the interest of the community at large as well as in the interests of the parties to those labour relations.[106]

The Court concluded that courts have no jurisdiction to consider claims arising from rights created by a collective agreement. This decision has implications not only for claims for damages for illegal strikes, but also, as will be discussed later, for actions for wrongful dismissal where an employee is protected from unjust dismissal by a collective agreement. Judicial deference to arbitration processes ultimately is based on respect for the right of legislatures and parties to choose what they deem to be the best institutional mechanism with which to resolve labour relations disputes.

Despite this supposed deference, the Court affirmed curial jurisdiction to grant injunctions to prohibit illegal strikes, even though this involves as much a resolution of disputes over collective agreement rights as the awarding of damages. The Court viewed the avoidance of the disruptive effect of strikes, except in well-defined circumstances, as one of the basic design features in labour relations legislation. It claimed that the prohibition against strikes during the term of the collective agreement stands independently of the requirement that collective agreement disputes be settled by arbitration. Courts are said to serve the public interest in protecting the public from wildcat strikes and illegal lockouts. Arbitration, despite its advantages in other situations, is considered not to be sufficiently speedy to prevent the harm that may be caused by the illegal walkouts.

Hence, courts continue to play a central role in the regulation of industrial conflicts. By granting injunctions backed by their contempt power, courts have effective tools to control illegal strike activity. Injunctions are often granted in very short order, sometimes without the targets of the injunctions even being notified that an application for injunction is being considered.[107] Although these injunctions are interlocutory in nature, in many instances no trial is ever heard on the merits of the case because the main goal of the applicant has been achieved by forcing the strikers to return to work. The Supreme Court of Canada has affirmed the importance of maintaining production at the expense of establishing procedures that are more likely to examine the real merits of the dispute.

Nevertheless, the decision is important for its deferential approach to the right of legislatures and parties to collective agreements to

---

[106] *St Anne Nackawic*, *supra*, note 104 at 717-18.
[107] *See, e.g.*, *B.C.G.E.U.*, *supra*, note 9.

establish original jurisdiction in decision-making bodies other than courts. Furthermore, the Court seems willing to concede that this jurisdiction is exclusive rather than concurrent, so that courts are precluded, other than by judicial review, from considering a range of claims that otherwise would have been within their powers. Many of the incidents of the individual employment relations are thus subsumed within the structure of collective rights and must be resolved by the processes established to administer the collective relations.

B. Individual Rights and Collective Relations

There is present in labour law an inherent tension between the ideologies of individualism and collectivism. The union does not act merely as the agent of employees in entering into a collective agreement with an employer.[108] It is also a party in its own right and represents the collective interests of workers. An important role of the union is the representation of employees in the grievance/arbitration procedures under the collective agreement. One of the powers of the union is deciding whether to continue with a grievance. Unions will assess the likelihood of success of the grievance, consider the appropriate allocation of scarce union resources, take into account the desirability of maintaining a good working relationship with management and attempt to balance the internal political considerations of the various interests represented by the union. The duty of fair representation may give unions an incentive to carry forward grievances that they might otherwise have chosen to abandon.[109] Some collective agreements and legislation may require that certain types of unresolved disputes be arbitrated. However, there continues to be, in many cases, the possibility that an employee's grievance may never be adjudicated through the process established by the collective agreement.

There are two types of cases where an employee is likely to rely on an individual right to commence a court action in the face of union reluctance to pursue the grievance. If an employee has been dismissed, it may be claimed that an action for wrongful dismissal is appropriate because it is the only means for the employee to establish the wrongfulness of the employer's actions and to claim compensation. The other situation arises where the employee claims that he or she is owed a benefit or wages that have not been paid. In both cases, the employee may seek to invoke the individual contract of employment as a means of overcoming the decision which acts as a bar to redress under the

---

[108] *Oliva* v. *Strathcona Steel Mfg Inc.* (1986), 74 A.R. 46, [1987] 1 W.W.R. 730 (C.A.) [hereinafter *Oliva* cited to A.R.].

[109] T. Knight, *Tactical Use of the Union's Duty of Fair Representation: An Empirical Analysis* (1987) 40 INDUST. & LAB. REL. REV. 1180; T. Knight, *The Role of the Duty of Fair Representation in Union Grievance Decisions* (1987) 42 RELATIONS INDUSTRIELLES 716.

collective agreement. A variety of cases have arisen recently which reinforce collective values at the expense of individual values. Nevertheless, these cases also display the interaction between collective and individual aspects of regulating the employment relationship, particularly where there are pre-employment agreements or where the collective agreement is no longer in force.

The *St Anne Nackawic* decision[110] establishes that the function of interpreting the collective agreement is to be left to the grievance arbitration process established either by the agreement itself or by statute. It has also become clear that the application of general principles of contract law must be approached with caution as to their suitability to the specialized nature of collective agreements.[111] The relational context in which the parties find themselves, the quasi-legislative function of the collective agreement and the impact of statutory intervention and policy direction contribute to the special status of collective agreements. It is within this context that one must assess the recent developments in this area.

Several cases have addressed the question whether an employee who has been dismissed and who is bound by a collective agreement may initiate a court action for wrongful dismissal. The employee may choose to do so because the union has refused to process the grievance to the arbitration stage, or because the employee does not have a great deal of faith in that process. In *Oliva*[112] the Alberta Court of Appeal concluded that an employee in this situation is not entitled to pursue a wrongful dismissal action in court. Because the collective agreement addresses the issue of dismissals, it therefore precludes the jurisdiction of courts to consider the matter. This is a reversal of the earlier position of the Alberta Court of Appeal on this issue.[113] The concurring opinion of Stevenson J.A. in *Oliva* raises a concern that individual employees will be denied access both to arbitral and judicial resolution of their complaints. Similar decisions have been reached in Nova Scotia,[114] Ontario,[115] Newfoundland[116] and British Columbia.[117] Less sympathy is

---

[110] *Supra*, note 104.

[111] *McGavin Toastmaster Ltd* v. *Ainscough* (1975), [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1.

[112] *Supra*, note 108.

[113] *Gleed* v. *Edmonton* (6 January 1981), Edmonton 13573 (Alta C.A.) (referred to in *Oliva*, *ibid.* at 52).

[114] *Hussey* v. *CHUM Ltd* (1987), 81 N.S.R. (2d) 326, 203 A.P.R. 326 (S.C.T.D.).

[115] *Bourne* v. *Otis Elevator Co.* (1984), 45 O.R. (2d) 321, 6 D.L.R. (4th) 560 (H.C.).

[116] *Bussey* v. *Bd of Ed. of Avalon North Integrated School* (1988), 70 Nfld & P.E.I.R. 205, 215 A.P.R. 205 (Nfld S.C.).

[117] *Gyuka* v. *Esco Ltd* (1987), 11 B.C.L.R. (2d) 335, 16 C.C.E.L. 116 (C.A.); *Marshall* v. *Health Lab. Rel. Assoc'n of British Columbia* (1988), 31 B.C.L.R. (2d) 359 (C.A.).

likely to be extended to a plaintiff who has attempted arbitration without success and then comes to court seeking to rely on a common law right to a remedy for breach of contract.[118]

Another decision held that the denial of access to the courts in this situation was not an infringement of section 15 of the *Charter*.[119] Employees covered by a collective agreement are not similarly situated to those who do not have access to a grievance arbitration procedure. The legislative provisions mandating the final resolution of collective agreement disputes through arbitration are a significant benefit to workers because they offer a less expensive alternative to litigation, representation, a remedy of reinstatement where warranted and the adjudication of a wider range of issues than can be adjudicated at common law. It was also noted that the grievance process is part of a complete package of rights, that the process is subject to judicial review and that the union's right of representation are the result of a democratic process.[120]

There are a number of other situations in which the courts have held that they are precluded from entertaining actions in the face of a collective agreement. For instance, several decisions held that employers are precluded from suing employees for repayment of sums that the employer claims were paid as the result of a mistake.[121] In dismissing these actions, the courts suggest that the *St Anne Nackawic* decision puts in doubt the continuing validity of the earlier decisions of the Supreme Court of Canada in *Hamilton Street Railway Co.* v. *Northcott*[122] and *General Motors of Canada Ltd* v. *Brunet*[123] which held that there were certain limited circumstances in which courts could entertain civil actions despite the existence of a collective agreement. As well, an Alberta court held that it has no jurisdiction

---

[118] *Polimeni* v. *Univ. of Manitoba*, [1987] 5 W.W.R. 126, 46 Man. R. (2d) 214 (C.A.).

[119] *Bartello* v. *Can. Post Corp.* (1987), 62 O.R. (2d) 652, 46 D.L.R. (4th) 129 (H.C.). *See also New Brunswick Teachers' Fed'n* v. *A.G. New Brunswick* (1987), 45 D.L.R. (4th) 154, 85 N.B.R. (2d) 86 (Q.B.).

[120] The Supreme Court of Canada's decision in *Ref. Re Workers' Compensation Act, 1983 (Nfld), supra*, note 12 appears to affirm the validity of this result.

[121] *Timmins (City) Comm'rs of Police* v. *Sawinski* (1987), 62 O.R. (2d) 71, (*sub nom. Timmins Bd of Police Comm'rs* v. *Sawinski*) 17 C.C.E.L. 282 (H.C.); *Sudbury Bd of Ed.* v. *Talpianinen* (1986), 57 O.R. (2d) 688 (Dist. Ct). *But see Sault Ste Marie Bd of Ed.* v. *McCaul* (1986), 54 O.R. (2d) 480 (Dist. Ct). The Court noted that the employee was no longer a member of the bargaining unit and that the collective agreement had expired.

[122] [1967] S.C.R. 3, 58 D.L.R. (2d) 708.

[123] (1976), [1977] 2 S.C.R. 537, 77 C.L.L.C. 14,067.

to grant an injunction to prevent an employer from breaching a collective agreement.[124]

In addition to limits on court jurisdiction arising from the *St Anne Nackawic* decision, Ontario courts have appeared willing[125] to give an expansive interpretation to the provisions of the Ontario *Rights of Labour Act*[126] which precludes an action against a trade union unless it may be a party irrespective of the provisions of the *Act* or of the *Labour Relations Act*.[127] Limitations may restrict the courts in their consideration of other complaints as well. For example, both the British Columbia and New Brunswick Courts of Appeal have ruled[128] that courts in those provinces cannot entertain actions against unions based on negligence in representation, despite a Supreme Court of Canada decision[129] holding that there is a common law duty of fair representation. The provision in a labour code of a set of rights against unions, pursuant to which disputes are administered by a labour relations board, displaces any jurisdiction that the courts might otherwise have had.

Despite the apparent pervasiveness of the collective aspects of labour law, there are still important functions for individualized contracts. Where an employee has been dismissed after the collective agreement has been terminated or while the employee is on a legal strike, an action for wrongful dismissal may still be available.[130] Employees who are not recalled after a strike has ended will be deemed to be laid-off and will be statutorily entitled to severance payments if the layoff is other than temporary.[131] Strikes do not terminate the employment relationship and, in the absence of a collective agreement, or before a settlement is reached, individual contracts

---

[124] *Carling O'Keefe Breweries Ltd* v. *West Union Brewery, Beverage, Winery and Distillery Workers, Local 287* (1987), 52 Alta L.R. (2d) 319 (C.A.). *See also Wittal* v. *Saskatchewan Gov't Ins.*, [1988] 5 W.W.R. 616, (*sub nom. Saskatchewan Ins., Office and Professional Employees' Union* v. *Saskatchewan Gov't Ins.*) 67 Sask. R. 14 (C.A.). Two members of the Court of Appeal held that the courts had no jurisdiction to grant an injunction or declaration maintaining the *status quo* until a grievance was arbitrated. The other two Justices did not address the issue.

[125] *Re McGhie and C.A.L.F.A.A.* (1986), 58 O.R. (2d) 333 (H.C.) (union members cannot bring an action against their union objecting to a merger with another union); *Can. Training & Dev. Group Inc.* v. *Air Canada* (1986), 57 O.R. (2d) 659, 39 C.C.L.T. 72 (Div. Ct) (individuals suffering losses as the result of an illegal strike cannot bring an action against the strikers for damages on the basis of conspiracy).

[126] R.S.O. 1980, c. 456.

[127] R.S.O. 1980, c. 228.

[128] *Mulherin* v. *U.S.W.A., Local 7884* (1987), 37 D.L.R. (4th) 333, [1987] 4 W.W.R. 603 (B.C.C.A.); *Bowcott* v. *C.B.R.T., Local 400* (1988), 29 B.C.L.R. (2d) 198 (C.A.); *C.B.R.T.* v. *Knight* (13 December 1988) Doc. No. 117/88/CA (N.B.C.A.).

[129] *C.M.S.G.* v. *Gagnon*, [1984] 1 S.C.R. 509, 9 D.L.R. (4th) 641.

[130] *Noa* v. *Burns Meats Ltd* (1986), 74 A.R. 352, 1 W.W.R. 131 (Q.B.).

[131] *Re C.J.A., Local 1928 and Citation Indus. Ltd* (1984), 9 D.L.R. (4th) 316 (B.C.C.A.).

exist. Courts need not worry in these situations about invading the jurisdiction of arbitrators because such jurisdiction depends on a collective agreement being in effect at the time the dismissal took place.

Individualized contracts may also come into existence prior to the employee becoming subject to the collective agreement and these contracts may survive the hegemonic effect of the collective agreement.[132] Whether in a particular situation a collective agreement is in effect will depend on the wording of bridging provisions in collective agreements and statutory provisions. This matter will normally be within the jurisdiction of an arbitration board.[133] If no such decision has been rendered, a court would have to become involved in the interpretation of a collective agreement, a matter which, as already indicated, is not within the original jurisdiction of courts. Furthermore, if no collective agreement is in effect, an arbitration board nevertheless may have jurisdiction flowing from the incorporation of the grievance arbitration provisions of the expired agreement into the individual contracts of employment. In that situation, however, the jurisdiction of the arbitration panel may not be exclusive, so that employees may have a choice of pursuing a remedy either through arbitration or through an action for wrongful dismissal.[134]

Individuals may also have rights against their employers arising not solely from the breach of their employment contracts, but from the breach of tort-based obligations. In that situation, the Trial Division of the Federal Court was willing to entertain an action by a bargaining unit employee against his employer despite the existence of a collective agreement.[135]

The collective/individual dichotomy also arises in another context. The most severe recession since the 1930's has occurred in the 1980's and this has placed great pressure on unions to agree to employer demands for cutbacks. Some employers have bargained very hard and have sought to take advantage of available opportunities to impose reduced benefits on workers. One means of so doing has been to declare unilaterally, after a collective agreement has come to an end, that the reduced benefits are as of that time in effect. Does the employer have the legal authority to do this? A number of important cases have addressed this issue.

In *Re Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 and Paccar Canada Ltd*[136] the British Columbia Court of Appeal decided that the employer could not alter unilaterally the terms and conditions of employment after the collective agreement

---

[132] *Wainwright* v. *Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760, 14 B.C.L.R. (2d) 247 (C.A.).

[133] *Alberta Liquor Control Bd* v. *Alberta Union of Prov. Employees* (1987), 85 A.R. 354, 29 L.A.C. (3d) 24 (Q.B.).

[134] *Ibid.*

[135] *Tourigny* v. *Canada* (1988), 17 F.T.R. 127.

[136] (1986), 32 D.L.R. (4th) 523, 7 B.C.L.R. 80 (C.A.).

had expired. The Court claimed that the law of contract underlies the whole collective bargaining process and that common law principles continue to operate, albeit not the traditional rules of master and servant. After a collective agreement expires, the terms and conditions of employment are those found in the expired collective agreement. An employer's unilateral decree of changed terms is not analogous to individual contracts where the employer is deemed to have given consideration by not exercising its power to dismiss. Under a collective bargaining regime, the employer no longer has the right to dismiss the employee without cause. The finding of the British Columbia Labour Relations Board that the employer had a power to change unilaterally terms and conditions was labelled patently unreasonable.

The Supreme Court of Canada, however, decided that the decision was not patently unreasonable. It held that where there is a continuing duty to bargain, the common law regime of individual contracts is displaced. It is normally assumed that the employment relationship will continue to be governed by the terms of the expired collective agreement, but where the collective agreement specifies a process of termination, it is entirely plausible to allow the employer to alter unilaterally terms and conditions of employment. The decision on the one hand affirms the centrality of the collective bargaining regime over individual contracting, but at the same time appears to allow the employer extensive powers which may serve to undermine the concept of bargaining in good faith with the union. The decision nevertheless appears to put British Columbia employers in much the same position as employers in other provinces.[137]

In Alberta it was held that an employer could roll back benefits unilaterally by first declaring a lockout and then inviting employees back to work on the basis of the altered terms.[138] The Alberta Labour Relations Board had held that the employer's offer constituted an unfair labour practice by imposing in the contract a restraint on the right of employees to bargain collectively. The Court, however, emphasized that the Alberta *Labour Relations Act* statutorily froze terms and conditions of employment only for a limited period of time while collective bargaining was taking place. The Court appears to have rejected the suggestion that an individual contract which incorporates the terms of the expired collective agreement continues to exist during a lockout. According to the Court, the grant of exclusive bargaining authority to the union extends only to collective bargaining and not to individual bargaining, at least after the statutory freeze on terms and

---

[137] (1989), 89 C.L.L.C. 14,050.

[138] *O.P.C.M., Locals 139 and 924* v. *Constr. Lab. Rel.* (1985), 59 A.R. 12 (*sub nom. O.P.C.M., Locals 139 and 924* v. *Constr. Lab. Rel. — An Alberta Assoc'n*), [1985] 4 W.W.R. 349 (C.A.).

conditions of employment has come to an end. The decision demonstrates the need to interpret carefully the relevant legislation in determining the interaction of collective and individual approaches. The Alberta decision ratified the tactic adopted by employers in the construction industry of having a short lockout followed by a unilateral rollback of benefits.[139]

Decisions similar to that of the Alberta Court of Appeal have been reached elsewhere. For instance, the Canada Labour Relations Board has stated that the bridging clause in a collective agreement serves only to keep the collective agreement in effect until the end of the statutory freeze period. Thereafter, an employer is entitled unilaterally to alter terms and conditions of employment without committing an unfair labour practice.[140] Similarly, the Saskatchewan Labour Relations Board has affirmed the right of the employer to alter unilaterally terms and conditions of employment after the expiry of the collective agreement provided that it complied with its duty to bargain in good faith.[141] The Alberta Board, on the other hand, has been careful not to give the employer too much leeway, holding that it cannot revoke unilaterally the duration clause of a collective agreement which states that the agreement would continue in effect during negotiations.[142] The Board also held that the statute then governing collective bargaining in the construction industry prohibited an employer from altering terms of employment by extending a collective agreement until a new master collective agreement has been concluded.[143]

---

[139] E.G. Fisher & S. Kushner, *Construction Labour Relations in Alberta: "Boom" to "Bust"* in M. Thompson, ed., IS THERE A NEW CANADIAN INDUSTRIAL RELATIONS? PROCEEDINGS OF THE 23RD ANNUAL MEETING OF THE CANADIAN INDUSTRIAL RELATIONS ASSOCIATION (Winnipeg: University of Manitoba, 1986) 383 at 385.

[140] *I.A.M., Lodge 148* v. *Air Canada* (1988), 88 C.L.L.C. 16,010 (Can. Lab. Rel. Bd).

[141] *Canada Safeway Ltd and R.W.D.S.U., Locals 454 and 480* (1985), 11 Can. L.R.B.R. (N.S.) 68 (Sask. Lab. Rel. Bd). *See also C.J.A., Local 1805* v. *Little Borland Ltd* (1986), 48 Sask. R. 291 (Q.B.).

[142] *C.U.P.E., Local 1855* v. *Ponoka (County No. 3)*, [1986] Alta L.R.B.R. 467 (Alta. Lab. Rel. Bd). *But see Millwrights, Mach. Erectors — Mechanical Fitters & Maintenance, Loc. Union 1975* v. *Tyger Contractors Ltd*, [1988] Alta L.R.B.R. 1 (Alta. Lab. Rel. Bd) (if parties have ceased to bargain, the collective agreement is terminated despite the bridging clause in the collective agreement).

[143] *B.S.O.I.W., Local 720* v. *Northern Steel Inc.*, [1987] Alta L.R.B.R. 576 (Alta. Lab. Rel. Bd) (The new Alberta *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 128 provides that if notice to bargain has been given, the collective agreement continues in force until either a new collective agreement is reached, the union's bargaining rights are terminated or a lawful strike or lockout commences).

IV. Labour and Federalism Issues in the Supreme Court of Canada

A. *Application of Provincial Laws to Federal Undertakings*

Although the constitutional contours of labour relations policy are relatively well defined, there continues to be a number of boundaries which must be clarified by courts. In the past several years there have been four major decisions of the Supreme Court of Canada dealing with the rights of provinces to enforce their occupational health and safety legislation against federal undertakings and the right of the province to establish tribunals that have the power to reinstate workers held to have been unjustly dismissed.

On 26 May 1988, the Supreme Court of Canada handed down three decisions which limited substantially the power of provinces to enforce their occupational health and safety legislation against federal undertakings. In *Bell Canada* v. *Commission de la santé et de la sécurité du travail*,[144] Bell Canada objected to the Quebec Commission's enforcement of provisions of the *Act Respecting Occupational Health and Safety*,[145] which permitted pregnant employees to apply for a protective reassignment. In the second case, Canadian National Railway objected to the same Commission's investigation, using powers conferred under the same statute, of a rail accident in which several persons had been killed.[146] In the third case, an employer engaged exclusively in interprovincial and international transport objected to an order made by an officer under the British Columbia *Workers Compensation Act* requiring it to take steps to comply with the *Act*.[147] In all three cases, the unanimous opinion of the Court was written by Mr Justice Beetz. The leading opinion in the trilogy was delivered in *Bell Canada*,[148] but the reasoning therein is equally applicable to all three cases. Beetz J. started with five propositions on which his analysis rested. These were:

> 1. General legislative jurisdiction over health belongs to the provinces, subject to the limited jurisdiction of Parliament ancillary to the powers expressly conferred by s. 91 of the *Constitution Act, 1867* or the emergency powers relating to the peace, order and good government of Canada. . .;
>
> 2. In principle, labour relations and working conditions fall within the exclusive jurisdiction of the provincial legislatures. . .;

---

[144] [1988] 1 S.C.R. 749, 21 C.C.E.L. 1 [hereinafter *Bell Canada* cited to S.C.R.].

[145] R.S.Q. 1977, c. S-2.1.

[146] *Can. Nat. Ry Co.* v. *Courtois*, [1988] 1 S.C.R. 868, 21 C.C.E.L. 260.

[147] *Alltrans Express Ltd* v. *The Workers' Comp. Bd of British Columbia*, [1988] 1 S.C.R. 897, 21 C.C.E.L. 228.

[148] *Supra*, note 144.

> 3. Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working condition in the federal undertakings covered by ss. 91(29) and 92(10)a., b., and c. of the *Constitution Act, 1867*, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. . .;
>
> 4. . . .[P]rovincial workmen's compensation schemes were applicable to federal undertakings. . .;
>
> 5. Proposition five is the double aspect theory, which appears to have been stated for the first time in *Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130:
>
> "...subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91. . .".[149]

The key to these three decisions is the characterization of the essential nature of the statutes in question. Although the statutes have, as their purpose, the protection of the health and safety of workers, they accomplish this by a direct and extensive intervention both in the field of work conditions and labour relations and in the field of management and operation of undertakings. Mr Justice Beetz states that "it is clear that on its face the *Act* principally treats working conditions, labour relations and the management of an undertaking".[150] The Quebec statute is described as regulating respective rights and obligations of workers under the contract of employment.[151] It is not intended to deal with the health and safety of the people in the province in general, but rather is concerned with relations between workers and employers as such. In this sense the statute is concerned with labour relations.[152] Finally, the *Act* is said to create a system of partial co-management of the undertaking by the workers and the employer, and to be addressed primarily to the manager of the undertaking because it is management which is in a position to attain many of the purposes of the *Act*.[153]

Having so characterized the statute in question, there was little difficulty in finding that the application of propositions two and three leads inexorably to the conclusion that the provincial statute could not apply to federal undertakings. The authority of the federal Parliament with respect to working conditions, labour relations and the management of undertakings within its jurisdiction is exclusive and the pro-

---

[149] *Ibid.* at 761-65.
[150] *Ibid.* at 798.
[151] *Ibid.* at 800.
[152] *Ibid.* at 809.
[153] *Ibid.* at 810-11.

vincial legislation is *ultra vires* even if it is consistent with federal legislation. Constitutional scholars may find these cases interesting in that they insist on maintaining the inter-jurisdictional immunity of federal undertakings from provincial laws, which in their pith and substance deal with issues that are clearly within the jurisdiction of the provincial government.

From a policy perspective, the Court is concerned that a division of jurisdiction over occupational health and safety of federal undertakings would be a source of uncertainty and dispute given the complex, specialized and highly detailed nature of regulation in this area.[154] Furthermore, the Court rejected the argument that because a federal undertaking is subject to the compensatory provisions of provincial legislation it is constitutionally subject to the preventive provisions under the same statute on the ground that the two form an indivisible whole. Workers' compensation is essentially different from occupational health and safety regulation because the former does not impinge on labour relations, working conditions or management of the undertaking, while the latter clearly does.

B. Regulatory Processes and Section 96 of the Constitution Act, 1867

It is well-established that section 96 of the *Constitution Act, 1867* prevents a provincial legislature from conferring the jurisdiction of superior courts on a provincial tribunal. Challenges to the broad powers given to labour relations tribunals to reinstate employees who have been discharged as a result of their union affiliation[155] and effectively to enjoin illegal strikes and picketing have, nevertheless, withstood constitutional attack.[156] In the most recent decision of the Supreme Court of Canada on the applicability of section 96 to the regulation of employment relationships, the Court once again favoured the right of provinces to confer broad remedial powers on provincial tribunals.[157] In *Yeomans* an employer had been ordered by the Director of the Labour Standards Tribunal to reinstate an employee on the grounds that the employee had been dismissed unjustly contrary to section 67A of the Nova Scotia *Labour Standards Code*.[158] The employer had appealed the decision unsuccessfully to the Labour Standards Tribunal which was empowered under the *Act* to hear such appeals. The Appeal Division of the Nova Scotia Supreme Court subsequently held that the

---

[154] *Ibid.* at 843.

[155] *Labour Relations Bd (Sask.)* v. *John East Iron Works Ltd* (1948), [1949] A.C. 134, [1948] 4 D.L.R. 673 (P.C.).

[156] *Tomko* v. *Labour Relations Bd (N.S.)* (1975), [1977] 1 S.C.R. 112, 14 N.S.R. (2d) 191.

[157] *Yeomans* v. *Sobey's Stores Ltd* [1989] 1 S.C.R. 238, 92 N.R. 179 [hereinafter *Yeomans* cited to N.R.].

[158] S.N.S. 1972, c. 10.

power granted by the statute to the Director and the Labour Standards Tribunal to reinstate unjustly dismissed employees was in violation of section 96 of the *Constitution Act, 1867*.

In deciding whether the provincial legislature could grant these powers, the majority decision of Wilson J. insisted on following a strictly schematic approach. She applied the three-stage test enunciated in *Re Residential Tenancies Act, 1979*,[159] which required the Court to consider first whether the power or jurisdiction conferred upon the Tribunal conforms with the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. After characterizing the issue as one relating to jurisdiction over unjust dismissal, it was concluded that this jurisdiction was exercised primarily by superior courts prior to Confederation. The second stage was to consider whether the power being exercised was judicial in nature. Wilson J. held that the power, as exercised by the Director of Labour Standards, was not judicial in nature because of the inquisitorial and mediative role that was assigned to this official. Therefore, the assignment of the power of reinstatement to the Director was not *ultra vires*. However, the power, as exercised by the Labour Standards Tribunal was judicial. Therefore the analysis moved to the third stage, in which one must look at the context in which the power is exercised. The *Labour Standards Code* was characterized as a comprehensive scheme for the protection of non-unionized workers. In addition to the wide range of substantive rights granted to workers, it provides an inexpensive and speedy means to investigate and resolve complaints. In this sense, the judicial functions of the Tribunal are incidental to the broader social policy goals that the *Code* is designed to achieve.

The concurring opinion of La Forest J. is considerably less schematic. He characterizes the guarantee to employees of a right to be protected from unjust dismissal as independent of any existing contractual arrangement, stating that, "[e]ssentially it is a new obligation imposed by law. It transcends the relationship between private parties."[160] As a result, he concludes that the judicial components of the *Code* bear no relationship to the contractual issues assigned to section 96 courts in 1867. Hence, there is no need to examine minutely which courts exercised jurisdiction over master and servant contracts at Confederation.

This decision is consistent with a number of lower court decisions that have upheld the right of provinces to extend broad powers to

---

[159] [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554.
[160] *Supra*, note 157 at 231.

administrative tribunals in order to ensure more effective compliance with a wide range of protective employment rights.[161]

V. Judicial Review of Labour Boards and Arbitrators

In the last *Recent Developments* article on labour law in this journal, I referred to the broad supervisory jurisdiction retained by courts over arbitrators and labour boards. It also noted the trend toward judicial deference to arbitrators and labour boards, which has led to, in many situations, the affirmation of tribunal decisions even in situations where courts may have preferred a different interpretation of the collective agreement or constituting statute. A review of decisions since the publication of the earlier article affirms these trends. The Supreme Court of Canada continues to claim a deferential role for courts, while maintaining the vitality of review based on jurisdiction and natural justice. These serve to rein in the perceived excesses which may lead to the grant or claim of unfettered jurisdiction to and by arbitrators and labour boards. It is also appropriate to consider in this section the likely impact of the *Charter* on administrative law grounds of judicial review in the field of labour relations.

A. What Is a Jurisdictional Question

The decision of the Court in *Syndicat des employés de production du Québec et de l'Acadie* v. *Canada Labour Relations Board*,[162] discussed in the last article, affirmed that in cases where questions of jurisdiction were at issue, the court was required to determine the correctness of the inferior tribunal's decision, rather than merely determining whether it was reasonable. The court has subsequently used the correctness test in several cases. In *Gendron* v. *La Baie-James (Municipalité de)*[163] the Court quashed a decision of the Quebec Labour Court. The Labour Court decided that the appropriate remedy for an employee who had been unfairly represented by his union in an arbitration was to order that the matter be sent to arbitration a second

---

[161] *Asselin* v. *Industries Abex Ltée*, [1985] C.A. 72, 22 D.L.R. (4th) 212 (Que. C.A.) (adjudicator's power under Quebec's *Labour Standards Act, 1979* to reinstate unjustly dismissed employees does not contravene s. 96); *Evans* v. *Employment Standards Bd* (1983), 149 D.L.R. (3d) 1, 46 B.C.L.R. 198 (C.A.) (collection of unpaid wages in British Columbia); *Central Canadian Structures Ltd* v. *Dir. of Employment Standards Div.* (1984), 8 D.L.R. (4th) 514, [1984] 4 W.W.R. 182 (Man. C.A.) (investigating claims for unpaid wages); *Re Telegram Publishing Co. and Zwelling* (1973), 1 O.R. (2d) 592, 41 D.L.R. (3d) 176 (Div. Ct), *rev'd in part* on other grounds (1976), 11 O.R. (2d) 740, 67 D.L.R. (3d) 404 (C.A.) (referees with power to order payment of wages in lieu of notice and to order severance pay).

[162] [1984] 2 S.C.R. 412, 14 D.L.R. (4th) 457 [hereinafter *S.E.P.Q.A.* cited to S.C.R.].

[163] [1986] 1 S.C.R. 401, 66 N.R. 30.

time. As in *S.E.P.Q.A.*,[164] the Court was concerned with a tribunal's claim of remedial powers which it did not think were granted clearly by the terms of the relevant statute. The effect of this decision in the particular case is to deny to the Labour Court what it sees as the most appropriate remedy for the breach of the duty of fair representation.

The most recent decision of the Supreme Court of Canada characterizing the decision of a labour relations tribunal as jurisdictional and, in this case, subject to a writ of evocation, is *Syndicat national des employés de la Commission scolaire regionale de l'Outaouais* v. *Bibeault*.[165] Employees of two janitorial firms which had contracts with a school board were represented by a union which commenced a legal strike. The school board then terminated its contracts with the two firms and subcontracted instead with a third firm. The central issue in the dispute was whether the third firm was bound by the certification held by the union for the other two firms. The resolution of this issue required an interpretation of section 45 of the Quebec *Labour Code*.[166] The labour commissioner and the Labour Court decided that the third firm was bound by the certification, even though there was no legal relation between the three firms; that is, there was no agreement of any kind between the old and the new employer to transfer the undertaking. The first two employers had never transferred rights to the third. The Quebec Superior Court granted a writ of evocation which was upheld by the Quebec Court of Appeal. The issue before the Supreme Court of Canada was whether a reviewable error had been committed by the labour commissioner and the Labour Court in determining that there had been a transfer of the undertaking in the circumstances.

Beetz J., writing for the Court, concluded that the labour commissioner and the Labour Court erred in their interpretation of section 45. The error was characterized as jurisdictional in nature, so that it was unnecessary to decide whether the errors were patently unreasonable.

The lower courts had concluded that the commissioner and the Labour Court made an error on a preliminary question and, therefore, their decisions were subject to a writ of evocation. Their power to register the successor employer as subject to the existing certification depended on a correct answer to the preliminary question of whether an alienation had taken place between the predecessor employers and

---

[164] *Supra*, note 162.

[165] [1988] 2 S.C.R. 1048, 35 Admin. L.R. 153 [hereinafter *Bibeault* cited to S.C.R.].

[166] R.S.Q. 1977, c. C-27. Section 45 states that, "[t]he alienation or operation by another in whole or in part of any undertaking otherwise than by judicial sale shall not invalidate any certification granted under this code, any collective agreement or any proceeding for the securing of certification or for the making or carrying out of a collective agreement."

the successors. Beetz J. reviewed the leading decisions on judicial review involving errors of law and concluded:

> It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
>
> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.[167]

Beetz J. stated that the theoretical underpinning of the collateral or preliminary question doctrine is unimpeachable — jurisdiction conferred on administrative tribunals is limited and that a tribunal cannot, by a misrepresentation of an enactment assume a power not given to it by the legislator. The problem with this theory is that it assumes that the legislature never intended to leave to the administrative tribunal the exclusive determination of the existence of conditions of law or fact which limits its authority. The legislature may have intended to grant to the administrative tribunal exclusive jurisdiction to decide such issues or it may have intended that the conditions set out would limit the authority of the tribunal so that if it erred in determining the existence of the conditions, it would thereby lose jurisdiction:

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"[168]

He proposed instead that a pragmatic, functional analysis be used to determine whether a particular decision is jurisdictional or not:

> The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is

---

[167] *Supra*, note 165 at 1086.
[168] *Ibid.* at 1087.

> within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction.[169]

Three advantages are said to inhere in this approach to jurisdictional questions:

1) It focusses attention on the intention of the legislature rather than on interpretation of an isolated provision. This is especially important in the context of labour relations tribunals protected by privative clauses;

2) A pragmatic or functional analysis is better-suited to deal with the question of whether the tribunal has been given the power to decide. The courts' powers of review are not limited to identifying the questions to be dealt with by the tribunal, but rather to discover whether the legislator intended the tribunal's decisions on these matters to be binding on the parties subject to the right of appeal, if any;

3) The final reason why pragmatic or functional analysis is more advantageous is that:

> [I]t puts renewed emphasis on the superintending and reforming function of the superior courts. When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection: *Crevier* v. *Attorney General of Quebec*, [1981] 2 S.C.R. 220. Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning.[170]

After engaging in a statutory interpretation exercise, Beetz J. concluded that it was clearly the intent of the Quebec legislature to confer only limited jurisdiction on the labour commissioner. The commissioner must ensure that the requirements stated in section 45 of the

---

[169] *Ibid.* at 1088-89.
[170] *Ibid.* at 1090.

Act are met before undertaking to resolve the difficulties arising out of the application of this provision. It was pointed out that this is a much more limited role than that normally given to labour relations boards in other provinces. The duty of the commission to record an alienation is primarily administrative and its jurisdiction to do so depends on such an alienation having taken place in fact and in law. Furthermore, the question of whether an alienation and operation by another has taken place is a civil law concept that requires no special expertise on the part of an administrative tribunal.

Proceeding on the assumption that the commissioner's interpretation of section 45 deserves no deference, the Court undertakes an exhaustive analysis of what the correct interpretation should be. It concluded that errors had been made by the labour commissioner and the Labour Court in interpreting section 45, with respect to the concept of an undertaking, the identity of the undertaking and with respect to what constitutes an alienation. Finally, although Beetz J. noted that it was unnecessary for him to do so, he indicated that the interpretations were patently unreasonable.

This decision raises a number of issues. First, it appears finally to lay to rest the collateral or preliminary question doctrine as a basis for judicial review. Second, in determining whether a matter is jurisdictional, it utilizes the same approach as the deferential "patently unreasonable" test, looking at the statute as a whole and considering the context in which the decision is to be made. On the other hand, one must question whether there will be a tendency to label what otherwise would have been a collateral or preliminary question, as one which the legislature did not intend to leave to the exclusive determination of the administrative tribunal. Although the Court claimed that the issue in question was not one involving the special expertise of the labour commissioner or the Labour Court, it is noteworthy that the Labour Court was concerned with the best means of protecting the bargaining rights of employees employed by contractors whose contracts could be terminated and replaced with those of a competitor. The Court suggested that there were other ways in which protection could be afforded, such as by having certifications that were not limited to particular locations. However, this appears to be a matter within the expertise of persons authorized by the *Act* to make such decisions.

This resort to a lower standard of review for jurisdictional issues has been condemned roundly.[171] The criticism lies in the fact that it is

---

[171] B. Langille, *Judicial Review, Judicial Revisionism and Judicial Responsibility* (1986) 17 R.G.D. 169 at 171, in discussing the *S.E.P.Q.A.* decision stated:

> [T]he decision flies in the face of both logic and experience. The main cause for concern is the unwarranted and undesirable intrusion by the Court upon the role assigned by the legislature to the labour relations board.

See also D. Mullan, *The Supreme Court of Canada and Jurisdictional Error: Compromising New Brunswick Liquor?* (1986) 1 CAN. J. ADMIN. L. & PRAC. 71.

difficult to distinguish issues that are jurisdictional in nature from those that are not and that there is no valid reason that deference is paid in some cases but not in others. To continue these distinctions is to invite losing parties to call for judicial review, which may result in expense and delay that will have a detrimental impact on the operation of the industrial relations system.

B. Consensual Arbitration

In *Telecommunications Workers Union* v. *British Columbia Telephone Co.*[172] the arbitrator held that the employer did not have the right to discipline employees for their conduct on the picket line during a legal strike. The Court, in a 4-1 decision, concluded that it did not have to determine if the arbitrator had made an error of law, because it was satisfied that any such error, if made, was not jurisdictional in nature. The Court adopted the dissenting reasons of Lambert J.A. in the British Columbia Court of Appeal.[173] He concluded that although there was an error of law, it was not a sufficient ground for quashing the decision of the arbitrator, given that it was protected by a privative clause in the *Canada Labour Code*.[174] Furthermore, because it was a consensual arbitration, the maximum amount of judicial restraint was warranted when the arbitrator answered the question that was put to him. The Court added that in light of the highly imprecise terms of reference by which the jurisdiction of the arbitrator was constituted, it was within the jurisdiction of the arbitrator to determine if the employer had the right to impose any disciplinary measures.

The dissenting opinion of L'Heureux-Dubé J. was less deferential and displayed many of the conflicts inherent in an approach which emphasizes jurisdiction as the basis of review. She concluded both that the decision of the arbitrator constituted an error of law and that the decision was jurisdictional in nature. Her judgment canvassed many authorities and asserted that while section 107(2) of the *Canada Labour Code*[175] prohibits an employer from dismissing or disciplining an employee for the sole reason that the employee is on strike, this does not mean that an employer cannot discipline a worker for improper conduct during the strike.

L'Heureux-Dubé J. concluded that the question that had been put to the arbitrator was what, if any, disciplinary sanction the dismissed

---

[172] [1988] 2 S.C.R. 564, 89 C.L.L.C. 14,010.

[173] *British Columbia Telephone Company* v. *Telecommunication Workers Union* (1985), 65 B.C.L.R. 145, 20 D.L.R. (4th) 719 (C.A.).

[174] R.S.C. 1970, c. L-1, *as am.* S.C. 1972, c. 18; S.C. 1977-78, c. 27; S.C. 1980-81-82-83, cc. 47, 121; S.C. 1984, cc. 39, 40; R.S.C. 1985, c. L-2.

[175] R.S.C. 1970, c. L-1, *as am.* S.C. 1972, c. 18, s. 1; S.C. 1977-78, c. 27, s. 36; S.C. 1980-81-82-83, c. 121, s. 17; S.C. 1984, c. 39, s. 21; R.S.C. 1985, c. L-2, s. 3(2).

employees should face? In finding that the employer had no authority to discipline, the arbitrator refused to exercise the jurisdiction that had been given to him. Thus, the arbitrator was characterized as having refused to answer the question that was put to him because of an error of law. This is said to be a patently unreasonable interpretation of his jurisdiction. The reference to a patently unreasonable standard of review as the basis for concluding that there was a jurisdictional error is noteworthy. It is unclear whether there would have been a jurisdictional error, in Mme Justice L'Heureux-Dubé's opinion, if the arbitrator had been merely incorrect but reasonable in concluding that the employer had no right to discipline the striking workers.

Mme Justice L'Heureux-Dubé was clearly concerned that courts may become too deferential to administrative decision-making. She characterized law as the only effective limit on administrative decision-making. While she agreed that courts should defer to the expertise of specialized bodies as final decision-makers within the area of their expertise, this does not oust the duty of the courts to evaluate the decisions for procedural fairness or jurisdictional error. No special deference should be owed to consensual arbitrators — the only difference may be in the way in which jurisdiction is defined. Having concluded that there is a jurisdictional error, the decision of the arbitrator should be quashed.

It is somewhat unfortunate that the majority of the Court insisted on maintaining a distinction between consensual and non-consensual arbitration. Furthermore, their suggestion that the arbitrator was subject to greater deference because he had answered the very question put to him appears to be a revival of the position that former Chief Justice Laskin had attempted to promote, without much success, in a number of opinions. No attempt was made to justify such special treatment, and there will arise once again the difficult question of whether an arbitrator has erred on the very question that has been asked or on a collateral issue of law. The differences between the majority and dissenting opinions on this issue indicates some of the problems that arise.

C. The Patently Unreasonable Test and Charter Challenges

The Supreme Court of Canada, in one of its most recent opinions, suggests that, in at least some cases, the patently unreasonable test is not sufficiently deferential. In *Slaight Communications*[176] the Court was required to decide whether an adjudicator appointed under section 61.5 of the *Canada Labour Code*[177] had jurisdiction to provide a

---

[176] *Supra*, note 13.

[177] R.S.C. 1970, c. L-1, *as am.* R.S.C. 1970, c. 17 (2d Supp.), s. 16; S.C. 1977-78, c. 27, s. 21; R.S.C. 1985, c. L-2, s. 242.

particular form of remedy. The adjudicator made a finding that an employee had been wrongfully dismissed and, in addition to awarding damages and costs, required the employer to provide a letter of reference on behalf of the employee containing a series of factual statements, the accuracy of which were not contested. In addition, the employer was prohibited from doing anything other than providing a copy of the letter of reference in response to any inquiries it received about the employee's work performance. In a 4-2 decision, the Court concluded not only that the adjudicator had statutory jurisdiction to provide this remedy, but also that such a remedy was a reasonable limit on the employer's freedom of expression under the *Charter*. In the course of concluding that there was statutory authority for the arbitrator to make the award in question, Dickson C.J.C. commented on the connection between administrative review on the basis of patent unreasonableness and review based on section 1 of the *Charter*:

> The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard* v. *Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at pp. 494-95), in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to section 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.[178]

This passage leaves a number of matters rather unclear. It clearly establishes that where the claimed unreasonableness arises from an infringement of *Charter* values, analysis under section 1, because of its greater structure and sophistication, is the appropriate way to proceed. The acknowledgement that the patently unreasonable test involves undeveloped values, however, renders it suspect, even in non-*Charter* cases. The statement that a patently unreasonable test should be no more restrictive than a section 1 analysis indicates that careful attention should be paid to the purposes which inform a particular exercise of discretion or interpretation of a statutory provision, even in a non-*Charter* context. Chief Justice Dickson's willingness to do so in this particular case is evidenced by the emphasis placed on the

---

[178] *Slaight Communications*, *supra*, note 13 at 1049.

protection of employees because of the inequality of bargaining power between employer and employee.

D. What Is a Privative Clause?

One of the most thorough reviews of the role of the court in judicial review was conducted by the Ontario Court of Appeal in *Re Ontario Public Service Employees' Union and Forer.*[179] The Ontario Public Service Labour Relations Tribunal decided that Forer should be exempt from paying union dues because of his religious beliefs and opinions. The Divisional Court quashed the decision, claiming that the tribunal had incorrectly defined the word "religious" used in section 16(2) of the *Crown Employees Collective Bargaining Act.*[180] The tribunal had been granted exclusive jurisdiction to exercise the powers conferred on it, and to determine all questions of fact and law. The actions of the tribunal were declared to be final and binding for all purposes.

According to the Court, in the absence of a privative clause, the scope of review in *certiorari* proceedings includes both questions of jurisdiction and law. If there is a privative clause, the scope is limited to questions of jurisdiction. In other words, a tribunal not protected by a privative clause must be correct in any interpretation it makes of its legislation, but must only be reasonable if it is protected by a privative clause, unless the question is labelled as jurisdictional. Questions of jurisdiction are said to include natural justice, bad faith, basing a decision on extraneous matters and failing to take relevant matters into account.[181]

The Court further concluded that a finality clause of the type in question, even though not accompanied by a clause prohibiting resort to *certiorari*, has a privative effect. As a result, there is a narrowing, if not an obliteration of the distinction between the standards of review applicable to questions of law and jurisdiction. In the course of giving a wide effect to a finality clause the Court averred to the trend towards judicial deference and the recognition of the "legitimacy of tribunals as an essential part of the structure of government and the legal system".[182]

It remains unclear whether there is a substantial difference in approach where there is no privative clause at all. The test for determining what constitutes an error of law, at least in the context of interpreting the constitutive statute of the tribunal, is whether the

---

[179] (1985), 52 O.R. (2d) 705, 23 D.L.R. (4th) 97 (C.A.) [hereinafter *Re O.P.S.E.U.* cited to O.R.].

[180] R.S.O. 1980, c. 108.

[181] These matters are listed in *S.E.I.U., Local 333* v. *Nipawin Dist. Staff Nurses Assoc'n*, [1975] 1 S.C.R. 382 at 389, 41 D.L.R. (3d) 6 at 11-12.

[182] *Supra*, note 179 at 722.

interpretation given by the tribunal is one which the language of the document could reasonably bear. It is unfortunate that the Court did not undertake to clarify whether there was any substantial difference in the level of review.

Nevertheless, given the pervasiveness of finality clauses in legislation establishing and defining the jurisdiction of labour relations tribunals and arbitrators, this appears to be a clear indication of extensive judicial deference. This is exemplified in the Ontario Court of Appeal's decision in *Re City of Ottawa and Ottawa Professional Firefighters' Assoc'n, Local 162*.[183] The Court indicated strong disagreement with the interpretation of a collective agreement provision given by the arbitrator, but in the face of a statutory provision declaring the decisions of arbitrators to be final, it concluded that the arbitrator's decision should stand because it could not be labelled as patently unreasonable.

E. Judicial Review by Lower Courts

Ultimately, however, it is important in testing the extent of deference, to look at what the courts are doing rather than what they are saying. The claim that a test of patent unreasonableness is deferential may not be borne out in practice if courts are willing to label most decisions with which they disagree as patently unreasonable. Furthermore, if courts continue to insist that many of the errors made by lower tribunals are jurisdictional in nature, and may be quashed, there is in effect little deference.

A limited survey of Ontario court decisions, both reported and unreported, between 1986 and 1988 reveal some interesting trends. The extent of curial deference may vary from province to province; as well, the results from one province are not to be used to base any general conclusions across Canada. Nevertheless, the unifying framework provided by the Supreme Court of Canada certainly enables other provinces to achieve similar results.

Of forty decisions included in the sample, nineteen were quashed and twenty-one were upheld. The largest volume of cases consisted of review of arbitration decisions (20) with ten upheld and ten quashed. The next largest group involved the Ontario Public Service Grievance Settlement Board in which seven decisions were quashed and four were upheld. The Ontario Labour Relations Board, on the other hand, had only one decision quashed while four were upheld. One decision of the Public Service Labour Relations Tribunal was upheld, as was one decision of the Minister of Labour in deciding whether to appoint an arbitrator. Finally, one decision of an interest arbitrator was quashed while another was upheld.

---

[183] (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609 (C.A.).

It is difficult to conclude from this survey that courts are being particularly deferential to the decisions of labour tribunals and arbitrators. Given that a party who seeks review knows that there is roughly a fifty percent chance of success, that would not appear to be a deterrent to seeking review. It is true that these cases may be on the periphery, and that forty cases over a three-year period, in comparison to the hundreds of decisions where review could have been sought, is a relatively small proportion. In the absence of the court's avowed abstentionist approach, many more may have sought judicial review.

A survey of leading cases from all of the provinces and the Federal Court of Appeal demonstrates the same mixture of deference and jurisdictional claims as described in the Supreme Court of Canada decisions. For instance, there are decisions which affirm orders of the lower tribunal either because they agree with the correctness[184] of the decision or because they do not think the decision can be labelled as patently unreasonable.[185] On the other hand, there are decisions which strike down tribunal awards on the ground that a jurisdictional error has been made,[186] that a decision was patently unreasonable,[187] or that there is an error of law on the face of the record where there is no

---

[184] *See Alberta Lab. Rel. Bd* v. *I.W.A., Loc. 1-207* (1989), 64 Alta L.R. (2d) 402 (C.A.).

[185] In *New Brunswick (Bd of Mgmt)* v. *New Brunswick School of Business Employees Assoc'n* (1988), 85 N.B.R. (2d) 264 (C.A.), it was found that the Board's decision as to whether a particular employee should be excluded from the bargaining unit gave the statutory provision an interpretation it could reasonably bear. *See also C.R.R.T., Loc. 607* v. *Inverness Consol. Memorial Hosp.* (30 November 1988), No. S.C.A. 01953 (N.S.S.C.A.D.); *U.M.W., Dist. No. 26* v. *Cape Breton Dev. Corp.* (1988), 83 N.S.R. (2d) 391 (S.C.A.D.); *Yorkton Credit Union* v. *Saskatchewan Joint Bd, R.W.D.S.U.* (1988), 67 Sask. R. 251 (C.A.); *Fleury* v. *Epiciers Unis Metro-Richelieu Inc.* (1988), 10 Q.A.C. 81 (C.A.).

[186] In *City Consumers Co-op Soc. Ltd* v. *R.W.D.S.U., Loc. 597* (27 October 1988), No. 167186 (Nfld C.A.), it was held that the arbitrator exceeded his jurisdiction by purporting to confer a remedy which he was not authorized to confer. In *University Hosp. Bd* v. *A.U.P.E., Loc. 54*, [1989] 4 W.W.R. 436, 93 A.R. 141 (Q.B.), it was held that the arbitration board failed to deal with the issue put to it. It made its decision on extraneous evidence in such a situation as to lead to a denial of natural justice. In *Regional Admin. Unit #5 School Bd* v. *C.U.P.E., Local 1145* (1988), 69 Nfld & P.E.I.R. 332 (P.E.I.S.C.A.D.), it was held that the arbitration board had no jurisdiction to order that the grievor be examined by a doctor mutually acceptable to both the employer and the grievor when the collective agreement clearly gave the employer the power to make that decision. In *Re A.U.P.E. and the Queen in Right of Alta* (1988), 54 D.L.R. (4th) 727 (Alta C.A.), it was decided that the Public Service Grievance Appeal Board was wrong in deciding it could not provide a remedy for a continuing grievance.

[187] *See C.B.R.T., Local 607* v. *Inverness Consol. Memorial Hosp.* (1987), 78 N.S.R. (2d) 356, 193 A.P.R. 356 (S.C.A.D.); *British Columbia Gov't Employees Union* v. *Indus. Relations Council* (1988), 33 B.C.L.R. (2d) 1 (C.A.); *Mescher* v. *Canada (Treasury Bd)* (9 November 1988), No. A-255-88 (Fed. C.A.).

privative clause in effect.[188] In some cases the courts disagree with the interpretation given by the tribunal but did not indicate the precise grounds on which they felt justified in intervening.[189]

VI. Controlling Strikes and Picketing

In the section of this article dealing with *Charter* developments, much of the analysis centred on the Supreme Court of Canada decisions dealing with the rights to strike and picket. These cases demonstrate a commitment to the idea that a great deal of discretion is to be left to the legislatures in defining the contours of permissible striking and that if the legislature has not enacted provisions dealing with picketing, the courts can continue their regulation of picketing through the operation of common law torts, inherent contempt powers and criminal law. This section undertakes a review of recent cases dealing with industrial disputes. These cases do not reflect any great shift in jurisprudence in the past several years, nor are they consistent. Given the mixture of statutory and common law rules which may lead to differing results in differing jurisdictions, one must be careful not to over-generalize in analyzing these decisions. Nevertheless, it is useful to analyze judicially these major issues that serve to define the extent of effective power that can be wielded by the parties during a dispute.

A. *Restraints on Picketing in Support of Legal Strikes*

The cases demonstrate the willingness of courts to control strictly the contours of industrial action. There are many circumstances in which a court will limit picketing undertaken in support of a legal strike. The focus of concern is to protect the employer's property interests, including the employer's right to attempt to carry on business, to prevent any potential threats to the safety of individuals arising from picket line conduct and to protect innocent third parties from the economic consequences of strikes in which they have no direct interest.

---

[188] *See Saskatchewan Gov't Employees Union* v. *Wascana Hosp.* (1988), 66 Sask. R. 56 (C.A.), where it was held that the arbitration board erred in deciding that the employer could dismiss an employee for a second time on the basis of allegations which it had known about, but not relied upon, in making the earlier dismissal decision, which was held by another panel to be unjustified.

[189] *See British Columbia Gov't Employees Union* v. *Indus. Relations Council*, *supra*, note 187, where the Court found that the Industrial Relations Council had read into the *[Industrial Relations] Act* a provision that was not in accordance with the view that a government employee was automatically employed by a successor employer. It was said that there was no rational basis for this conclusion, and that such a decision amounted to amending legislation, which the Council was not permitted to do.

It is through the granting of injunctions that courts play a major role in regulating strikes and picketing. In deciding whether an injunction should be granted, courts must consider whether there is some cause of action on which the claim for injunctive relief is based. They must also decide whether the granting of equitable relief, by way of an injunction, is warranted in the circumstances, given that damages, rather than injunctions, are the normal remedy for violations of common law rights. The Alberta Court of Appeal decided that the normal criteria for determining whether an injunction should be granted do not apply to picketing. In *U.A.W.* v. *Pacific Western Airlines Ltd*[190] the Court stated that it was not necessary to demonstrate that irreparable harm would occur if the injunction were not granted. The Court also stated that an injunction could be granted to prohibit or limit activities not in themselves illegal, if those activities have led to the commission of unlawful acts. The Court justified placing strict numerical limits on the number of picketers who could be present at the various work locations of the employer.

The Court recognized that strikes are often seen as a contest in which parties attempt to use raw economic power to force the other into submission. The employer is entitled legally to use replacement workers, non-unionized employees and other means to remain in business. The union's power is derived from the direct effects of the withdrawal of labour, as well as through convincing other workers and customers not to deal with the employer. The Court sees its role as keeping the peace against unlawful conduct on either side. There is an unstated assumption either that the law is thus being neutral, or else if it is not neutral, nevertheless is justified in tipping the balance of power as it does. In this context, it is ironic that the Court creates special rules for granting injunctions in picketing cases. Its justification for these special rules is the fact that, although the basis of the injunction is a claim of rights as between private parties, it is, in fact, the general public that is being protected by the injunction.[191] Furthermore, the special treatment is justified on the ground that in industrial disputes, interim and interlocutory injunctions are likely to be final and will never be tried on their merits in a full-scale trial. The conclusion that the number of picketers alone can make picketing unlawful is based on the claim that the numbers of picketers, alone, can block access and intimidate "by their exuberance and their numbers".[192]

---

[190] [1986] 3 W.W.R. 531, 43 Alta L.R. (2d) 289 (C.A.) [hereinafter *Pacific Western Airlines* cited to W.W.R.].

[191] In this case, the rights, especially of air travellers, to have unrestricted access to the airport, and to be free from intimidation or coercion, as compared to permissible forms of persuasion, were protected.

[192] *Supra*, note 190 at 542.

In a Saskatchewan case arising from the same labour dispute, Estey J. was of the view that a demonstration should cause irreparable damage if an injunction was to be granted.[193] He stated that the picketing interfered with the plaintiff's right to carry on its business and, therefore, amounted to irreparable damage.

In many labour disputes, the power of unions depends on the extent to which they can build public support for their cause. During the strike against Gainers Incorporated in Alberta in 1986, courts granted injunctions which not only put very tight limits on the number of strikers who could picket in front of Gainers' plants, but also prohibited picketing by any persons who were not members of or sanctioned by the striking union.[194] In an application to vary the terms of the injunction the Court noted that problems arose only when the employer attempted to conduct business. As soon as it tried to bring workers into the plant, large numbers of people tried to prevent the activity. The Court concluded that section 114 of the Alberta *Labour Relations Act*,[195] then in effect, clearly limited the right to picket to union members or those authorized by the union. The Court assumed that many of the picketers who helped the strikers in resisting the employers' attempts to carry on business were not authorized by the union. It is interesting to note that the new Alberta *Labour Relations Code*[196] states that "anyone" may engage in picketing in front of a struck employer's premises subject to the power of the Labour Relations Board (not the court) to regulate numbers, location and timing of picketing, taking into account the directness of the interest of the persons involved, violence or likelihood of violence, the desirability of preventing escalation of the dispute and the right to peaceful free expression of opinion.

Alberta is not the only province whose labour relations legislation defined the boundaries of permissible picketing. The New Brunswick *Industrial Relations Act*[197] permits picketing at the employer's place of business by a legally striking trade union, but otherwise prohibits trade unions from attempting to persuade anyone from dealing in the products of any person. This provided the basis for granting an injunction to prohibit union members from distributing leaflets at the ferry terminal in Cape Tormentine asking the public to boycott the products of the employer against whom they were engaged in a lawful strike.[198] The Court adopted the less stringent standard, requiring only that there be

---

[193] *Pacific Western Airlines Ltd* v. *U.A.W.* (1985), 45 Sask. R. 136 (Q.B.).

[194] *Gainers Inc.* v. *U.F.C.W.I.U., Local 280-P* (1987), 73 A.R. 35 (Q.B.).

[195] R.S.A. 1980 (Supp.), c. L-1.1 *as rep. Labour Relations Code*, S.A. 1988, c. L-1.2.

[196] S.A. 1988, c. L-1.2, s. 82.

[197] R.S.N.B. 1973, c. I-4, s. 104.

[198] *Marine Atlantic Ltd* v. *R.W.D.S.U., Local 1065* (1987), 83 N.B.R. (2d) 185 (Q.B.).

a substantial issue to be tried and commented that the property interests of the plaintiff must surely take precedence over the right of the union and its members to boycott. Why this should be so is not dealt with in any detail. This is an especially difficult issue in cases where the property in question is accessible to the general public.[199]

The Saskatchewan Court of Appeal has rendered two recent decisions dealing with the circumstances in which a court can grant an injunction to limit picketing during a legal strike. In the first case, *Potash Corporation of Saskatchewan Mining Ltd* v. *Todd*,[200] the Court overturned an injunction that had been awarded on the basis of affidavit evidence. It held that given the usually final nature of injunctions granted in industrial conflict situations, the burden on the plaintiff was to demonstrate that they had a strong *prima facie* case. This is a higher burden than is called for by many courts which require only that the plaintiff demonstrate that there is either a substantial question to be tried or a fair question as to the existence of a right: "[o]n the lesser of the two standards a plaintiff need not demonstrate that he will in all probability win at trial but only that his case is not frivolous or vexatious."[201] The opinion of Cameron J.A. indicated a concern for ensuring that the fundamental right to speak freely and the right to demonstrate not be too easily interfered with, and therefore he posited the need for a more stringent test in picketing cases. In addition, he stated that "such restraint as may be put upon the defendant [picketers] should not in general extend beyond the tortious conduct complained of and established by the plaintiff".[202] In other words, "picketing is not to be judged as though it were subject to some general or special body of law divorced from that of the law of torts".[203]

It is a welcome sign that the Court was willing to acknowledge "that an injunction, particularly with respect to numbers of pickets, can have a critical effect on the degree of success or failure in a strike or lockout".[204] On the other hand, the Court claimed that most injunctions are granted to deal with breaches of the peace and that union members must, if they wish to exercise their right to picket without restraint by the courts, be prepared to discipline themselves so that a high standard of order is maintained. Nevertheless, the Court indicated that even where there was evidence of illegal actions on the picket

---

[199] *See, e.g., R.* v. *Layton* (1986), 38 C.C.C. (3d) 550 (Ont. Prov. Ct) holding that a person passing out leaflets in a shopping mall in support of a union organization drive could not be convicted for violation of the *Trespass to Property Act*, R.S.O. 1980, c. 511, because to do so would infringe on the individual's freedom of expression and association guaranteed by the *Charter*.

[200] [1987] 2 W.W.R. 481, 53 Sask. R. 165 (C.A.) [hereinafter *Potash* cited to W.W.R.].

[201] *Ibid.* at 487.

[202] *Ibid.* at 491.

[203] *Ibid.* at 494.

[204] *Ibid.* at 526.

line, this would not necessarily justify wide injunctions of the kind that had been granted by the Chambers Judge in this case:

> I question the use of injunctions to restrain isolated criminal acts since it makes the union and its entire membership bear the burden of responsibility for those acts when they may be quite innocent of them and when, as here, the union leadership appears to have taken steps to instruct their membership against criminal acts on the picket line and ordered such conduct to cease when it was observed by an officer of the union. Any other approach requires a finding of conspiracy to commit the unlawful acts, and there is no evidence of that here, either by word or deed.[205]

The dissenting opinion of Vancise J.A. would have granted an injunction to prohibit unlawful criminal action by picketers. In his view, "[t]he union is responsible for the conduct of those who picket."[206]

A Newfoundland case, *Easteel Industries (1984)* v. *International Association of Machinists and Aerospace Workers, Octagon Lodge*,[207] granted an injunction prohibiting picketing at the employer's administrative offices which were located at a site other than where the striking employees were working, and limiting the number of picketers at the worksite to four. The Court used the much less stringent test of whether there was a serious issue to be tried, and did not look at the merits of the case to determine whether the claims made in the affidavit justified the granting of the injunction. It was claimed that the balance of convenience favoured the granting of the injunction to the plaintiff, without any explanation of why this might be so.

In the second major decision of the Saskatchewan Court of Appeal, the problem arose from what is commonly referred to as "common situs" picketing.[208] The defendant union was engaged in a lawful strike against a subcontractor working on a construction project belonging to the plaintiff. It was picketing the only entrance to the construction site. In order to allow some construction to continue, the plaintiff built a second gate intended for the sole use of employees of a second subcontractor against whom the union was not striking. The union then picketed in front of the second gate and the employees of the second subcontractor honoured the picket line. The plaintiff sought an injunction to prohibit this picketing. Only two of the three justices who heard the case took part in the decision and they were in disagreement about whether an injunction could be granted in the circumstances.

---

[205] *Ibid.* at 529.

[206] *Ibid.* at 513.

[207] (1987), 67 Nfld & P.E.I.R. 319, 206 A.P.R. 319 (Nfld S.C.T.D.).

[208] *See Garry* v. *Sherritt Gordon Mines Ltd* (1987), [1988] 1 W.W.R. 289, (*sub nom. Sherritt Gordon Mines Ltd and TIW Industries Ltd* v. *P.P.F., Locals 179 and 264*) 59 Sask. R. 104 (C.A.) [hereinafter *Garry* cited to W.W.R.].

The case focussed on whether there had been an unlawful interference with contractual relations. Bayda C.J.S. held that there was such an interference. In his opinion, there was both a direct interference in the contract between the subcontractor and its employees, and an indirect interference in the contract between the plaintiff and the general contractor hired to carry out the construction of the fertilizer plant. He held that a direct interference has three elements:

> (i) direct persuasion or procurement or inducement applied by the third party to the intended contract performer; (ii) knowledge on the part of the third party of the contract; and (iii) an intention by the third party of bringing about an interference with performance of the contract.[209]

Bayda C.J.S. thus accepted the English court decisions which hold that interference with performance of the contract, and not actual breach, is all that is required to establish the occurrence of a tortious action.[210] However, Cameron J.A. required that there be an actual breach of the contract where the direct persuasion used by the defendant was not in itself unlawful, as was the situation in this case. Thus, Bayda C.J.S. was able to hold that there was an interference with the performance of the contract of employment of the subcontractor's employees, whereas Cameron J.A. was not convinced that this interference with performance amounted to a breach. If there was a breach, it was of the union's obligations under the collective agreement, and it could not be said that this resulted from the picketer's direct persuasion of the contract breaker (the union). Given the split, the decision of the Judge in Chambers was upheld.

The difference in approach between the two justices is quite striking. Cameron J.A. required that all the elements of a tort-based claim be proved in the application for an injunction. Furthermore, he recognized that the application of the doctrines at issue in the context of a trade dispute must take into account the modern structure of collective bargaining and the need to balance the various economic interests at stake. His claim is that the law should not only be concerned with protecting property and contractual rights, but also "the peaceful pursuit by associations of employees of their legitimate economic interests".[211] Bayda C.J.S. undertook a much more narrowly focussed doctrinal analysis without acknowledging the need for a balancing between the conflicting interests.

There are a large number of labour board opinions dealing with the contours of permissible picketing, especially in British Columbia,

---

[209] *Ibid.* at 304.

[210] *See Torquay Hotel Co.* v. *Cousins* (1968), [1969] 2 Ch. 106, [1969] 1 All E.R. 522 (C.A.); *Merkur Island Shipping Corp.* v. *Laughton; The Hoegh Apapa*, [1983] 2 A.C. 570, [1983] 2 W.L.R. 778, [1983] 2 All E.R. 189 (H.L.).

[211] *Supra*, note 208 at 327.

where extensive jurisdiction over picketing rests with what is now the Industrial Relations Council. No attempt will be made to analyze these decisions. However, it is important to note the willingness of the legislature to circumscribe the discretion of the Board to decide what constitutes permissible picketing. The extensive 1987 revisions to British Columbia's *Industrial Relations Act*,[212] formerly the *Labour Code*, included amendments to the provisions dealing with picketing that significantly narrow the rights of legally striking workers to picket.[213] Among other things, the definition of "ally", against whom secondary picketing is permitted, was narrowed, the sites where primary picketing is permitted were limited and the definition of common site picketing was expanded so that picketing could be confined to the struck division of the employer.[214] The central thrust of the amendments was to ensure that picketing does not adversely affect persons not involved in the labour dispute. However, they clearly go beyond that in protecting separate divisions of the struck employer from the effects of the strike. These amendments are only part of a wide ranging set of revisions that constitute one of the greatest withdrawals of rights from unions since the introduction of extensive collective bargaining legislation in the 1940s.[215]

B. Illegal Strikes

It is an important feature of the control of industrial disputes that on the one hand, unions are entitled to picket in front of an employer's premises during a legal strike for the purposes of persuading others, including customers, consumers and other employees not to deal with the employer. On the other hand, employees who heed the unions' call and refuse to cross the picket line may be enjoined from engaging in an illegal strike. This is what happened in the *St Anne Nackawic* case.[216] The Supreme Court of Canada decided that the question of damages caused by the illegal strike of those honouring the picket line must be decided by arbitration, but that the courts could enjoin the strike itself and enforce the injunction through its contempt powers. In a subsequent Newfoundland decision, a court held that even if the collective agreement contains a clause prohibiting the employer from instituting a civil action against union members who honour a lawful picket line, the employees can nevertheless be enjoined from striking.[217]

---

[212] *Industrial Relations Act*, R.S.B.C. 1979, c. 212.

[213] R.S.B.C. 1979, c. 212, s. 95, *as am. Industrial Relations Reform Act, 1987*, S.B.C. 1987, c. 24, s. 48.

[214] R.S.B.C. 1978, c. 212, ss. 27(1), *as am.* S.B.C. 1987, c. 24, s. 18.

[215] *See* Panitch & Swartz, *supra*, note 1 for a more complete description of these changes.

[216] *Supra*, note 104.

[217] *See Marco Ltd* v. *C.J.A., Local 597* (1987), 67 Nfld & P.E.I.R. 253, 87 C.L.L.C. 14,034 (Nfld S.C.T.D.).

Basically, the parties cannot contract out of the statutory provisions which prohibit strikes during the term of the collective agreement.

In another Newfoundland decision, it was held that the union was the appropriate defendant in an application for an injunction to prohibit an illegal strike.[218] The strikers were honouring a legal picket line set up by employees of another subcontractor working at the same site. Given the failure of the union to take any steps to get its members back to work, it was held that the union was sufficiently implicated in the illegal strike to be made a party to the injunction.

C. Contempt of Court

After an injunction has been granted, the coercive powers of the courts are available to ensure that the injunctions are obeyed. Failure to abide by the terms of the injunction can give rise to a finding of contempt of court and liability to either fines or imprisonment. The fines may be levied against the individuals who violated the provisions of the injunction or against the trade union that was made defendant in the action. It is important to keep in mind that reported cases form only a small portion of all decisions; thus noting the principles the courts claim to use tells one little about the extent of the power that the courts actually wield.

The decisions of the Supreme Court of Canada in *B.C.G.E.U.* and *N.A.P.E.* have already been discussed earlier.[219] The first of these decisions established the right of a court, on its own motion and pursuant to its powers to protect the interests of the courts through citation for contempt, to enjoin peaceful picketing around the court house by legally striking court workers. The second case further established that a union could not discipline a member who crossed such a picket line, even though the union was legally entitled to strike. The interest of the public in unimpeded access to justice was said to justify the resulting infringement on the freedom of expression. These cases demonstrate the use of the contempt power as the basis for granting an order which must be obeyed. However, the contempt power is more commonly used to enforce an order already made or to punish for the violation of a court order.

In theory, it is difficult to establish that a contempt of court citation is warranted. It has been said that contempt of court is the most potent device open to the court and the ultimate remedy to preserve the authority and integrity of the court.[220] It is therefore

---

[218] *See SCC Construction Ltd* v. *P.P.F.* (1987), 63 Nfld & P.E.I.R. 295, 194 A.P.R. 295 (Nfld S.C.T.D.).

[219] *Supra*, note 9.

[220] *See Placentia-St Mary's Roman Catholic School Bd* v. *Newfoundland Assoc'n of Public Employees, Local 5802* (1986), 60 Nfld & P.E.I.R. 350, 181 A.P.R. 350 (Nfld S.C.T.D.).

claimed that it is used sparingly, with proof beyond a reasonable doubt required. The plaintiff who obtains an injunction is entitled to act as the prosecutor on the motion for contempt.[221]A Saskatchewan Queen's Bench decision has stated that a civil contempt charge for breach of a court order can co-exist with a charge by indictment under subsection 116(1) of the *Criminal Code* (which makes it an offence to disobey the lawful order of any court of justice in Canada).[222]In this particular case the Court refused to grant a stay so that the criminal charges could be dealt with first.

Where the injunction is to prohibit an illegal strike, but the strike ends before the court hears the motion to cite for contempt, it has been held appropriate to exercise the court's discretion and deny the motion. The court's primary concern is not to punish for violation of an order, but to ensure compliance with the order.[223]A New Brunswick court, however, fined a union $500 for allowing the number of picketers to exceed the number set out in the injunction, although there was no indication that this was a continuing problem.[224]

The British Columbia Court of Appeal has affirmed the appropriateness of requiring the union to pay the costs incurred by police in enforcing an injunction, in addition to a $10,000 fine.[225]It is clear that courts are willing to sentence individuals to prison terms if found guilty of contempt of court by violating an injunction banning or controlling picketing or illegal strikes. Sentences are sometimes suspended on the condition that the individuals undertake to obey the court order in the future.[226]

The union will not always be held responsible for individual conduct that may be in violation of the injunction.[227] In *Canada Post Corp.* v. *C.U.P.E.*, the union was not found to be in contempt given the absence of evidence that the union instructed or authorized the violations. Furthermore, the Court exercised its discretion and refused

---

[221] *Ibid.*

[222] *See Potash Corp. of Saskatchewan Mining Ltd* v. *Todd*, [1986] 6 W.W.R. 646, 52 Sask. R. 231 (Q.B.).

[223] *See Citation Industries Ltd* v. *C.J.A., Local 1928* (1988), 32 B.C.L.R. (2d) 120 (S.C.); *Parklane Private Hospital Ltd* v. *B.C. Gov't Employees Union* (1988), 88 C.L.L.C. 14,017 (B.C.S.C.). It should be noted that the Ontario Court of Appeal has been willing to allow punishment for a violation of an order even though there was compliance at the time of hearing of the motion for contempt. *See Re Ajax and Pickering General Hospital and C.U.P.E.* (1981), 35 O.R. (2d) 293, 82 C.L.L.C. 14,164 (C.A.).

[224] *Brunswick Bottling Ltd* v. *R.W.D.S.U., Local 1065* (1987), 81 N.B.R. (2d) 264, 88 C.L.L.C. 14,001 (Q.B.T.D.).

[225] *See Verigin Construction (1983) Ltd* v. *B.C. and Yukon Building Trades Council* (1988), 30 B.C.L.R. (2d) 31 (C.A.).

[226] *See, e.g., Simpson Timber Co. (Sask.)* v. *Bonville*, [1986] 5 W.W.R. 180, 49 Sask. R. 105 (Q.B.).

[227] *See Canada Post Corp.* v. *C.U.P.E.* (1987), 85 N.B.R. (2d) 122, 217 A.P.R. 122 (Q.B.T.D.).

to cite individuals for contempt where there were technical violations of the injunction, but where the judge was also convinced that there was compliance with the spirit of the court order.[228] An Alberta decision concluded that a union was in contempt on the basis that the acts and omissions of its officers constituted acts of the union. The contempt by the union and its officers was labelled as criminal rather than civil, given the deliberate nature of the violations of the injunctions, the wanton disregard for human safety and the open defiance of the rule of law.[229] The Court did not elaborate on the importance of characterizing the contempt as criminal, but from the cases cited, the implication is that imprisonment for criminal contempt is normally justified.

Despite the possible severity of punishment for a finding of contempt, the informality of procedures used to hear motions for contempt is somewhat surprising. In *Zeidler*,[230] for example, the Court proceeded purely on the basis of affidavit evidence.

D. Conclusion

There are a wide range of issues surrounding strikes and picketing that have not been canvassed in this review. These include labour board determination of what constitutes a strike (for example, refusal to work overtime), what constitutes picketing, determination of damages for illegal strikes and the right of the employer to discipline employees for their conduct during a strike. These issues, as well as the ones addressed, form the nuts and bolts of legal control over strikes and picketing.

It is clear that in many ways, the law applying to industrial conflict is specialized. In theory, subject to laws of general application, one sees the tendency of courts to deal with the issues that arise on the basis of the need to keep the peace and protect property interests, without too great a concern for ensuring that judicial action should fit formally within the general doctrines. The power to enjoin and cite for contempt, if the injunctions are not heeded, places the courts in the vanguard of protecting the interests of the public and of the employer. While there is at times a recognition of the need to balance competing interests, all too often there is but limited recognition of the interests of the union in pursuing its goals through the exertion of economic pressure on the struck employer. Even when there is a balancing, there is a tendency to place such great emphasis on the property rights of the employer, including the rights of unimpeded access (which make it possible for the employer to carry on business during a strike), that one must question the ultimate neutrality of the law in policing the economic battle between the parties.

---

[228] *Ibid.*

[229] *Zeidler Forest Industries Ltd* v. *I.W.A., Local 1-207* (1988), 84 A.R. 171, 88 C.L.L.C. 14,020 (Q.B.).

[230] *Ibid.*

THE LAST DAY, THE LAST HOUR: THE CURRIE LIBEL TRIAL. By Robert J. Sharpe. The Osgoode Society/Carswell, 1988. Pp. 312. ($29.95)

During the night of 10-11 November 1918, in the last hours before the armistice that effectively ended the First World War, the Canadian Corps seized the Belgian town of Mons. It was an event rich in symbolism that crowned Canada's remarkable military achievements during that blood-drenched conflict. At Mons, four years before, the tiny British Expeditionary Force had surprised the vast German armies with unexpectedly tenacious resistance which had helped to deny them a conquest of France. At that time, in the summer of 1914, the rag-tag first contingent of Canada's untrained troops was just assembling at Val Cartier, Quebec. Hardened by three years of trench fighting, by the summer of 1918 the Canadian Corps of some 150,000 men had become one of the most powerful Allied formations: in August-November, the Canadians spearheaded the final thrust that shattered the German armies. That achievement was in no small part due to the superb leadership of Lieutenant General Sir Arthur W. Currie, a Canadian militiaman who, by dint of determination and competence in some of the hardest fought battles on the western front, had been appointed Corps Commander in 1917.

Ten years later, in 1928, Currie was fighting for his reputation and, he believed, for that of the Canadian Corps in a courtroom in Cobourg, Ontario. W.T.R. Preston, a vicious Liberal party hack, had published an article in the *Port Hope Evening Guide*. It had denounced the "worse than drunken spree by Canadian Headquarters" that had resulted in heavy loss of life of Canadian troops, for the purely symbolic recapture of Mons, at a time when Currie was fully aware that the armistice would shortly come into effect. Preston was repeating charges that Sir Sam Hughes, Minister of Militia and Defence in 1911-16, had made in the privileged forum of the House of Commons in 1919. Hughes, who had selected Currie for a brigade command in 1914, had turned against the general later in the war when Currie quite properly refused to give front line command to the Minister's unqualified son. Hughes had died in 1921, but he had many friends and his charges — which even his sympathetic biographer attributes to ill-health, paranoia and jealousy[1] — lived on, fuelled by the profound public reaction in all nations that had fought in the First World War against revelations of command incompetence and the resulting squandering of lives in that conflict. When Currie sued the *Evening Guide* in 1928, he was striking back at Hughes.

History has vindicated Currie. Recent studies, based on full archives now available, have demonstrated time and again that he was

---

[1] R.G. Haycock, SAM HUGHES: THE PUBLIC CAREER OF A CONTROVERSIAL CANADIAN, 1885-1916 (Waterloo, Ont: Wilfred Laurier Press, 1986) at 317.

an inspired battlefield tactician, whose intelligence and long experience on the western front sharpened his innate grasp of the myriad complexities of modern war. Above all, his determination to achieve goals with the least possible casualties amounted to "fanaticism". He courageously refused badly conceived orders from his British superiors — just as he refused to accept inexperienced officers pressed upon him by Canadian politicians — and mercilessly drove himself in making sure plans were sound, and his men as well equipped and trained as humanly possible. He was, in the very best sense, consummately professional, representing a break from the amateurism and political intrigue and patronage — embodied in Hughes — that had previously characterized the Canadian military.[2]

The literature on military history includes two chapter-length accounts of the Cobourg trial, and the authors of these accounts judge the trial a signal victory for Currie,[3] as did much of the press and many public figures in 1928. The jury, after all, found for the general.

Robert J. Sharpe's book on the trial comes to no such satisfying conclusion. A legal scholar whose interests cover a broad spectrum, from the details of procedure to the significance of law in society, Professor Sharpe makes a convincing case that Currie was sadly mistaken in bringing the libel suit.

Most interesting for historians is his contention that the courtroom was an inappropriate forum in which to investigate the operations of the Canadian Corps: "[t]he adversary trial process is designed to dissect and examine discrete events more modest in scale. Rules of evidence deliberately filter the flow of information. Argument and debate are closely constrained and controlled."[4] Large land battles, especially fluid mobile operations of the type the Canadian Corps conducted in the fall of 1918, are among the most difficult events to describe accurately and precisely. Tens of thousands of men were scattered in small groups over dozens of square miles. The singular term "battle" is a misleading description of what was actually a multitude of small-unit encounters. No man saw more than an infinitesimal fraction of what was going on; headquarters, miles to the rear and connected to the front by unreliable communications, could maintain only the most general picture and the information was often several hours old.

---

[2] A.M.J. Hyatt, GENERAL SIR ARTHUR CURRIE: A MILITARY BIOGRAPHY (Toronto: Canadian War Museum/University of Toronto Press, 1987) at 145-46; *see also* D. Morton, A PECULIAR KIND OF POLITICS: CANADA'S OVERSEAS MINISTRY IN THE FIRST WORLD WAR (Toronto: University of Toronto Press, 1982) and S.J. Harris, CANADIAN BRASS: THE MAKING OF A PROFESSIONAL ARMY 1860-1939 (Toronto: University of Toronto Press, 1988).

[3] D.G. Dancocks, SIR ARTHUR CURRIE: A BIOGRAPHY (Toronto: Methuen, 1985) at 254-55; J. Swettenham, TO SEIZE THE VICTORY: THE CANADIAN CORPS IN WORLD WAR I (Toronto: The Ryerson Press, 1965) at 19-20.

[4] P. 238.

Although modern war generates mountains of paper, little of it is definitive. In particular, formation and unit war diaries, the basic and often sole record of combat, were written hours, frequently days, after the event they described, usually by a junior officer who relied on whatever communications that had filtered through to the headquarters, and on the memories of others. Memory, even immediately following an event, is notoriously fallible, particularly in the shock and numbing terror and exhaustion of combat. Professor Sharpe emphasizes the problem by reproducing the contradictory and inconclusive descriptions of the action in and around Mons given by veterans who testified at the trial.

Indeed, the author suggests that General Currie's own memory was faulty. In 1927-28, Currie consistently maintained that there had been little fighting and no fatal Canadian casualties in Mons on 11 November (official casualty returns, grouped as they were for the whole period 9-11 November, were unclear, but lent some credence to Currie's recollection because only one death on that day could be confirmed). The entry in Sir Arthur's personal diary for the 11th gives a different impression:

> Some fighting took place through the streets, where I saw dead bodies later in the day. The German machine gunners defending the position were all volunteers, and remained at their posts until they were either killed or captured.

Another difficulty was the danger, ever present in libel suits, that the case would become an open-ended dissection of Currie's character. It was only through the skillful efforts of Currie's counsel, W.N. Tilley, that examination was restricted to the events of 11 November. Nevertheless, Frank Regan, the ruthless and aggressive lawyer for the *Evening Guide*, succeeded in bringing before the jury scandalous — and unfounded — hearsay evidence about Sir Arthur's general conduct during the battle of Ypres in 1915. W.T.R. Preston, who acted for himself, cut closer to the quick. Just prior to the outbreak of war, Currie, on the brink of bankruptcy, had illegally used funds from his militia regiment to cover personal debts. Professor Sharpe shows in agonizing detail how Preston nearly succeeded at the preliminary examination, and during the trial, in exposing this seamy affair.

The book leaves no doubt that Currie's victory in the trial was an exceedingly narrow one. His legal resources were vast compared to those of the shoestring defence, and the law of libel strongly favoured the complainant: it was incumbent upon the *Evening Guide* and Preston to prove the truth of the statements in his article. Still, the jury awarded only $500 damages compared to the $50,000 that Sir Arthur had claimed.

This is a balanced and sensitive work, which, as detailed historical studies should, raises as many questions as it answers. The personalities Professor Sharpe draws are full and convincing: he examines carefully, and on its own merits, what each of them had to say. Unsavoury as

he was, Preston was addressing a legitimate public concern about the enormous loss of life in the war and, significantly, ex-soldiers came forward to testify on behalf of the *Evening Guide*. It was for this reason that Frederick W. Wilson, the editor of the newspaper and an honest, forthright man, stood by the article. The only transgression, moreover, had been to repeat what Sir Sam Hughes had already published in HANSARD. Paradoxically, in celebrating Sir Arthur Currie's victory, newspapers were also endorsing law that in important ways muzzled the press.

None of this is to say that Currie has been diminished. Quite the reverse. Unwilling to accept Sir Arthur's achievements and qualities at face value, Sharpe incisively summarizes the relevant military literature, disregards the idolatry and is convinced by the hard core of evidence. The detailed account of Currie's actions before and during the trial, if anything, enhances his reputation for unpretentious dignity and clear intellect, most strikingly in chapter 12, when Sharpe allows him to speak for himself by reproducing the transcript of his gruelling cross-examination by Frank Regan.

In this instance, prolonged quotation is successful, but in other places it is less so. The thread is sometimes lost in pages of verbatim transcripts which could better have been summarized. I also wish the author had done a broader analysis of the emotional impact of the war. Such distinguished books as Paul Fussell's THE GREAT WAR AND MODERN MEMORY[5] and Eric J. Leed's NO MAN'S LAND[6] suggest that troops who endured the prolonged, ghastly and all-encompassing combat of the First World War felt utterly alien to the civilian world they had known. This literature, together with the large body of Canadian combat memoirs now available, could have been used to deepen our understanding of Currie, together with the officers and the few other ranks who supported his case, and the larger number of other ranks who testified for the *Evening Guide*. Both sides, the book suggests, were making a passionate effort to communicate the experience of the war and find its meaning: it is a dimension well worth pursuing. Perhaps this is an historian picking nits. THE LAST DAY, THE LAST HOUR is uncommonly well-written, interesting and thoughtful.

*Roger Sarty**

---

[5] (London: Oxford University Press, 1976).

[6] (Cambridge: Cambridge University Press, 1979).

* Directorate of History, National Defence Headquarters.