

# BRINGING THE COMMON LAW TO THE BAR OF JUSTICE: A COMMENT ON THE DECISION IN THE CASE OF *DOLPHIN DELIVERY LTD.*

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## I. INTRODUCTION

In *Retail, Wholesale and Dep't Store Union, Local 580 v. Dolphin Delivery Ltd.*<sup>1</sup> the Supreme Court of Canada decided that the *Charter of Rights and Freedoms*<sup>2</sup> does not alter the existing balance of power in labour relations in favour of unions. According to Mr. Justice McIntyre, picketing does constitute a form of expression of ideas and, therefore, falls within subsection 2(b) of the *Charter*.<sup>3</sup> However, the Court held that the *Charter* does not restrain the power of courts to grant injunctions which limit or prohibit peaceful picketing in the context of a strike. This holding is justified by Mr. Justice McIntyre on the basis of sections 1 and 32 of the *Charter*.<sup>4</sup> Thus, the judge-made common law rule that secondary picketing is *per se* illegal because it always involves the tort of inducing breach of contract<sup>5</sup> cannot be challenged regardless of the fact that it significantly inhibits the ability of unions to inform the public about strikes and the demands of their members.

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<sup>1</sup> (1986), [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, *aff'g* (1984), 10 D.L.R. (4th) 198, [1984] 3 W.W.R. 481 (B.C.C.A.) [hereinafter *Dolphin Delivery*]. An interesting comment on this case appeared after this article was written. See D. Beatty, *Constitutional Conceits: The Coercive Authority of the Courts* (1987) 37 U.T.L.J. 183.

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>3</sup> *Supra*, note 1 at 588, 33 D.L.R. (4th) at 187 (S.C.C.).

<sup>4</sup> *Ibid.* at 592, 598-99, 33 D.L.R. (4th) at 190, 195.

<sup>5</sup> *Hersees of Woodstock Ltd. v. Goldstein* (1963), [1963] 2 O.R. 81, 38 D.L.R. (2d) 449 (C.A.) [hereinafter *Hersees*]. For a critique of this case, see H.W. Arthurs, *Comment* (1963) 41 CAN. BAR REV. 573. For a discussion of secondary picketing, see generally J.A. Manwaring, *Legitimacy in Labour Relations: The Courts, The British Columbia Labour Board and Secondary Picketing* (1982) 20 OSGOODE HALL L.J. 274.

This decision is not surprising. There is a long tradition of judicial hostility to secondary picketing and to unions in general.<sup>6</sup> The common law rules which restrain or prohibit picketing are similar to the restrictions imposed by labour relations statutes on picketing in connection with strikes. A decision to expand the scope of permissible picketing would have represented a radical shift in judicial as well as legislative policy and, therefore, the result was largely predictable.

However, the reasoning in this decision remains unconvincing because the Court fails to examine either the common law rule or labour relations policy in light of the *Charter*. Whether one supports or opposes the entrenchment of constitutional rights, the *Charter* has radically changed both the criteria against which social policy is evaluated and the role of the courts in the process of the elaboration and implementation of that policy. Judicial deference to legislative policy is now only appropriate when that policy is in line with the *Charter*. When the policy is elaborated by the courts themselves, consistency with the *Charter* has to be a primary concern. Thus, the courts are constitutionally mandated to take an active role in the political process through which social policy is defined.<sup>7</sup>

Labour relations policy has always been extremely controversial. Two important groups in society, employers and unions, use their economic and political power to strengthen their relative bargaining positions and increase their share of wealth. This struggle is necessarily political because governments of different political hues use legislation to strengthen or undermine the power of each group and define the ways in which this

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<sup>6</sup> See Manwaring, *ibid.*, for a discussion of the literature. See also J.A.G. Griffith, *THE POLITICS OF THE JUDICIARY* (Manchester: Manchester University Press, 1977); H.W. Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century* (1967) 45 CAN. BAR REV. 786 and *Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship* (1960) 38 CAN. BAR REV. 346.

<sup>7</sup> Some commentators have opposed the *Charter* because of what they see as the inevitable politicization of the judiciary and the inevitable legalization of politics. See, e.g., R. Fulford, *The Charter of Wrongs* (December 1986) SATURDAY NIGHT 7. I agree with the view that the *Charter* is not necessarily a progressive step in the evolution of Canadian society. However, the *Charter* exists and it is not likely that it will be repealed in the near future. Refusal to try to influence its interpretation will only make the situation worse as the union movement has learned to its detriment. I personally believe that we have to engage in the debate, if only in order to minimize the damage caused by the *Charter*. For an account of the union movement's lack of interest in the *Charter* at the time of its adoption, see J.M. Weiler, *The Regulation of Strikes and Picketing Under the Charter* in J.M. Weiler & R.M. Elliot eds., *LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (Toronto: Carswell, 1986) 211. Recent decisions of the Supreme Court of Canada (see, e.g., *Reference Re Pub. Serv. Employees Act (Alta.)* (1987), [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577) suggest that the union movement will pay a heavy cost for its refusal to participate in the political process of the elaboration of the *Charter*. The women's movement participated in that process and, if the litigation strategy is carefully worked out, may be able to use the *Charter* to make some real gains.

power can be used.<sup>8</sup> The only way in which an appropriate balance of power can be found is through the political debate and struggle within and without the legislative process.<sup>9</sup>

Historically, courts have been directly involved in this political conflict from the first stirrings of the trade union movement.<sup>10</sup> Too often in the past the courts were, or appeared to be, blatantly partisan. As a result, unions have long regarded the judicial system with suspicion. This is one of the reasons why the legislatures in Canada have, over time, adopted an approach to the regulation of industrial relations which largely excludes the courts.<sup>11</sup> In light of this history, the courts should tread carefully when confronted with a legal dispute arising out of an economic conflict. Rightly or wrongly, the legitimacy of their decisions is suspect, at least in the eyes of the union movement, and they must be very sensitive to the need to maintain the appearance of neutrality.

The adoption of the *Charter* changes the *status quo* for it forces the courts once again to play an important role in the definition of the industrial relations policy of the country. The *Charter* requires the courts to oversee the regulation of labour relations to ensure that *Charter* rights and freedoms are respected. This is a more activist role than they have played in recent years. Given the intensity of conflict in this area, their decisions will necessarily be controversial. If the judges want their decisions to carry weight or to be regarded as legitimate, they must provide convincing reasons to support their holdings.

In *Dolphin Delivery*, the Supreme Court of Canada does not provide persuasive reasons for its decision. The Court's discussion of subsection 2(b) leaves unanswered important questions about the nature of freedom of expression. Its analysis of the role of freedom of expression in the area of labour relations is superficial. It interprets section 1 on the basis of the same assumptions about unionism that have motivated the courts for many years, without subjecting those assumptions to any critical scrutiny. It avoids altogether a consideration of the merits of the common

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<sup>8</sup> The current conflict in British Columbia between the Social Credit government and the union movement over Bill 19 (*Industrial Relations Reform Act, 1987*, S.B.C. 1987 c. 24) shows how political power is used to redistribute power between these two groups in society.

<sup>9</sup> For discussions of the relationship between industrial conflict and politics, see Task Force on Labour Relations Study No. 22, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-66* by S.M. Jamieson (Ottawa: Information Canada, 1968); G. Horowitz, *CANADIAN LABOUR IN POLITICS* (Toronto: University of Toronto Press, 1968); I.M. Abella, *NATIONALISM, COMMUNISM AND CANADIAN LABOUR* (Toronto: University of Toronto Press, 1973); W. Kaplan, *EVERYTHING THAT FLOATS: PAT SULLIVAN, HAL BANKS, AND THE SEAMEN'S UNIONS OF CANADA* (Toronto: University of Toronto Press, 1987).

<sup>10</sup> For a brief history of this involvement, see Griffith, *supra*, note 6, c. 3.

<sup>11</sup> See generally P. Weiler, *RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW* (Toronto: Carswell, 1980). The privative clause in most labour relations acts being evidence enough of this. See, e.g., *Labour Relations Act*, R.S.O. 1980, c. 228, s. 108.

law rule that secondary picketing is *per se* illegal by denying that court orders constitute state action for the purposes of section 32 of the *Charter*. The Court's interpretation of section 32 forms the heart of the decision, and yet many of the implications of that interpretation are not even discussed.

The purpose of this article is to argue that the decision of the Supreme Court of Canada is seriously flawed. First, the merits of the approach used by the Court in analyzing the challenged rule will be examined. I will argue that, by deciding to consider the *Charter* issue in the context of an application for an injunction in which very little relevant evidence was presented, the Supreme Court of Canada opened the door to a manifestation of the traditional judicial anti-unionism. Next, the common law rule which holds that secondary picketing is *per se* illegal will be discussed in light of sections 1 and 2(b) of the *Charter*. Here I will argue that secondary picketing is a form of expression that is *prima facie* protected by subsection 2(b) and that the rule prohibiting such picketing cannot survive under section 1 because it suffers from the defect of overbreadth. Finally, the Court's interpretation of section 32 will be scrutinized to see whether it is possible to apply the *Charter* to judicially created common law doctrines. I will argue that the Court has misinterpreted section 32 because the result of its decision is to insulate judicially created common law rules from constitutional scrutiny. This interpretation actually defeats the purpose of the *Charter*, and of section 32 in particular, by allowing one branch of government to violate the *Charter* with impunity and, hence, reduce the protection of the rights and freedoms of Canadians.

## II. APPLYING THE CHARTER: FACTS AND FANTASIES ABOUT UNIONS

The facts in *Dolphin Delivery* are very straightforward, but do not, in themselves, explain the decision. The meaning or significance attached to the facts by the Court was derived from a number of assumptions about the strength of unions and the effectiveness of picketing which determine the course of Mr. Justice McIntyre's judgment. The decision is convincing only if these assumptions are accepted. Unfortunately, the assumptions appear to be strongly influenced by traditional judicial attitudes towards unions.

It is important to understand the nature of the proceedings in the context of which the *Charter* issue was raised. The company, Dolphin Delivery, made an application for a *quia timet* injunction which would prohibit any picketing of its premises by the defendant union. The union had not yet begun to picket. The company was asking the Court to restrict the right of the union to communicate the fact of its strike to the public on the basis of potential losses which might be incurred as a result. The nature of the remedy requested required the Court to determine whether the union's exercise of freedom of expression would probably cause the type of injury to the plaintiff that would justify the granting of an injunction. The Judge hearing the application was obliged to make this

prediction without the benefit of any evidence as to the type and extent of harm that the plaintiff might suffer.<sup>12</sup> Inevitably, the decision had to be based on speculation, and yet, in such a proceeding, the conclusions about the probability of harm can virtually dictate the result. Given the importance of the rights enshrined in the *Charter* and the speculative nature of the harm, it would seem reasonable for judges to be very reluctant to issue *quia timet* injunctions when such an order would restrain the exercise of a *Charter* freedom.

The facts proven were that the union was involved in a legal strike against Purolator Ltd. Dolphin Delivery had an agreement with Purolator whereby it delivered parcels and messages on Purolator's behalf. After the strike began, Dolphin agreed to do the same work for a company called Supercourier Ltd. The union applied to the British Columbia Labour Board for a declaration that Dolphin Delivery was an ally of Purolator because Supercourier was simply the struck employer operating under another name and, hence, Dolphin was a legitimate target of primary picketing. The British Columbia Labour Relations Board (B.C.L.R.B.) declined jurisdiction because the union was certified under the *Canada Labour Code*<sup>13</sup> and, therefore, the strike was governed by the provisions of the federal statute. Faced with this setback, the union decided that it would attempt to exert pressure directly on Dolphin Delivery. Union officials advised the company of the union's intention to set up picket lines in front of its place of business unless it ceased doing business with Supercourier. Upon receiving notice of the threatened picketing the company applied for an injunction. No picketing in fact occurred. No additional facts were proven.

Mr. Justice McIntyre stated that the factual basis of the case was not very well-developed, but said that the Court had to proceed because of the importance of the case.<sup>14</sup> He did not explain why the Court did

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<sup>12</sup> See R.J. Sharpe, *INJUNCTIONS AND SPECIFIC PERFORMANCE* (Toronto: Canada Law Book, 1983) at 30-31.

<sup>13</sup> R.S.C. 1970, c. L-1.

<sup>14</sup> *Supra*, note 1 at 581, 33 D.L.R. (4th) at 182 (S.C.C.). One might think that adequate evidence would be essential for any determination of the application of section 1. The *Charter* issue was not raised before the Chambers Judge and he did not make any findings of fact with express reference to this issue (*supra*, note 1 at 201, [1984] 3 W.W.R. at 483-84 (B.C.C.A.)).

Mr. Justice McIntyre said: "Ordinarily, some evidence will be necessary to enable the Court to decide whether s. 1 should be applied to preserve a limitation on a right, and the burden of proof will lie upon the party supporting the limitation . . . [but some cases are self-evident and] [t]his, in my view, is such a case in so far as the need for evidence is concerned." *Supra*, note 1 at 590, 33 D.L.R. (4th) at 188 (S.C.C.). It may be that, because the Court based its decision upon section 32, it felt that it was unnecessary to consider the question of the application of section 1 in any detail. However, that does not explain why the answer seems so self-evident to Mr. Justice McIntyre. Contrast this approach with the comments of Mr. Justice Estey in *Law Soc'y of Upper Canada v. Skapinker* (1984), [1984] 1 S.C.R. 357 at 383-84, 9 D.L.R. (4th) 161 at 182, where he comments on the minimal record presented to the Court on the section 1 issue and

not ask for clarification of the facts and/or the submission of supplementary information. Given the importance of the issue before the Court, it seems very peculiar to insist on proceeding without making sure that all the information necessary was available to the Court. This may not be a standard procedure but *Charter* cases are not standard cases.<sup>15</sup> The Supreme Court of Canada should be very reluctant to define the nature and ambit of fundamental rights on the basis of inadequate evidence.<sup>16</sup>

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the importance of providing sufficient evidence. In *R. v. Jones* (1986), [1986] 2 S.C.R. 284 at 299, 31 D.L.R. (4th) 569 at 594 [hereinafter *Jones*], Mr. Justice La Forest stated that "[a] court must be taken to have general knowledge of our history and values and to know at least the broad design and workings of our society."

Mr. Justice McIntyre appears to be treating his assumptions about the union movement as the same type of general knowledge as the importance of the educational system to society in the *Jones* case. I would argue that these two types of "facts" are quite different. No one in the *Jones* case was contesting the importance of education. In this case, however, the impact of the picketing and the question of whether or not it should be assumed to constitute the tort of inducing breach of contract form the crux of the controversy. It is essential to have some evidence on this point if the Court is to evaluate the merits of the *per se* illegality rule. The Supreme Court of Canada simply assumes away the problem. For a discussion of evidence in *Charter* litigation, see B.G. Morgan, *Proof of Facts in Charter Litigation* in R.J. Sharpe, ed., *CHARTER LITIGATION* (Toronto: Butterworths, 1987).

<sup>15</sup> The *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 67, gives the Supreme Court of Canada the power to ask for further evidence.

<sup>16</sup> Compare the approach taken in *Dolphin Delivery* with that taken in *Operation Dismantle v. R.* (1985), [1985] 1 S.C.R. 441 at 457-58, 18 D.L.R. (4th) 481 at 492-93, where Chief Justice Dickson states:

Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure.

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The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": Sharpe [*supra*, note 12, at 31]. . . .

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It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

These excerpts demonstrate that the courts are much more reluctant to proceed without adequate proof in contexts other than labour relations. For a discussion of this reluctance, see Sharpe, *supra*, note 12 at 30-31 and *Redland Bricks Ltd. v. Morris* (1969), [1970] A.C. 652 at 655, [1969] 2 All E.R. 576 at 579, where the House of Lords states: "A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future."

For a discussion of Canadian case law, see *Dialadex Communications Inc. v. Crammond* (1987), 57 O.R. (2d) 746 at 750-51, 34 D.L.R. (4th) 392 at 396 (H.C.). Of course, the courts would say that the same policy is applied in all circumstances. However, it is the willingness to perceive harm as probable that varies from context to context.

On the basis of these facts, Mr. Justice McIntyre made some very important assumptions:

1. The picketing would have been peaceful.
2. Some employees of Dolphin Delivery and some trade members employed by customers of Dolphin Delivery would have refused to cross the picketline set up by the strikers.
3. The daily business of Dolphin Delivery would have been disrupted to a considerable extent.

These assumptions are not unusual in this type of case. The *quia timet* injunction is intended to prevent harm from occurring pending trial of the merits of the dispute. The judge must make some attempt to assess the likelihood of irreparable losses if the applicant is not protected. Since judges lack expertise in industrial relations and have little knowledge of unions, the need to make such an assessment on the basis of little or no evidence increases the likelihood that the decision will be influenced by judicial bias.<sup>17</sup> It is much easier to justify the granting of injunctions if you assume that the union movement is so powerful that its picketing will inevitably inflict major harm. This bias is evident in Mr. Justice McIntyre's conclusion:

[I]t is evident that the purpose of the picketing in this case was to induce a breach of contract between the respondent and Supercourier and thus to exert economic pressure to force it to cease doing business with Supercourier. It is equally evident that, if successful, the picketing would have done serious injury to the respondent.<sup>18</sup>

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<sup>17</sup> The courts have been severely criticized for many years for their willingness to grant injunctions in labour disputes with very little regard for the legitimate interests of labour. This criticism forms one of the important bases for current labour policy which attempts to exclude labour relations as much as possible from the jurisdiction of the courts. For a classic statement of the critique, see F. Frankfurter & N. Greene, *THE LABOR INJUNCTION* (New York: Macmillan, 1930) and B. Laskin, *The Labour Injunction in Canada: A Caveat* (1937) 15 CAN. BAR REV. 270. See also E.L. Teed, *The Ex Parte Injunction — Use and Abuse* (1968) 18 U.N.B.L.J. 118; H.W. Arthurs, *Challenge and Response in the Law of Labour Relations* (1966) U.B.C.L. REV. 335; P.C. Weiler, *The "Slippery Slope" of Judicial Intervention* (1971) 9 OSGOODE HALL L.J. 1; S.A. Tacon, *TORT LIABILITY IN A COLLECTIVE BARGAINING REGIME* (Toronto: Butterworths, 1980). For a thorough discussion of labour policy, see Weiler, *supra*, note 11 at 289-94.

<sup>18</sup> *Supra*, note 1 at 588, 33 D.L.R. (4th) at 187 (S.C.C.). These conclusions underline the jurisprudential weakness of the decision. There is no discussion of the tort of inducing breach of contract. The Court does not define the tort or make any attempt to analyze the case law. Yet it is not necessarily evident that the tort would have been committed had the union been allowed to picket. In order to recover damages for the tort, a plaintiff must show that the defendant knew of the contract, intended to cause a breach of the contract, and used direct persuasion to induce the breach or indirectly persuaded the party to breach through the use of unlawful means. There must be no justification for the defendant's actions. The plaintiff must also show that there was an actual breach which caused losses. *D.C. Thomson Ltd. v. Deakin* (1952), [1952] Ch. 646, [1952] 2 All E.R. 361 (C.A.).

One or more of these elements may have been lacking in this case. While the union did want Dolphin to stop dealing with Supercourier, it is not certain that Dolphin

Mr. Justice McIntyre's assumptions about the intention of the union, the effectiveness of the union's picketing and its consequences for the company predetermine the answer to the question of the constitutionality of the decision to grant the injunction. How could one reasonably oppose the decision when it is assumed that the activity of the union constitutes the tort of inducing breach of contract? Thus, the constitutionality of the role which was used to justify the granting of the *quia timet* injunction is to be determined on the basis of judicial perceptions of the potential impact of the threatened picketing. At the original hearing this may be inevitable given the urgency of the request before the judge. However, it seems particularly inappropriate in a *Charter* challenge which has reached the Supreme Court of Canada long after the original dispute has been resolved. There is no compelling reason to refuse to test the assumptions upon which the decision to grant the injunction was based in light of the best possible evidence. Mr. Justice McIntyre suggested that the merits of the union's case could be determined at trial in spite of the

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would have had to breach its contract in order to do so. It may well be that Dolphin and Supercourier concluded a discrete contract for each transaction. It is not clear that Dolphin had no right to refuse to deliver goods for any motive however arbitrary. But, even assuming that Dolphin would have been in breach of its contract, it is not clear why Dolphin's own willingness to give in to the pressure of the union should have given it a cause of action. If any one would have a right to sue the union, it would be Supercourier. Other persons, such as Dolphin's own clients or employees, might have breached contracts with Dolphin. Again, it is hard to see how the tort could be committed if the clients had no continuing contractual obligation to use Dolphin's services. Thus, the most likely breaches of contract would have been the refusal by the employees of clients to cross the picket line. These breaches could not give Dolphin a cause of action because Dolphin was not a party to those contracts. The employers of these persons would have had a cause of action for breach of the employment contract. Dolphin would have been able to obtain a remedy against the client for breach of contract if there was an obligation to use its services but not otherwise. Dolphin's own employees might have refused to cross the picket line but there is no proof that they would have necessarily done so in such large numbers so as to disrupt its operations. If they did so, their action would have constituted an illegal strike for which Dolphin would have a remedy under the collective agreement or the B.C. *Labour Code*, R.S.B.C. 1979, c. 212. Thus, it is not at all clear that Dolphin would have had the right to sue the defendant union even if the picketing had been allowed.

Of course, many of these questions about possible breaches of contracts would have been answered if there had been more adequate evidence. It should also be stressed that the Supreme Court of Canada is being perfectly faithful to a long line of cases in which the courts gloss over jurisprudential problems in their rush to grant the injunction. They seem more concerned with the possibility that the picket line could be effective than with the issue of whether it would give rise to a cause of action if it was actually effective. For discussions of the judicial approach to picketing, *see ibid.*, all references, but especially Tacon.

fact that there would be no trial.<sup>19</sup> *Charter* issues should not, in my opinion, be decided on such a basis.

Obviously, if we did not assume that the picketing would have these effects, it would be much easier to argue that picketing is a reasonable exercise of the right to freedom of expression. As long as the courts operate on these kinds of assumptions, no secondary picketing can ever be justified. The assumptions permit the court to avoid the important issue which is the extent to which such picketing actually causes harm. Even worse, it becomes impossible ever to know the answer to this question because the decision of the Supreme Court of Canada in this case means that all secondary picketing is automatically restrainable and we will never acquire any real evidence about its effects. If one's priority is to protect the property interests of employers this may be no great cost, but if we are really concerned about protecting the rights enshrined in the *Charter*, this seems to be an inappropriate way to proceed.

Thus, the constitutionality of the judicially imposed limits on the right of striking union members to express their opinions was decided in the context of a proceeding that, by its nature, prevented the Court from getting sufficient evidence upon which to base its decision. Judges who are not labour relations experts and who have little awareness of the hostility with which the labour movement regards the courts may not have difficulty with this way of proceeding. However, it seems unlikely that their decision will have much legitimacy in the eyes of the union movement. It may appear, rather, as another manifestation of the tradition of judicial anti-unionism which dates back to the industrial revolution.

This criticism is not directed at the ultimate holding in *Dolphin Delivery*. It may well be that the common law rule against secondary picketing should survive a challenge based on subsection 2(b) of the *Charter*. Certainly it has been the judicial and legislative policy in Canada for many years to limit the right to picket so that economic costs of strike activity are kept to a minimum.<sup>20</sup> This criticism is, however, directed at the impression that the Supreme Court of Canada gives of treating a *Charter* freedom very lightly because it has not been able to break out of the ideological preconceptions that have traditionally tainted decision-making in the area of labour relations. Given the potential implications

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<sup>19</sup> See *supra*, note 1 at 592, 33 D.L.R. (4th) at 190 (S.C.C.), where Mr. Justice McIntyre suggested that the proportionality test under section 1 had been met because "this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence". Obviously the case will never go to trial. There is no cause of action because the union cannot picket. One of the major criticisms of the interim labour injunction is that it prevents any consideration of the merits by deciding the issue *de facto* without allowing a full consideration of the issues. The union is interested in winning the strike, not in litigating legal issues which will be decided long after the strike is over. See sources *supra*, note 17.

<sup>20</sup> See Manwaring, *supra*, note 5.

of the *Charter* for labour relations in this country,<sup>21</sup> this seems particularly unfortunate.

### III. IS PICKETING A FORM OF EXPRESSION?

Freedom of expression is not a self-defining term.<sup>22</sup> It is difficult to imagine how society would function if this freedom were absolute but the necessity of finding the boundaries between legitimate and illegitimate expression does not change the fact that the possible limits vary enormously.<sup>23</sup> Thus, the courts, when defining freedom of expression, are engaged in a task that typifies their new political role. The answer to the question cannot be found using traditional legal tools.<sup>24</sup> Neither the rules of interpretation of a constitutional document nor precedent provide much guidance.<sup>25</sup> The courts have to work on a terrain that is shifting and contested. They are defining the kind of society in which Canadians will live in the future even though any consensus on this issue is necessarily ephemeral. The task is not an easy one.

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<sup>21</sup> For an interesting discussion of the potential implications of the *Charter*, see generally D.M. Beatty, *PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE* (Montreal: McGill-Queen's University Press, 1987).

<sup>22</sup> The extent to which this is true becomes clear when one examines the extensive literature on the subject. The approaches to the definition of freedom of expression vary greatly. See, e.g., A. Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Port Washington, N.Y.: Kennikat Press, 1948); T. Emerson, *THE SYSTEMS OF FREEDOM OF EXPRESSION* (New York: Random House, 1970); T. Scanlon, *A Theory of Freedom of Expression* (1972) 1 PHIL. & PUB. AFF. 204. See also the controversies about pornography, C.A. MacKinnon, *Pornography, Civil Rights, and Speech* (1985) 20 HARV. C.R.-C.L.L. REV. 1; K.A. Lahey, *The Charter and Pornography* and L. Arbour, *The Politics of Pornography* in Weiler & Elliot, *supra*, note 7 at 265 and 294 — and hate propaganda — D.A. Downs, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT* (Notre Dame: University of Notre Dame Press, 1985); D. Hamlin, *THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE* (Boston: Beacon Press, 1980).

<sup>23</sup> Even authors who argue for a very broad definition of freedom of expression acknowledge that restrictions against libel, treason and child pornography are legitimate. See, e.g., Emerson, *ibid*.

<sup>24</sup> Section 2 should be contrasted with ss. 7-14 which deal with legal rights. There is a long legal tradition dealing with these kinds of rights and the precedents can be very helpful to a court which is interpreting those sections. See D. Paciocco, *CHARTER PRINCIPLES AND PROOF IN CRIMINAL CASES* (Toronto: Carswell, 1987), especially c. 2.

<sup>25</sup> The Canadian courts have traditionally been very reluctant to provide much effective protection for freedom of expression although they have held that is a very important right. See M.D. Lepofsky, *OPEN JUSTICE: THE CONSTITUTIONAL RIGHT TO ATTEND AND SPEAK ABOUT CRIMINAL PROCEEDINGS* (Toronto: Butterworths, 1985), especially c. 3. See also *Reference re Alberta Statutes* (1938), [1938] S.C.R. 100, [1938] 2 D.L.R. 81, *aff'd* with respect to one statute (*sub nom. A.G. Alberta v. A.G. Canada*) (1938), [1939] A.C. 117, [1938] 3 W.W.R. 337 (P.C.); *Saumur v. City of Quebec* (1953), [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641; *Switzman v. Elbling* (1957), [1957] S.C.R. 285, 7 D.L.R. (2d) 337; *Nova Scotia Bd. of Censors v. McNeil* (1978), [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1; *Gay Alliance Towards Equality v. Vancouver Sun* (1979), [1979] 2 S.C.R. 435, [1979] 4 W.W.R. 118.

The text of the *Charter* itself provides little guidance when one seeks to describe the ambit of the protected right. Subsection 2(b) reads:

Everyone has the following fundamental freedoms:

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. . . .

Section 2 comes under the heading of fundamental freedoms. The word "fundamental" suggests that the freedoms enumerated therein are extremely important, so important that they form the foundation or basis of Canadian society.<sup>26</sup> The list of freedoms found in subsection 2(b) does not restrict the meaning of freedom of expression. The section does not suggest that these basic freedoms are limited to any particular realm of Canadian life, such as the political process. They are relevant to most of the realms of daily experience and thus are potentially very broad. It would seem obvious then that subsection 2(b) protects picketing to the extent that it involves the peaceful expression of ideas.

This generous interpretation is supported by the Supreme Court of Canada's directive that a broad purposive approach be taken to the interpretation of the *Charter*.<sup>27</sup> There have been decisions in which the courts have suggested that freedom of expression protects only political expression, but this restrictive interpretation of the *Charter* is not supported by the text.<sup>28</sup> In *Dolphin Delivery*, the Supreme Court of Canada

<sup>26</sup> See WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, 2d ed. (New York: Library Guild, 1958) at 741-42.

<sup>27</sup> *Hunter v. Southam Inc.* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

<sup>28</sup> See, e.g., *Re Klein and Law Soc'y of Upper Canada* (1985), 50 O.R. (2d) 118 at 168, 16 D.L.R. (4th) 489 at 539 (Div. Ct.), where Mr. Justice Callaghan stated: "I would conclude that there is no reason to expand the meaning of the word 'expression' in s. 2(b) of the Charter to cover pure commercial speech. Commercial speech contributes nothing to democratic government because it says nothing about how people are governed or how they should govern themselves." See also *Re Koumoudouros and Municipality of Metropolitan Toronto* (1984), 45 O.R. (2d) 426 at 435, 6 D.L.R. (4th) 523 at 533 (Div. Ct.), *rev'd* (1985), 52 O.R. (2d) 442, 11 O.A.C. 74; *R. v. Zundel* (1987), 58 O.R. (2d) 129 at 155-56, 18 O.A.C. 161 at 180. Mr. Justice Beetz appears to adopt the same approach in his opinion in *Dolphin Delivery* where he dissented from the majority on this point, although concurring in the result. His reasons are so brief that it is impossible to know why he disagrees. But see *Re Ontario Film and Video Appreciation Soc'y and Ontario Bd. of Censors* (1983), 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (Div. Ct.), *aff'd* (1984), 45 O.R. (2d) 80, 2 O.A.C. 388, *leave to appeal granted* (1984), 55 N.R. 318, 41 C.R. (3d) xxix (S.C.C.). See also Weiler, *supra*, note 7 at 223-25.

The liberal interpretation of freedom of expression is consistent with the American approach to the regulation of picketing which recognizes that, first of all, it is a form of expression of ideas (see *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Carey v. Brown*, 447 U.S. 455 (1980); *United States v. Grace*, 461 U.S. 171 (1983)), although subject to regulation when inseparably combined with conduct that the government can constitutionally regulate (see *International Bhd. of Teamsters, Local 695 v. Vogt Inc.*, 354

adopts a much more liberal definition of freedom of expression. After citing authors such as Milton and John Stuart Mill, Mr. Justice McIntyre has no difficulty in concluding that the picketing which the applicant sought to restrain would have constituted a form of expression.

In my opinion, the holding is justified.<sup>29</sup> A broad interpretation of subsection 2(b) recognizes the importance of speech to all segments of society. This approach is the one most likely to be recognized as legitimate by broad sections of the population. As well, it acknowledges the nature of the activity in which the employees would have engaged. The striking employees would have peacefully marched up and down in front of the premises of the company. They would have carried signs conveying information about their conflict with Purolator. Clearly, this is a form of expression of ideas.

The purpose would have been to invite the public to act on the basis of this peacefully communicated message.<sup>30</sup> Indeed, some part of the

U.S. 284 (1957)).

It is important to note that while the United States Supreme Court acknowledges that picketing is a form of expression, it quickly moved away from the position adopted in *Thornhill v. Alabama* to allow extensive regulation of picketing in the labour context. For a summary of the case law, see *Annot.*, 72 L.Ed.2d 872 (1982).

<sup>29</sup> This holding is sometimes described as the silver lining in this decision. I find it hard to get excited about the conclusion that picketing is a form of expression when the protection it is given is so weak. The holding is *obiter* to the extent that the result turns on the interpretation of section 32. It was suggested to me in discussion that one way of avoiding the implications of the interpretation of section 32 would be to argue that the case turns on the application of sections 1 and 2(b). However, this reading of the decision does not appear to me to be very convincing. If I am right, the "silver lining" could prove illusory.

<sup>30</sup> Courts often assume that picketing is a form of speech which provokes an immediate reaction on the part of employees regardless of the message:

The picket line has become the sign and symbol of trade union solidarity and gradually became a barrier — intangible but none the less real. It has now become a matter of faith and morals and an obligation of conscience not to breach the picket line and this commandment is obeyed not only by fellow employees of the picketers but by all true believers who belong to other trade unions which may have no quarrel at all with the employer who is picketed.

*Heather Hill Appliances Ltd. v. McCormack* (1965), [1966] 1 O.R. 12 at 13, 52 D.L.R. (2d) 292 at 293 (H.C.), *Stewart J.*, *aff'd* (1966), [1966] 1 O.R. 15n, 52 D.L.R. (2d) 295n (C.A.).

A similar idea was expressed by the United States Supreme Court:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

*Bakery and Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769 at 776-77 (1942). See also *United States v. O'Brien*, 391 U.S. 367 (1968). This view of picketing forms the core of the "speech plus" doctrine used by the American courts to justify the regulation of

public may well have decided to act on it. Union solidarity is a powerful principle for some Canadians. However, this in itself is not a reason to exclude such speech from the ambit of freedom of expression under the *Charter*. All speech seeks to convince the listener of both its truth and the necessity of acting on that truth. The desire to convince does not distinguish picketing from any other form of speech.<sup>31</sup>

In addition, picketing is not an activity that is necessarily connected to economic conflict. Many marginal political groups use picketing as a means of communicating their message. Consumer and religious groups sometimes resort to this tactic to publicize issues.<sup>32</sup> Unless the constitutional status of picketing is to be determined by the content of the message,<sup>33</sup> it seems inappropriate to distinguish between picketing in different contexts when interpreting section 2. If such distinctions are justified, they can be taken into account when applying section 1.<sup>34</sup>

#### IV. APPLICATION OF SECTION 1

Mr. Justice McIntyre did not analyze the application of section 1 to the common law rule which makes secondary picketing illegal *per se*

picketing. The argument is that picketing is more than speech because people will respond to the pickets without any rational consideration of the content of the speech (see Emerson, *supra*, note 22 at 433-49 for a discussion of the American case law).

This interpretation of the desire of the public to respect peaceful picket lines seems to deny the ability of ordinary people to make rational choices. It is possible to argue that the desire of people to respect the picket lines shows that a substantial portion of the population want to know about labour conflicts. In any case, I would argue that there is no need to use the speech plus doctrine in Canada because, unlike the American *Bill of Rights*, the *Charter* has section 1 which permits the imposition of reasonable limits on the protected freedoms.

<sup>31</sup> See Weiler, *supra*, note 7 at 230.

<sup>32</sup> Picketing and consumer boycotts were important weapons in the struggle for civil rights in the United States. See, e.g., *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886 (1982) [hereinafter *N.A.A.C.P.*] and Emerson, *supra*, note 22 at 433-34.

<sup>33</sup> The American courts have rejected as unconstitutional distinctions based on the content of the speech. See *Carey v. Brown*, *supra*, note 28.

<sup>34</sup> Curiously, Mr. Justice McIntyre did not explain why he believes that picketing is a form of expression in spite of its purely economic focus in this case. All of the case law that he cited in support of his conclusion stressed the importance of expression for the political process and he, himself, spoke solely in such terms. The respondent argued that expression should be limited to political ideas. Mr. Justice McIntyre never clarified why freedom of expression includes this form of economic speech. I believe that his conclusion is correct but his reasoning will not be very helpful in future cases. He also failed to explain why the speech/conduct distinction does not apply to picketing. In the majority judgement of the British Columbia Court of Appeal, Mr. Justice Esson stated that "[n]ot all picketing today is a form of expression". *Supra*, note 1 at 212, [1984] 3 W.W.R. at 495 (B.C.C.A.). He excludes picketing from the realm of expression because it is primarily a form of conduct. This characterization of picketing has been accepted in the United States. Although Mr. Justice McIntyre did not explicitly state his reasons, his reasoning may have been that section 1 of the *Charter* provides a way to recognize the dual nature of picketing without adopting an artificially restrictive definition of freedom of expression in order to justify legitimate regulation.

on the basis of the tort of inducing breach of contract<sup>35</sup> in any great detail.<sup>36</sup> Ordinarily the burden of proof lies upon the party seeking to restrain a *Charter* freedom.<sup>37</sup> In this case, Mr. Justice McIntyre decided that this burden of proof is very easily discharged because no evidence other than that before the Chambers judge and the assumptions and findings of the court itself is necessary. He then went on to define the issue as one of the appropriate balance between the interest of the respondent in its economic well-being and the right of striking employees to communicate information. At first glance it seems obvious that fundamental freedoms should not be restricted in order to promote private gain. However, according to Mr. Justice McIntyre, this initial impression is inaccurate.<sup>38</sup>

Mr. Justice McIntyre decided that the restriction on the *Charter* freedom is justified by the high social cost of strikes and the public policy against secondary picketing.

The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties.<sup>39</sup>

Thus, the justification of the restraint on the freedom of expression of unions and their members under section 1 is premised on the public interest. Society, as a whole, has a collective interest in limiting the impact of strikes. The common law rule which, according to the Court, infringes subsection 2(b) of the *Charter* protects private economic well-

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<sup>35</sup> See *Hersees*, *supra*, note 5. See generally Tacon, *supra*, note 17 for a discussion of the tort of inducing breach of contract in a labour context. See also P. Burns, *Tort Injury to Economic Interests: Some Facets of Legal Response* (1980) 58 CAN. BAR REV. 103 for a general discussion of the tort.

<sup>36</sup> This may be explained by the fact that the decision turns on the interpretation of section 32 which would make this discussion *obiter*. It may also explain why Madame Justice Wilson did not feel compelled to analyze the tort of inducing breach of contract in spite of her criticism of the approach of the majority.

<sup>37</sup> See *R. v. Oakes* (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

<sup>38</sup> Madame Justice Wilson criticizes the analysis of the common law rule under section 1 in her concurring judgment. She argued that it is incorrect to take into account the impact of the picketing on the applicant company when deciding whether the contested rule survives scrutiny under section 1. She states that the Court should take an objective approach to the application of section 1. The impact on the particular party, which she characterized as subjective, is relevant only if the rule is demonstrably justified in a free and democratic society and the Court proceeds to the next step of determining whether the injunction should issue in the circumstances of the individual application. She also criticized the lack of analysis of "the origin and historical development of the tort [of inducing breach of contract] and its role in relation to labour disputes". *Supra*, note 1 at 605, 33 D.L.R. (4th) at 200 (S.C.C.).

<sup>39</sup> *Ibid.* at 591, 33 D.L.R. (4th) at 189.

being as a means of protecting the interest of all Canadians in minimizing the economic cost of strikes. This reasoning is analogous to the policy arguments used to explain why the right to strike has been so extensively regulated by statute and common law.<sup>40</sup> It is implicitly based on the view that maximizing profit in private hands benefits all of society while increasing wages only benefits those who pocket the earnings.<sup>41</sup>

In Mr. Justice McIntyre's opinion, the application of section 1 of the *Charter*, in order to preserve the common law rule, is consistent with legislative policy in British Columbia. Secondary picketing is prohibited by the British Columbia *Labour Code*.<sup>42</sup> Therefore, the common law rule is demonstrably justified in a free and democratic society. He does not discuss statutory policy in any depth and does not take notice of the fact that the statute actually abolishes the common law rule, takes the jurisdiction to restrain secondary picketing away from the courts and requires the B.C.L.R.B. to follow a more sophisticated procedure for the identification of secondary picketing. In other words, even though legislative policy in British Columbia opposes resort to the courts for the resolution of labour disputes, the Supreme Court of Canada uses the statute to justify upholding the common law rule of *per se* illegality under section 1.<sup>43</sup>

<sup>40</sup> As Weiler points out:

[W]e have gone about as far as we can go in legally regulating strike action in Canada. All that remains of the right to strike is the irreducible minimum. That extensive battery of legal regulations is enforceable by instant legal procedures and mandatory legal orders (ultimately enforceable by contempt of court proceedings).

*Supra*, note 11 at 69.

<sup>41</sup> This view was expressed more explicitly by Mr. Justice Aylesworth in *Hersees*, *supra*, note 5 at 86, 38 D.L.R. (2d) at 454, where he says:

[T]he right, if there be such a right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.

See generally Arthurs, *supra*, note 5 at 580-81.

<sup>42</sup> R.S.B.C. 1979, c. 212, s. 88 and s. 85(3) *as am.* S.B.C. 1984, c. 24, s. 16. However, it is possible that this picketing would have been legal under the British Columbia Code because Dolphin Delivery was performing work which, but for the strike, would have been performed by the striking workers. The argument would be that by performing this work, Dolphin Delivery had ceased to be neutral and had become an ally of the struck employer. See Manwaring, *supra*, note 5 at 307-09. Courts have accepted similar arguments: see, e.g., *Commonwealth Holiday Inns of Canada Ltd. v. Sundy* (1974), 2 O.R. (2d) 601, 43 D.L.R. (3d) 641 (H.C.) and *Sasso Disposal Ltd. v. Webster* (1975), 10 O.R. (2d) 304, 63 D.L.R. (3d) 108 (H.C.). However, the ally doctrine is less clearly established at common law.

<sup>43</sup> Professor Arthurs suggests that, in fact, the *per se* illegality rule goes against legislative policy. *Supra*, note 5 at 584. Apparently, the Ontario legislature declined to follow a committee recommendation to outlaw secondary picketing. In other words, the Ontario Court of Appeal did what the legislature consciously refused to do. Mr. Justice McIntyre's use of the legislative policy to justify the rule is particularly ironic.

This purported deference to legislative policy shown by the reluctance of the Court to question the restrictions imposed by statute on secondary picketing seems out of place in this case. The issue is not whether the policy has been approved by a duly elected legislature. Rather, it is whether the common law rule can withstand constitutional scrutiny.<sup>44</sup> The mere fact that it is similar to policies approved by legislatures cannot, in itself, justify a common law violation of the *Charter*. If legislative approval alone could justify policies which violate the *Charter*, there would be no need for section 33 which allows for a legislative override of *Charter* provisions.<sup>45</sup> Obviously, elected officials are constrained by the *Charter* and statutory rules limiting the right to picket can be challenged. Similarities between the common law and legislative policy will

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<sup>44</sup> This issue will have to be faced when the labour legislation of the provinces is challenged under the *Charter*. For example, Alberta has defined the scope of picketing in its *Labour Relations Act*, R.S.A. 1980, c. L-1.1, s. 114 as follows:

- (1) When there is a strike or lockout that is permitted under this Act, a trade union, members of which are on strike or locked out, and anyone authorized by the trade union may, at the striking or locked out employees' place of employment and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to
  - (a) enter the employer's place of business, operation or employment,
  - (b) deal in or handle the products of the employer, or
  - (c) do business with the employer.
- (2) Except as provided in subsection (1), no trade union or other person shall persuade or endeavour to persuade anyone not to
  - (a) enter an employers' [*sic*] place of business, operation or employment,
  - (b) deal in or handle the products of any person, or
  - (c) do business with any person.

This section does not exempt public expressions of sympathy, *see, e.g., Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 104(3), or forms of persuasion other than by picketing, *see, e.g., The Labour Relations Act, 1977*, S.N. 1977, c. 64, s. 124(3).

Courts have interpreted a similar section as prohibiting a consumer boycott in *A.G. Canada v. Whitelock* (1973), 37 D.L.R. (3d) 757, (*sub nom. A.G. Canada v. General Truck Drivers Union, Local 31*) [1973] 5 W.W.R. 235 (B.C.S.C.); *Sonoco Ltd. v. Local 433, Vancouver Converters of the Int'l Bhd. of Pulp, Sulphide and Paper Mill Workers* (1970), 13 D.L.R. (3d) 616, 73 W.W.R. 458 (B.C.C.A.); *Slade & Stewart Ltd. v. Haynes* (1969), 5 D.L.R. (3d) 736, (*sub nom. Slade & Stewart Ltd. v. Retail, Wholesale & Dep't Store Union Local 580*) 69 W.W.R. 374 (B.C.S.C.). *Quaere* whether such an extensive restriction on freedom of expression would survive a *Charter* challenge on the basis provided by *Dolphin Delivery*? I would suggest that the section is clearly overbroad because it covers all forms of persuasion, even those unrelated to a strike, *see Darrigo's Grape Juice Ltd. v. Masterson* (1971), [1971] 3 O.R. 772, 21 D.L.R. (3d) 660 (H.C.). If this is true, the common law *per se* illegality rule which suffers from the same defect should also be redefined.

<sup>45</sup> This approach appears to incorporate into the case law interpreting the *Charter* the rule requiring judicial deference to the legislature that so restricted the impact of the *Canadian Bill of Rights*, S.C. 1960, c. 44, *reprinted in* R.S.C. 1970, App. III [hereinafter *Bill of Rights*]. The Supreme Court of Canada has not shown such deference in other cases so it is surprising to find it here.

only justify the common law rules to the extent that legislative policy is consistent with the *Charter*.

This invocation of legislative policy by the Court demonstrates real confusion about the issue before it. The different statutory approaches to the regulation of secondary picketing are not being challenged. The question is whether the common law rule of *per se* illegality is a reasonable limit prescribed by law and can be demonstrably justified in a free and democratic society. While legislative policy is obviously relevant, the differences between legislative and judicial approaches to the implementation of the policy have to be taken into account.<sup>46</sup>

Because of his confusion about the real issue before the Court, Mr. Justice McIntyre's discussion of the application of section 1 is unsatisfactory. For reasons which are not clear, he does not ask the questions outlined by the Supreme Court of Canada in previous decisions concerning the application of section 1.<sup>47</sup> Because he did not ask the right questions he was unable to provide convincing arguments to support his holding. As a result his reasoning does nothing to dispel the impression that the Court was influenced by traditional judicial hostility to unions. When we examine the *per se* illegality rule, in light of the analysis used by the Supreme Court of Canada in previous cases, we see that the rule can be questioned without substituting judicial policy for legislative policy which seeks to restrict the impact of industrial conflict to the parties who have some influence over the outcome of the dispute.

Although Mr. Justice McIntyre does not mention this point, it seems obvious that the *per se* illegality rule meets the first criterion of section 1, which requires that the infringement of the *Charter* right or freedom be prescribed by law. The rule was adopted by a duly constituted court in the exercise of its power to interpret and apply precedent.<sup>48</sup> As well, it seems hard to argue that the objective which the rule is intended to achieve is not one of sufficient importance to justify some limitation on freedom of expression. As pointed out in *Dolphin Delivery*, the social costs of industrial conflict are great and the welfare of all Canadians depends on the elaboration of labour relations policies which keep those costs within acceptable bounds. While one can disagree with the choices

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<sup>46</sup> In my article on secondary picketing, I argued that judicial and legislative policy are substantially the same and that the limits imposed on the right to picket are fairly uniform across the country. The differences lie in the strategies of legitimation of the decision-making rather than the substance of the rules. I still believe that to be true but this uniformity does not mean that regulation by the common law is not a much blunter and clumsier approach than statutory regulation. See Manwaring, *supra*, note 5 at 319-20.

<sup>47</sup> See, e.g., *R. v. Oakes*, *supra*, note 37 at 138-39, 26 D.L.R. (4th) at 227 and *R. v. Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 352, 18 D.L.R. (4th) 321 at 366 [hereinafter *Big M*].

<sup>48</sup> See *R. v. Therens* (1985), [1985] 1 S.C.R. 613 at 645, 18 D.L.R. (4th) 655 at 680, where Mr. Justice Le Dain stated: "The limit may also result from the application of a common law rule."

made concerning acceptable forms of dispute resolution, the legislatures and the courts must elaborate and apply policy in this area and sometimes these policies will require that the freedom of expression of employers and/or employees be restrained.<sup>49</sup> Thus, the reduction of the costs of industrial conflict is a pressing and substantial concern in a free and democratic society.<sup>50</sup>

The important question is whether the means chosen to attain this objective — a rule holding all secondary picketing is *per se* illegal — meets the test of proportionality. The Chief Justice of Canada has suggested that the test of proportionality involves three components.<sup>51</sup> First, the means used must be rationally connected to the objective. They cannot be arbitrary, unfair or based on irrational considerations. Second, the means must impair the right or freedom as little as possible. Finally, the effects of the means used to achieve the objective must be proportional to the desired objective.

It is difficult to assess the *per se* illegality rule against the first criterion because very little evidence relevant to this issue was presented. If it was shown that the rule is based solely on judicial prejudice against unions because secondary picketing in fact did not increase the costs of labour conflict, it would be possible to argue that it is based on irrational considerations. Empirical evidence about the extent to which unions engaged in this activity prior to the adoption of the rule and the impact of the picketing on the costs to society of industrial conflict would be necessary to support this argument. No such evidence was before the Court.

The second and third criteria both deal with the problem of overbreadth.<sup>52</sup> The second focuses on the definition of the means used to attain the objective while the third asks whether the means which appears proportional on its face has effects which go beyond those which are necessary in the circumstances. If the means is defined so broadly that it restricts the rights of all Canadians more than is necessary to achieve the objective, it does not survive the proportionality test. If the measure adopted actually affects those rights in a manner unrelated to the objective or to an unnecessary extent, the measure will not meet the test regardless of the definition used.

I would argue that the rule first defined by the Ontario Court of Appeal in *Hersees*<sup>53</sup> is excessively broad. The rule, as it is formulated

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<sup>49</sup> *E.g.*, restrictions on the right of employers to negotiate directly with employees are essential if the system of collective bargaining is going to work. The same is true for the prohibition of recognition picketing. It is reasonable to restrict these forms of expression in order to have a collective bargaining regime that will facilitate the resolution of industrial conflict.

<sup>50</sup> *R v. Oakes*, *supra*, note 37 at 138-39, 26 D.L.R. (4th) at 227; *Big M*, *supra*, note 47 at 352, 18 D.L.R. (4th) at 366.

<sup>51</sup> *R. v. Oakes*, *ibid.* at 139, 26 D.L.R. (4th) at 227.

<sup>52</sup> See C. Rogerson, *The Judicial Search for Appropriate Remedies under the Charter: The Examples of Overbreadth and Vagueness* in Sharpe, *supra*, note 14.

<sup>53</sup> *Supra*, note 5.

and applied, goes beyond that which is necessary to attain the objective of protecting innocent third parties from the costs of strikes. The rule does not include any criteria for distinguishing between secondary and other forms of picketing and it prohibits all secondary picketing absolutely without consideration of circumstances which may justify the picketing. It may be that case by case adjudication could provide adequate protection to freedom of expression. However, few cases of this sort actually go to trial. The interim injunction determines the outcome. The judge hearing the application for an injunction will have to proceed on the basis of documentary evidence and in relative haste. Therefore, it is important that the rule be clear in order to provide effective guidance to the decision-maker. In addition, it is necessary that the rule be clearly defined in order to permit the public (or its legal advisors) to decide whether a planned picket line would be permissible. Because this is a judge-made rule, there is no problem of institutional competency and the court can redefine it to provide the necessary protection for freedom of expression.

The common law rule is overly broad because it makes no distinction between the many types of peaceful picketing in which Canadians at times engage, such as political or consumer picketing, or secondary picketing in support of a strike.<sup>54</sup> Its generality could chill desirable forms of speech beyond the field of labour relations. In addition, the rule does not permit a court to acknowledge that some forms of secondary picketing may be justifiable. There is no allowance for cases such as *Hersees* where union members attempted to convince the general public to support them by not buying certain products. In such cases the public has no obligation to purchase the targeted goods or services and, if the information alone influences consumer choices, the public obviously considers the information to be of considerable relevance. In the absence of coercion, threats, violence and trespass, there is no compelling reason to stop union members from peacefully communicating the fact of their strike.<sup>55</sup>

An absolute ban on picketing may completely deprive the most powerless elements of Canadian society of the ability to communicate with the public. Neither is it certain that alternative forms of communication will always be available. Small unions and other social movements may not command the resources necessary to gain access to other media. The prohibition on picketing will prevent those least able to communicate their ideas from using one of the most accessible means of communication.

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<sup>54</sup> See cases *supra*, note 44, especially *Darrigo's Grape Juice Ltd. v. Masterson*.

<sup>55</sup> Compare *Hersees*, *supra*, note 5, with *National Lab. Rel. Bd. v. Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (1964) [hereinafter *Fruit and Vegetable Packers*], where the United States Supreme Court held that peaceful picketing intended to convince the public to boycott certain goods is protected speech as long as it is not intended to induce the public not to deal with the secondary target and it does not have the effect of cutting off deliveries or inducing the employees to cease work. See also *National Lab. Rel. Bd. v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980), where the Court distinguishes *Fruit and Vegetable Packers*.

Surely a more flexible rule could be adopted; a rule which would acknowledge the utility of picketing under some circumstances, without causing undue harm to the public interest. Such a regime might provide for injunctions where there is evidence to suggest that the picketing complained of is, in fact, inducing breaches of contracts, or that tortious and/or criminal acts are being committed. In such circumstances, the picketers would have gone beyond the mere expression of ideas.

As well, the injunction could be drafted to allow for a legitimate exercise of this right if possible in the circumstances. The court order could also be based on a more accurate assessment of the actual and potential damages suffered by the party requesting the injunction. This would reduce the perception of judicial bias.

Thus, a more restrictively defined rule would recognize the importance of picketing as a form of speech for marginal or less wealthy groups. It would ensure that the common law is used solely to prevent the use of secondary picketing from forcing third parties to join in the fight with the primary employer. It would allow unions to use their freedom of expression to exert legitimate pressure on the struck employer without inflicting losses on innocent third parties.<sup>56</sup> It would ensure that Canadian society hears from all groups that have legitimate points of view to express on issues of great concern.

The reformulation of the rule that secondary picketing is *per se* illegal does not require the abolition of the tort of inducing breach of contract. While the tort originated in a dispute between an employer and an employee and has been used primarily to regulate the employment relationship,<sup>57</sup> it is now used in contexts other than the granting of labour injunctions.<sup>58</sup> The question is whether picketing can be assumed to automatically constitute the tort so that all picketing, other than primary picketing in conjunction with a labour dispute, can be restrained before it occurs. Is it necessary to totally restrain the right to express one's ideas through picketing in order to protect the interests of society in reducing the costs of industrial conflict?

If the *Charter* protection for freedom of expression has any substance, it must protect the right to speak out on controversial issues such as disputes over wages and working conditions. Sometimes the speech will provoke action. If the speech is peaceful and is not accompanied by

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<sup>56</sup> This view was adopted by the United States Supreme Court in *Fruit and Vegetable Packers, ibid.*, a case involving a consumer boycott. It may be that my view that there is some scope for informational picketing, even before secondary employers, underestimates the strength of the union movement. However, that does not mean that the *per se* illegality rule does not have to be refined to allow for other forms of picketing. See also *N.A.A.C.P., supra*, note 32 and Emerson, *supra*, note 22 at 433-49.

<sup>57</sup> *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 E.R. 749, [1843-60] All E.R. Rep. 208, 95 R.R. 501 (Q.B.). For a discussion of this case, see H.J. Glasbeek, *Lumley v. Gye — The Aftermath: An Inducement to Judicial Reform?* (1975) 1 MONASH UNIV. L. REV. 187. See also Tacon, *supra*, note 17.

<sup>58</sup> See generally Burns, *supra*, note 35.

any unlawful acts, and if the actions taken as a result of the speech are themselves lawful, it is difficult to justify restraining freedom of expression solely on the basis that some people may agree with the views expressed.

V. TO WHOM DOES THE CHARTER APPLY? — OF SECTION 32  
AND THE COURTS

The Supreme Court of Canada ultimately decided *Dolphin Delivery* by holding that the union cannot challenge the common law rule restricting secondary picketing on the basis of the *Charter* because the application for an injunction is private litigation. This conclusion may appear surprising in light of the importance attached, in its analysis of section 1, to the public interest in regulating strikes and picketing and the comprehensive legislative framework that implements this policy in all Canadian jurisdictions. It is very hard to understand how any aspect of labour relations can be said to be private. If it is the public interest that justifies the rule, then, surely it is in the public interest that the rule conform to the *Charter*.

The interpretation of section 32 adopted by the Court forms the basis for the decision. Subsection 32(1) reads as follows:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Mr. Justice McIntyre said that the *Charter* applies to the common law. Thus, according to him, the crucial issue is whether the *Charter* applies to private litigation. He asked: “does the *Charter* apply to private litigation divorced completely from any connection with Government?”<sup>59</sup> This formulation of the question dictates the answer. By focussing on the identity of the applicant, a private company, and assuming that there is no connection to government, the Court blinds itself to the real issue.

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<sup>59</sup> *Supra*, note 1 at 593, 33 D.L.R. (4th) at 191 (S.C.C.).

It is obvious that the *Charter* does not apply to private parties. Dolphin Delivery owes no duty to the union to obey the *Charter*.<sup>60</sup>

It is very important to understand that the focus of the *Charter* challenge is *not* the behaviour of the company. The real issue is whether a *court* can adopt and apply a legal rule that violates the *Charter*. In other words, the focus of the inquiry is on the actions of the Court and the general legal backdrop against which private parties act out their relationships. If the *Charter* does apply to the common law, often the only way the issue can be raised is in the context of a lawsuit between

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<sup>60</sup> This represents the view of some Canadian observers. See generally P.W. Hogg, CONSTITUTIONAL LAW OF CANADA, 2d ed. (Toronto: Carswell, 1985) at 674-75; J.D. Whyte, *Is the Private Sector Affected by the Charter?* in L. Smith et al., eds., RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS (Saskatoon: Canadian Human Rights Reporter Inc., 1986); A.A. McLellan & B.P. Elman, *To Whom does the Charter Apply? Some Recent Cases on Section 32* (1986) 24 ALTA. L. REV. 361; K. Swinton, *Application of the Canadian Charter of Rights and Freedoms (Ss. 30, 31, 32)* in W.S. Tarnopolsky & G.A. Beaudoin, eds., THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1982).

But see D. Gibson, THE LAW OF THE CHARTER: GENERAL PRINCIPLES (Toronto: Carswell, 1986); Y. de Montigny, *Section 32 and Equality Rights* in A.F. Bayefsky & M. Eberts, eds., EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1985); W.R. Lederman, *Democratic Parliaments, Independent Courts and the Canadian Charter of Rights and Freedoms* in J.C. Courtney, ed., THE CANADIAN HOUSE OF COMMONS: ESSAYS IN HONOUR OF NORMAN WARD (Calgary: University of Calgary Press, 1985); B. Slattery, *Charter of Rights and Freedoms — Does it Bind Private Persons* (1985) 63 CAN. BAR REV. 148. I will not discuss this debate because my purpose is to criticize the application of s. 32 to the common law regulation of labour relations. Therefore, I will assume that the *Charter* does not apply to relations between private parties. However, I should stress that I do not necessarily agree that private parties should not have to respect fundamental freedoms.

The courts are beginning to interpret s. 32 and they agree with the view that the *Charter* does not apply to private parties. Regarding the application of the *Charter* to unions, see, e.g., *Re Lavigne and Ontario Public Service Employees Union* (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 (H.C.) (*Charter* applies indirectly to possible uses by union of dues collected from non-members under a collective agreement because a statute authorizes the inclusion of a closed shop clause); *Re Bhindi and British Columbia Projectionists Local 348* (1986), 4 B.C.L.R. (2d) 145, 29 D.L.R. (4th) 47 (C.A.) (*Charter* does not apply to private sector collective agreements); *Re Baldwin and British Columbia Gov't Employee's Union* (1986), 3 B.C.L.R. (2d) 242, 28 D.L.R. (4th) 301 (S.C.) (*Charter* does not apply to possible uses of union dues collected by union from non-members under a closed shop clause of the collective agreement even though collection of dues authorized by statute). See *Re McKinney and Bd. of Governors of the Univ. of Guelph* (1986), 57 O.R. (2d) 1, 32 D.L.R. (4th) 65 (H.C.); *Bancroft v. Governing Council of the Univ. of Toronto* (1986), 53 O.R. (2d) 460, 24 D.L.R. (4th) 620 (H.C.); and *Harrison v. Univ. of British Columbia* (1986), 13 C.C.E.L. 98 (S.C.) for decisions in support of the proposition that the *Charter* does not apply to universities. See also *Re McCutcheon and City of Toronto* (1983), 41 O.R. (2d) 652, 147 D.L.R. (3d) 193 (H.C.) (*Charter* applies to municipalities); *Dixon v. A.G. British Columbia* (1986), 7 B.C.L.R. (2d) 174, [1987] 1 W.W.R. 313 (S.C.) (*Charter* applies to *Constitution Act*, R.S.B.C. 1979, c. 62); and *Madisso v. Bell Canada* (1985), 22 C.R.R. 162 (Ont. H.C.) (*Charter* does not apply to private companies subject to regulation by Parliament).

two private parties. A decision to strike down or amend a common law rule in order to ensure that the common law conforms to the *Charter* does not impose any obligation on the private parties to respect the constitutional rights of the private party raising the *Charter* issue. It simply ensures that the law of Canada conforms to the *Charter*.<sup>61</sup>

The inclusion of section 32 in the *Charter* is a form of codification of the state action doctrine created by the American courts to limit the impact of the American Constitution.<sup>62</sup> This doctrine holds that the American Constitution only applies to action that is taken by the state defined to include any level of government from local to national.<sup>63</sup> The doctrine is not unreasonable if one accepts the argument that there is a realm of private activity that exists independently of the state and the legal order. This view is fundamental to classical liberal theory, which was intended to justify the freeing of private economic activity from pervasive state regulation.<sup>64</sup> It requires that one accept a natural law theory of rights<sup>65</sup> and the argument that private actors should be free from regulation regardless of the consequences of their acts for other groups. By restricting the ability of governments to act, the Constitution aims to ensure that the individual is not totally subservient to the state.

In the United States, the state action doctrine has been severely criticized. Professor Charles Black, for example, has called the case law in this area "a conceptual disaster area".<sup>66</sup> The Supreme Court of the United States has said that it is an "impossible task" to formulate a test

<sup>61</sup> This argument is based on the distinction drawn by Professor Lawrence Tribe between acts of the state *qua* state, and the background legal order. See L.H. Tribe, *CONSTITUTIONAL CHOICES* (Cambridge, Mass.: Harvard University Press, 1985) c. 16, where he discusses the state action doctrine in detail. I will return to this point *infra*.

<sup>62</sup> See L.H. Tribe, *AMERICAN CONSTITUTIONAL LAW* (Mineola, N.Y.: Foundation Press, 1978) c. 18; Tribe, *ibid.*, c. 16; I. Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory* (1977) 12 HARV. C.R.-C.L.L. REV. 297; P. Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks* (1982) 130 U. PA. L. REV. 1296. I think that, in this instance, it is reasonable to impute motives to the American courts that decided the cases now known as the *Civil Rights Cases*, 109 U.S. 3 (1883) (see Nerken, *supra*). The courts were well aware that by restricting the ambit of the American *Constitution*, they were facilitating a state approved order of racial discrimination that was intended to frustrate the emancipation of American blacks. The state action doctrine is not explicitly mentioned in the American *Constitution* and the courts were not, at that time, bound by precedent. These decisions contributed to the denial of basic constitutional rights to blacks and other racial minorities for at least another 75 years. For a discussion of these cases from a Canadian perspective, see de Montigny, *supra*, note 60 at 589-95.

<sup>63</sup> See Tribe, *AMERICAN CONSTITUTIONAL LAW*, *ibid.*

<sup>64</sup> See C.B. MacPherson, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (Oxford: Oxford University Press, 1987) and R.M. Unger, *KNOWLEDGE AND POLITICS* (New York: Free Press, 1975) for discussions of liberal theory. Beatty, *supra*, note 21 argues that liberal principles underlie the *Charter*.

<sup>65</sup> See Brest, *supra*, note 62.

<sup>66</sup> C.L. Black Jr., *The Supreme Court 1966 Term — Foreword: "State Action"*, *Equal Protection and California's Proposition 14* (1967) 81 HARV. L. REV. 69 at 95.

which explains the results in the cases.<sup>67</sup> A more radical critique has argued that the public/private distinction is conceptually incoherent and, therefore, plays primarily an ideological role in legitimating the protection of private power against regulation.<sup>68</sup> The extent of the doctrinal confusion and the strength of the critique suggest that, in spite of the fact that the reasons for including section 32 in the *Charter* seem obvious, it is going to prove very difficult to apply the section in practice.

Most Canadian commentators<sup>69</sup> agree with a strict interpretation of section 32 that limits the application of the *Charter* to government actions. The majority appear to accept the premise of the liberal argument that there is a realm of private activity that must be free from interference by the courts. The motives for the positions taken probably vary. The acceptance of the ideology of the state action doctrine may be tempered by a desire to preserve legislative flexibility by keeping the courts out of as many policy decisions as possible. Thus, some commentators may believe that by restricting the scope of the *Charter*, the power of the legislatures to correct social problems through remedial legislation will be preserved.<sup>70</sup> Regardless of the motivations, these commentators have not demonstrated that the line between the public and private sectors can be found easily in any but the obvious cases. The *Dolphin Delivery* case is not one of the obvious cases and the Courts were forced to attempt to define state action in the very tangled jungle of legislative and judicial regulation of labour relations.

Mr. Justice McIntyre justified his conclusion that the *Charter* does not apply to the application for an injunction by arguing that there is no state action involved in this case to which it could possibly apply. He begins with the premise that the *Charter* was intended to restrain the various levels of government and to protect individuals from abusive government actions.<sup>71</sup> He cited a number of articles which support this view,<sup>72</sup> as well as the text of section 32 which speaks explicitly of the legislative and executive branches of government. He said that the *Charter* will apply to these branches of government regardless of whether their actions are contested in the context of litigation between a person and a

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<sup>67</sup> *Reitman v. Mulkey*, 387 U.S. 369 (1967) at 378.

<sup>68</sup> See the papers from the Symposium on the Public-Private Distinction (1982) 130 U. PA. L. REV. 1289-1608.

<sup>69</sup> See, e.g., Hogg, *supra*, note 60 and Swinton, *supra*, note 60.

<sup>70</sup> See Swinton, *ibid.* at 47-48. But see de Montigny, *supra*, note 60 at 566.

<sup>71</sup> *Supra*, note 1 at 593, 33 D.L.R. (4th) at 191 (S.C.C.).

<sup>72</sup> See secondary sources, *supra*, note 60. The Court overlooks several articles available in French that could have alerted it to the implications of its decisions for private law in Quebec. See, e.g., Y. de Montigny, *La Charte des droits et libertés, la prérogative royale et les "questions politiques"* (1984) 44 R. DU B. 156 and D. Lluellas et P. Trudel, *L'application de la Charte canadienne des droits et libertés aux rapports de droit privé* (1984) 18 R.J.T. 219. Professor de Montigny makes some interesting comments on the approach of Civil Law jurisdictions to the application of fundamental rights and freedoms to private law, *supra*, note 60 at 582-83.

branch of government or between private parties.<sup>73</sup> The action can be contested whether the government relies on a statute or the common law for its authority.

The difficulty in this case is that there is no direct state action. The rule that secondary picketing is *per se* illegal is a judge-made rule. It has existed for many years.<sup>74</sup> If there is an action, it occurs when the court itself decides to grant the injunction which has the effect of limiting the freedom of the union members to express their opinions. But, according to Mr. Justice McIntyre, this cannot be state action within the terms of section 32 because this interpretation would bring virtually all litigation within the scope of the *Charter*.<sup>75</sup> Thus, according to Mr. Justice McIntyre, the *Charter* will apply to all legislation, delegated legislation, regulations, orders-in-council, as well as any similar activities on the part of "other creatures of Parliament and the Legislatures",<sup>76</sup> however, it will not apply to court orders.

He concluded by saying that a private party does not owe a constitutional duty to another. If there had been a statutory provision prohibiting secondary picketing, it would have been possible to challenge the legal rule.<sup>77</sup>

<sup>73</sup> *Supra*, note 1 at 598-99, 33 D.L.R. (4th) at 195 (S.C.C.). Mr. Justice McIntyre refers to the decision of the Ontario Court of Appeal in *Re Blainey and Ontario Hockey Assoc.* (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 to illustrate his point. This case involved litigation between two private parties but the association relied on a section of Ontario's human rights statute to justify its discrimination against young women. The section of the act constituted the government action that could be challenged even though the private plaintiff was suing a private defendant.

<sup>74</sup> See *supra*, notes 5 & 6.

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To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*.

*Supra*, note 1 at 600-01, 33 D.L.R. (4th) at 196 (S.C.C.). Mr. Justice McIntyre does not provide any convincing reasons why this would be such a bad thing. Even if the *Charter* did apply to all court orders it would be very unlikely to make a great deal of difference in the majority of cases. Private litigation in areas such as contract and tort will rarely raise *Charter* issues. To the extent that it does it is hard to see how one could convincingly justify a refusal to protect fundamental rights by the courts, which are required to uphold the Constitution. It is not self-evident that the costs of applying the *Charter* to court orders would be prohibitive.

<sup>76</sup> *Ibid.* at 602, 33 D.L.R. (4th) at 198.

<sup>77</sup> It should be noted that this reasoning has very different consequences for the province of Quebec. All private law in Quebec is statutorily based because it derives from the Civil Code. Thus, the National Assembly has legislated in the area of private law. All legal rules derived from the Code will be subject to constitutional scrutiny. We thus have the curious situation in Canada that all private law in one province must conform to the *Charter* but that of the other provinces need not. Why should there be two categories of private law? See Slattery, *supra*, note 60.

In the case at bar, however, we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have found, the *Charter* applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke [*sic*] the *Charter*. . . . The appeal is dismissed.<sup>78</sup>

This conclusion requires consideration of two questions. First, does the *Charter* apply to the courts? Second, is there state action in this case, assuming that the *Charter* does not apply to court orders?

#### A. *Does the Charter Apply to the Courts?*

Mr. Justice McIntyre concluded that the *Charter* does not apply to the courts when they reach a decision to enforce private rights either through an order requiring payment of damages, or through an order granting a remedy in equity, such as an injunction. His reasoning on this point is confusing in spite of its importance to the result. He said that the courts are bound by the *Charter* in the same way that they are bound by all law<sup>79</sup> but, at the same time, he argued that court orders are not governmental action for the purposes of section 32 because the courts are not part of the executive branch of government. They act as neutral arbiters. This implies that courts have an independent constitutional status that exempts them from the *Charter*.<sup>80</sup> This reasoning is contradictory because it suggests that the courts are at the same time bound and not bound without providing any clear criteria which would permit us to decide when the *Charter* will apply.

If the courts are bound by the *Charter* it makes no sense to suggest that they do not have to respect it when making orders. For instance, assume the following hypothetical situation. A judge decides, on his own initiative, to issue an injunction requiring that all black women who are members of a union involved in a legal strike and engaged in picketing stay ten blocks away from the employer's premises while allowing whites of either sex to picket without restraint. The judge's justification is that

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<sup>78</sup> *Supra*, note 1 at 603-04, 33 D.L.R. (4th) at 198-99 (S.C.C.).

<sup>79</sup> *Ibid.* at 600, 33 D.L.R. (4th) at 196.

<sup>80</sup> See Hogg, *supra*, note 60, c. 7 & 8 for a discussion of the constitutional status of the courts. I am not suggesting that the courts do not have a special status under the *Constitution Act, 1867* ((U.K.), 30 & 31 Vict., c. 3) and the *Constitution Act, 1982* (being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11). Obviously they do, but that status does not explain why they are not subject to the *Charter*.

blacks and women are notoriously emotional and, therefore, black women are more likely to engage in violence than any other group.<sup>81</sup>

It is difficult to imagine that this court order would not be subject to a challenge under the *Charter*. This is discrimination by a branch of government, the judiciary, created by statute and given the jurisdiction to resolve certain disputes.<sup>82</sup> The power to issue an injunction is statutory.<sup>83</sup> A legislature can restructure any aspect of the judicial system over which it has jurisdiction. It has the power to vary the jurisdiction of the courts, although it is highly unlikely that a legislature could abolish the courts completely. To the extent that jurisdiction is shared by the federal and provincial governments,<sup>84</sup> the courts have special status because it is more difficult to alter their organization, but this special status does not make them any less the creatures of the legislatures. The legislatures can and do create and restructure the courts when they decide that such action is necessary.

There does not seem to be any compelling policy reason why the courts should be allowed to disregard the *Charter* when issuing orders. Mr. Justice McIntyre argues that because the courts are neutral arbiters, they are not subject to the *Charter*. This argument seems to confuse

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<sup>81</sup> Admittedly, this example is extreme and I am not suggesting that our courts would actually issue such a racist and sexist order. The point is that, if such an order issued, it would be open to challenge. It should be remembered as well, that judges do engage in high-handed behaviour and have to be constrained against abuse of power just like any other group in society. Recently, a Judge in Nova Scotia put a young offender in adult prison for 90 days for contempt of court when the youth, who was appearing in court for the first time, laughed in court. D. Wilson, "Nova Scotia probes case of boy tried in adult court" *The [Toronto] Globe and Mail* (27 April 1987) A3.

Earlier in the year, a Judge was suspended because his religious convictions led him to tell battered wives that it was their duty to stay with their husbands. R. Martin, "Nova Scotia fires fundamentalist judge" *The [Toronto] Globe and Mail* (16 January 1987) A1. These examples do not show that the *Charter* applies to the courts but, merely, that the courts can abuse their extensive power in the same way that any other government institution can.

<sup>82</sup> The federal and provincial governments share the jurisdiction to create courts, see *Constitution Act, 1867*, ss. 92(14), 96, 99, 101. Both levels of government have exercised this power: see, e.g., the *Supreme Court Act*, R.S.C. 1970, c. S-19; the *Federal Court Act*, R.S.C. 1970 (2d Supp.), c. 10; and provincial legislation such as the *Courts of Justice Act, 1984*, S.O. 1984, c. 11; the *County Court Act*, R.S.B.C. 1979, c. 72; the *Supreme Court Act*, R.S.B.C. 1979, c. 397; the *Court of Appeal Act*, S.B.C. 1982, c. 7.

<sup>83</sup> See, e.g., *Courts of Justice Act, 1984*, s. 115; *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 36; *Federal Court Act*, ss. 17, 18.

<sup>84</sup> Because the Supreme Court of Canada is mentioned expressly in the *Constitution Act, 1982* (ss. 41(d), 42(d)) it is possible that it is now beyond the reach of Parliament because of the amending formula contained therein. However, its composition is not mentioned in those subsections so it is likely that the federal government still has the power to unilaterally change its composition. The Meech Lake agreement (Orders, Government Business no. 12, *Motion to Appoint a Special Joint Committee on Constitutional Accord, 1987*, 2d Sess., 33d Parl., 1986-87 (established 16 June 1987)), if adopted, will change that.

neutrality between the parties and the traditional independence of the judiciary provided by the security of tenure given judges.<sup>85</sup> Obviously, courts have to maintain their independence from direct governmental interference in their decision-making. Judges must be insulated from political pressure as much as possible. However, they should not be exempt from the obligation to respect the Constitution when rendering their decisions. The *Charter* does not constitute political interference in judicial decision-making any more than the adoption of any other statute. If the courts are bound by the *Charter* in the same way they are bound by all law, they should no more be able to disregard it than any other statutory limit to their jurisdiction.<sup>86</sup> We should not have an unfettered public power in Canada.<sup>87</sup>

In the United States, the courts have rejected the argument that the American Constitution does not apply to court orders. Indeed, in a recent decision, the Supreme Court of the United States held that the role of the courts was an important criterion in determining whether there had been state action.<sup>88</sup> This case involved a suit challenging the right of a creditor to sell goods belonging to the debtor without providing due process protection. The creditor was authorized by statute to use a self-help remedy and was not required to obtain the authorization of a court before so proceeding.

Earlier Supreme Court decisions suggested that a debtor had a right to a hearing on the basis of the due process clause of the American Constitution. However, in those cases, the relevant statutes required that the creditor file certain papers with the court in order to obtain a pre-judgment garnishment order. The role of the court clerk was purely administrative. The Supreme Court distinguished these situations on the basis that, if there is not such recourse, then the clause does not apply. The mere fact that a court clerk was involved in the procedure was sufficient to transform the situation from one which was purely private to one in which there was state action.<sup>89</sup> Thus, the presence of the courts was sufficient to constitute state action.

The view that actions by the courts are state actions for the purposes of the American Constitution has been accepted by American scholars. Professor Herbert Wechsler, who argued for a very conservative approach to constitutional law, has written: "That the action of the state court is

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<sup>85</sup> See *Constitution Act, 1867*, s. 99 as am. *Constitution Act, 1960* (U.K.), 9 Eliz. 2, c. 2, which states that Judges of Superior Courts shall hold office, during good behaviour, until the age of 75 years. It should be noted that even the tenure of judges can be changed by legislative action.

<sup>86</sup> See, e.g., *supra*, notes 82 & 83.

<sup>87</sup> Assuming, of course, that s. 33 has not been invoked. If it has, the legislative power is unfettered.

<sup>88</sup> *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

<sup>89</sup> *Sniadich v. Family Fin. Corp.*, 395 U.S. 337 (1969); *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

action of the state . . . is, of course, entirely obvious".<sup>90</sup> Professor Laurence Tribe points out many instances where the Supreme Court of the United States held that the decision of a lower court to enforce a statute or a common law rule was state action and, hence, constitutionally reviewable.<sup>91</sup> He argues that:

So long as the party injured or threatened with injury by a permissive state rule sues the private injurer in state court, and that tribunal then denies relief on the basis of the state rule, that invocation of the rule by the state court itself becomes "state action" reviewable on the merits by the Supreme Court.<sup>92</sup>

Thus, the Supreme Court decided in *New York Times v. Sullivan*<sup>93</sup> that the common law of libel was state action and subject to First Amendment scrutiny. As a consequence, a private party could not use the common law of libel in order to restrict the right of the newspaper and other citizens, also private parties, to publish comments on public affairs.

The case which has provoked the most controversy is *Shelley v. Kraemer*,<sup>94</sup> in which the United States Supreme Court held that a decision to enforce a covenant in a deed prohibiting the sale of land to persons of certain racial backgrounds constituted reviewable state action. The result in the case was clearly desirable and needs no justification on the merits. The difficulty arises when one asks what remains of the state action doctrine once the courts decide to intervene in these circumstances. At first glance, it is impossible to find any state action in this case because the Court is merely enforcing a term of a voluntary agreement.

Professor Tribe characterizes the problem as follows: "The problem is not seeing that state courts are state actors — that, surely, is obvious. The problem is perceiving how the Missouri courts could violate the Constitution by 'merely' enforcing a private system that citizens had imposed on themselves."<sup>95</sup> He then proposes a new reading of the decision:

[T]he issue is not whether *any* judicial enforcement of racially invidious private arrangements constitutes racially invidious state action but whether

<sup>90</sup> H. Wechsler, *Toward Neutral Principles of Constitutional Law* (1959) 73 HARV. L. REV. 1 at 29.

<sup>91</sup> Tribe, *supra*, note 61, c. 16. Cases include *N.A.A.C.P.*, *supra*, note 32, where the United States Supreme Court held that a state court decision to hold individuals responsible for damages resulting from a peaceful economic boycott on the basis of Mississippi tort law constituted reviewable state action. The constitutional challenge was successful. See also *Marsh v. Alabama*, 326 U.S. 501 (1946); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) and *Martinez v. California*, 444 U.S. 277 (1980), where the Court discussed this issue but decided against the plaintiff.

<sup>92</sup> Tribe, *ibid.* at 257.

<sup>93</sup> 376 U.S. 254 (1964).

<sup>94</sup> 334 U.S. 1 (1948). For discussion of this case, see Tribe, *supra*, note 61; Nerken, *supra*, note 62 and Wechsler, *supra*, note 90.

<sup>95</sup> Tribe, *ibid.* at 259.

a state may *choose* automatically to enforce restrictive covenants that discriminate against blacks *while generally regarding alienability restraints as an anathema*. The real "state action" in *Shelley* was Missouri's facially discriminatory body of common and statutory law — the quintessence of a racist state policy. The state court's refusal to invalidate the racist covenant before it was simply the overt state act necessary to bring the state's legal order to the bar of the United States Supreme Court.<sup>96</sup>

Thus, the act that admits constitutional review is the decision to enforce a rule that, while prohibiting all other restrictive covenants, requires the courts to enforce such covenants when they restrict the sale of land on the basis of race. The state action is not the court order itself, but the rule upon which the court order is based. It is not the court order which is subject to constitutional review, but the set of legal rules which establish the backdrop against which the court issues its orders. As long as the rules can withstand constitutional scrutiny, the Constitution will not apply to private litigation.<sup>97</sup>

The Supreme Court of Canada does not distinguish between the action of the court in issuing its order and the legal rules which create the legal context in which the order is issued. Throughout his judgment, Mr. Justice McIntyre stresses that the party raising the *Charter* challenge must show that there has been state action. Because he focusses the analysis solely on the foreground, he requires that it be shown that the state actually did something. Thus, he concentrates on the fact that, apparently, the only state actor is the court itself when it grants the order. He does not look at the larger picture and see that the state can act in other more indirect ways.

This is a very restrictive definition of state action which, if accepted, would effectively insulate a great deal of activity from constitutional scrutiny. The government defines the legal context in which most social activity occurs. To the extent that it is bound by the *Charter*, it is required to create this backdrop in light of the *Charter*. If the courts refuse to step back and look at the backdrop, it will be very difficult to succeed in challenging this type of government action. The relevant action, in this case, is not the court order but the legal rule that prohibits secondary picketing *per se*. Can this rule withstand constitutional scrutiny?

When the question is asked in this way, the interpretation of section 32 adopted in this case seems wrong. Even with section 32 in the *Charter*, it should be possible to challenge the validity of common law rules that impinge on rights and freedoms enshrined in our Constitution. Thus, in order to ensure that Canadians get the full benefit of the *Charter*, it is

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<sup>96</sup> *Ibid.* at 260.

<sup>97</sup> Thus a court could issue an order enforcing a clause in an employment contract that restricts the freedom of expression of an employee, as long as the clause was part of a valid contract, freely consented to, and the legal context, common law and statutory, did not require the court to always deny employees' free speech regardless of their contracts.

necessary to apply it to the courts, which are part of the government of this country and subject to the jurisdiction of the various legislatures. Otherwise, Mr. Justice McIntyre's conclusion that the *Charter* applies to the common law will be a mere formality empty of content in most circumstances.

B. *Assuming that the Interpretation of Section 32 Adopted by the Supreme Court of Canada is Correct, Does the Charter Apply?*

Even if we assume that the Supreme Court of Canada is correct when it states that there must be legislative or executive action in order for the *Charter* to apply, it remains possible to question the conclusion that there is no state action in this case. As was pointed out above when discussing the interpretation of sections 1 and 2(b), labour relations are extensively regulated. Most matters relating to collective bargaining are governed either directly, by the relevant labour relations statutes,<sup>98</sup> or indirectly, by laws which define and limit the jurisdiction of the courts.<sup>99</sup> When creating this elaborate regulatory system, our governments were well aware of the policy choices which they were making. The rules governing picketing were, and still are, controversial. A decision not to change a common law rule is as much a state action as the decision to change it.

Therefore, it seems reasonable to conclude that once a government decides to regulate an area of activity, it has an obligation to ensure that the regulatory system created, which is composed of statutory and common law rules, conforms to the *Charter*. The *Charter* may not impose any positive obligation to intervene. The legislatures could leave the common law intact. However, once they decide to intervene they should be required to take the *Charter* into account. It would be a curious result if legislatures could avoid their *Charter* obligations by simply leaving in place judge-made rules which infringe the *Charter* while regulating the remaining areas of activity.

It is impossible in the context of this comment to examine all of the labour relations statutes in Canada. However, it is fair to say that each jurisdiction has adopted what is basically a variation on the same policy approach in this area. The strike weapon can only be used when there is no collective agreement in force, and only after the parties have followed the procedures set out in the applicable statute. These procedures usually provide for notice of desire to bargain and recourse to conciliation

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<sup>98</sup> See, e.g., *Canada Labour Code*, R.S.C. 1970, c. L-1; *Labour Code*, R.S.B.C. 1979, c. 212; *Labour Relations Act*, R.S.O. 1980, c. 228.

<sup>99</sup> See, e.g., *Courts of Justice Act*, 1984, S.O. 1984, c. 11, s. 115.

and mediation as directed by the designated minister.<sup>100</sup> Some statutes require a strike vote.<sup>101</sup>

The approach to the regulation of picketing varies to a greater extent. British Columbia has developed a statutory scheme to define primary picketing and to set limits on its use during legal strikes.<sup>102</sup> Ontario has chosen to limit the power of the courts to issue injunctions rather than empower the O.L.R.B. to regulate picketing.<sup>103</sup> As was pointed out in *Dolphin Delivery*, the federal government has chosen not to regulate picketing explicitly in its legislation.

These governments can legitimately disagree on the appropriate policy choice to make in this area. The argument is not that there should be perfect uniformity of labour relations policy across the country. However, it does seem reasonable that the *Charter* should apply consistently. Thus, in an area as extensively regulated as industrial relations, all governments should have the obligation to ensure that the labour policy adopted is consistent with the *Charter* in both substance and application. An interpretation of the *Charter* which requires explicit regulation of every dimension of labour relations before it is possible to challenge the policy adopted would result in the constitutional balkanization of the country. It seems inconsistent to say that the rules governing secondary picketing in British Columbia can be challenged to the extent that they infringe on freedoms of expression solely because they are found in a statute whereas the more restrictive rules in the other jurisdictions cannot be because the legislatures chose consciously not to legislate. If picketing is a form of expression, as the majority held in *Dolphin Delivery*, it merits equal protection across the country, subject only to such limits as are found to be reasonable and demonstrably justified under section 1.

Thus, I would argue that a decision not to legislate explicitly can, in certain contexts, constitute state action for the purposes of section 32 in the same way that a decision to legislate constitutes state action. It may be that there is no positive duty to legislate. The *Charter* does not impose any such obligation.<sup>104</sup> However, once a government decides to intervene legislatively it has a duty to ensure that the policy adopted is

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<sup>100</sup> See, e.g., *Labour Relations Act*, R.S.O. 1980, c. 228, ss. 14-17, 72; *Labour Code*, R.S.B.C. 1979, c. 212, s. 81 as am. *Regulations Act*, S.B.C. 1983, c. 10, sch. 2 (s. 21). For many years Saskatchewan was the only exception to this, but in 1983 its legislation was amended to prohibit strikes during the term of a collective agreement (*The Trade Union Act*, R.S.S. 1978, c. T-17, as am. S.S. 1983, c. 81, s. 14). Some statutes permit the parties to include a term in their collective agreement providing for the renegotiation of specific terms. If there is such a term either party can trigger the collective bargaining process with notice. See, e.g., *The Labour Relations Act*, S.M. 1972, c. 75, s. 52(3), C.C.S.M. L10, s. 52(3).

<sup>101</sup> See, e.g., *Labour Code*, R.S.B.C. 1979, c. 212, s. 81(1).

<sup>102</sup> *Labour Code*, R.S.B.C. 1979, c. 212, s. 88 and s. 85(3) as am. S.B.C. 1984, c. 24, s. 16.

<sup>103</sup> *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 115.

<sup>104</sup> S. 15 of the *Charter* may be an exception given that it states that every individual has the right to the equal protection and equal benefit of the law.

consistent with the *Charter*. This duty covers all aspects of the policy and not simply those incorporated explicitly into the statute adopted.

## VI. CONCLUSION

Labour relations policy has always been controversial. Employers and employees have strongly divergent interests and are willing to use their economic and political power to advance those interests. Because the social costs of these struggles can be great, the legislators have chosen to intervene and regulate the use of economic weapons in the fight over the appropriate distribution of the wealth created by our economy. It is inevitable that both employers and unions will attempt to use the *Charter* to influence the balance of power. When dealing with these cases the courts will have to show enormous sensitivity to the interests of both groups, and to the policy implications of their decisions. Otherwise their decisions will lack the legitimacy which is essential to constitutional law. It has been suggested that the courts are institutionally and philosophically unable to understand the needs and aspirations of the "out" groups in Canadian society.<sup>105</sup> If this is true, judicial legitimacy will be ephemeral indeed.

The decision of the Supreme Court of Canada in *Dolphin Delivery* does not bode well for the future. It suggests that the highest court has not understood the full implications of its new role under the *Charter*. The analysis in this case is unconvincing because the Court does not analyze the rule that secondary picketing is *per se* illegal in any depth. Rather the court uses a narrow interpretation of section 32 to insulate the common law from constitutional challenge. As a result, the union movement will feel frustrated and resentful. The decision will be simply another in a long line of decisions that are perceived to be motivated by judicial anti-unionism.

Unless the courts provide compelling reasons for their decisions, their legitimacy as constitutional actors will decline rapidly, especially when faced with controversial and emotional issues. The courts have a new and more active role to play in the political process in Canada. If we wish to avoid the politicization of the judiciary that has occurred in the United States, the courts will have to be more thoughtful and more rigorous. This is especially true in an area such as labour relations where the courts have traditionally been viewed with such suspicion.

However, the implications of this decision go far beyond the question of the impact of the *Charter* in the area of industrial relations. First, Mr. Justice McIntyre's interpretation of section 32 may lead to a situation in which constitutional rights apply differently and unequally across the country. In Quebec, the *Charter* will apply to private law because it is based in the Civil Code adopted by the National Assembly. In the common

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<sup>105</sup> See A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT. L. REV. 473.

law provinces, its application will depend upon the approach taken by the legislatures. Surely such uneven and unequal treatment offends the spirit if not the letter of the *Charter*.

Second, the interpretation of section 32 adopted by the Court, if followed, will effectively insulate a great deal of law from constitutional scrutiny. Courts will be free to adopt and apply rules without regard for the *Charter* and it will be impossible to challenge those rules unless it can be shown that there is state action in the narrowest sense. There does not appear to be any compelling reason why the common law should stand above the Constitution. Indeed, if the Rule of Law has any meaning, it must surely be that all government institutions, including the courts, are bound by the Constitution, including the *Charter of Rights and Freedoms*. As Professor Tribe has noted:

[I]t would be ironic indeed if, in a nation that purports to have a "government of laws and not of men" only individuals — and not the laws themselves — could be brought to the bar of justice and judged by the standards of the Constitution.<sup>106</sup>

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<sup>106</sup> Tribe, *supra*, note 61 at 266.