

CLASS WAR: ONTARIO TEACHERS AND THE COURTS[©]

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In 1997, the government of Ontario met with unexpected opposition to its changes to the education system with the introduction of Bill 160, the *Education Quality Improvement Act* culminating in a province-wide strike by teachers. In reaction, the government sought to divert the conflict into the courts. Although the teachers were initially successful in court, the strike was not, and many of the strikers' objectives were not met. The author argues that the law of injunctions and collective bargaining shifted and narrowed the scope of the conflict, and reduced the political power of the teachers. The litigation surrounding Bill 160 illustrates the anti-worker architecture of the law and the mandate of the courts in depoliticizing capital-labour disputes. The author concludes that Ontario teachers—and labour generally—must avoid the courts if they seek transformative change.

En 1997, le gouvernement de l'Ontario a affronté une résistance inattendue face aux changements apportés au système d'éducation suite à l'introduction du projet de loi 160, la loi sur l'amélioration de la qualité de l'éducation, ce qui a déclenché une grève provinciale des enseignants. Dans le but de dérouter le conflit, le gouvernement a réagi en s'adressant aux tribunaux. Malgré le succès initial des enseignants à la cour, la grève fut un échec et de nombreux objectifs des grévistes n'ont pas été atteints. L'auteur maintient que l'état du droit en matière d'injonctions et de conventions collectives a remanié et restreint la portée du conflit ainsi que réduit le pouvoir politique des enseignants. Le litige autour du projet de loi 160 illustre à la fois l'architecture anti-travailleur du droit et le mandat qu'ont les tribunaux de dépolitiser de telles disputes.

I. INTRODUCTION	806
II. THE CONTEXT FOR THE STRIKE	806
III. DEMOCRACY AND THE INJUNCTION	809
IV. JUDICIAL POLITICS	813
V. THE ANTI-WORKER ARCHITECTURE OF THE LAW	818
A. <i>Legal Regimes</i>	820
B. <i>Free Speech and Picketing</i>	822
C. <i>Ontario Teachers' Federation and Free Speech</i>	826

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D. <i>Limits of Law, Limits of Workers' Power</i>	829
VI. JUDICIAL POLITICS FOR WORKERS, FOR PROPERTY OWNERS	832

I. INTRODUCTION

The nine day Ontario school teachers' province-wide strike against Bill 160¹ in late October 1997 was a dramatic event both because of its scope and the fact that it was an illegal strike. Two features of this dispute were unique: first, the long-standing dispute had no sooner reached its climax—the province-wide walkout—than the locale of the battle was shifted into the courts; and second, the workers had a rare win in the judicial forum.² This comment is concerned with what this struggle teaches us about the impact of the judicialization of political militance, and takes the teachers' victory as its point of departure. It sets out to make three main points. First, that the victory was more limited than the teachers initially believed it to be and, in the end, may have been something of a pyrrhic victory. Second, this limited victory indirectly supports the argument that the architecture of the law does not lend itself to building a movement for political action by workers and their unions. Third, the dispute over Bill 160 highlights the mandate of the courts in depoliticizing capital-labour struggles. Given the way in which Bill 160 was brought to court, and given the nature of the case, it was very difficult in this instance for the court to abstract the legalized dispute from the political sphere. Even though this helped the teachers to win, the law's antagonism to the political use of collective economic worker power limited the scope of the victory. This result tells workers that, if they want transformative change, they should be wary of the judicialization of their struggles.

II. THE CONTEXT FOR THE STRIKE

When the Progressive Conservative government led by Mike Harris tabled Bill 160, Ontario teachers lobbied for its withdrawal or, at the very least, for large scale amendments. The negotiations dragged on

¹ *Education Quality Improvement Act* S.O. 1997, c. 31 [hereinafter "Bill 160"].

² *Ontario (A.G.) v. Ontario Teachers' Federation* (1997), 36 O.R. (3d) 367 (Gen. Div.) [hereinafter *Ontario Teachers' Federation*].

for about two months. Winning public support was key to both sides' strategies during this political struggle. As part of their tactics, the teachers made it publicly known that if the government remained intransigent they would strike, at an unspecified date. The government said that it would not back down. This brinkmanship created anxieties, and led to bouts of frenetic negotiations that, in the end, broke down.

From the legal point of view, one of the arresting aspects was the events of 27 October 1997. The unions finally declared that negotiations could go no further and that, as of 28 October, they would strike. The government *only five hours later* announced that it would be going to court to have the strikers ordered back to work.³

Three days into the strike, the Harris government lodged an application with the Supreme Court of Ontario, asking it to issue an order—an injunction—requiring the teachers to return to work. It would have come to court earlier but, it seems, the government needed three days to gather at least some evidence to make its application for an injunction respectable.

The government came to court because—as in the case of its protracted struggles with its own employees during the Ontario Public Sector Employees' Union (OPSEU) strike⁴—it had miscalculated politically. It had clearly planned its frontal attack on teachers in the belief that the various teachers' unions, with their very different memberships and outlooks, would not stick together and would not be able to keep their members solidly behind them. The government turned out to be wrong in these and other tactical assumptions. The government, which had attacked the school boards with its *Fewer School Boards Act*,⁵ and was further marginalizing school boards in the

³ See D. Girard, "Ontario Seeks Court Order" *The Toronto Star* (28 October 1997) A1.

⁴ When the Harris government came to power, it abrogated all of the major collective bargaining legislation amendments the predecessor New Democratic Party (NDP) government had introduced, except one. The NDP had given Ontario's public servants the right to strike, something that had been denied them during forty-two years of Progressive Conservative government and two terms of Liberal government. The Harris government left this new right to strike untouched, while it attacked the job security and terms of employment of its public servants with great vigour. It provoked a strike, believing that the electorate would favour its repression of "lazy," "not-in-the-real-world" public servants. The strike, however, lasted three weeks and opinion polls showed that, during it, public support was roughly equally divided between the government and the union: see M. Mittelstaedt & G. Abbate, "Ontario Fears Unrest in Jails" *The Globe and Mail* (1 March 1996) A6; C. Blizzard, "Solidarity First, Not Safety" *The Toronto Sun* (1 March 1996); and D. Rapaport, *No Justice—No Peace: The 1996 OPSEU Strike Against the Harris Government in Ontario* (Montreal: McGill-Queen's University Press, 1999).

⁵ S.O. 1997, c. 3. This Act reduced the number of school boards from 129 to 72, and the number of trustees from 1,900 to 700. It also capped trustees' remuneration at \$5,000.

contentious Bill 160,⁶ seemed to think that it could count on the support of school boards, but was clearly mistaken. The school boards did nothing to help the government. Further, throughout the highly publicized negotiations that, as noted, were vitally concerned with winning public support, the government maintained the teachers' allegations (that the Harris government was anti-education, and that it intended to take a huge amount of money out of the education portfolio to fund its tax rebates for the rich) were an unjustified calumny. However, on 22 October the contents of a contract struck between the government and a new deputy minister were leaked to the media. This leaked document suggested that the deputy minister would earn a performance bonus if the goal of cutting \$667 million out of the education budget was achieved.⁷ From the government's perspective, this revelation not only had an unfavourable impact on its bid for the hearts and minds of the people, it also displayed how poorly conceived the government's plans had been.

In addition to these tactical blunders, the Harris forces had counted on being able to paint teachers as well-paid workers with great holidays and short working days. To this end, it had made much of what it alleged to be the overly generous preparation time teachers enjoyed and of how poorly Ontario students were faring when their test results were compared with those of students in other jurisdictions. But once they had been found out to be less than trustworthy on the defunding issue, and when the teachers received a surprising amount of support from their secondary high school students, it became clear that the government had been too sanguine about its capacity to characterize teachers as overpaid, ineffective layabouts.

Finding itself frustrated in its efforts to win public support, the government attempted to turn its struggling political attack into a judicial one. In line with the argument of this commentary, the government was acting on the theory that, in court, numbers and social history do not matter. This is why the recasting of the struggle into a

⁶ *Supra* note 1. Among other things, the Bill proposed that the school boards be deprived of their right to tax, and gave the government of the day the power to sack boards and trustees in cases of financial mismanagement. As will be shown below, this led to a separate legal battle.

⁷ The deputy minister was Veronica Lacey. The contract and its accompanying text also mentioned the possibility of strike action by the teachers and indicated that resort to the courts should then be the counter manoeuvre. These anticipated risks materialized and the government responded in the way the document had argued it should: see J. Ruimy, "'Goal of Contract' \$667 Million Cut: It Also Calls for 'Legal Strategy' in Event of Strike" *The Toronto Star* (22 October 1997) A7; and D. Girard & J. Ruimy "'\$660 Million School Cuts Confirmed" *The Toronto Star* (24 October 1997) A1.

legal battle held out the promise that the government might offset its losses in the public-political sphere. This too turned out less well than the government had hoped.

III. DEMOCRACY AND THE INJUNCTION

The government applied for an injunction—that is, an order by the court requiring identified teachers or unionists to desist from their course of action. The basis for a labour injunction is (usually) that a strike will do irreparable harm to a property or contract right of the applicant. The court must, therefore, issue a cease and desist order before it is “too late.” To remind us of the utility of this legal tool in the certified labour setting, note that any violation of the order constitutes a contempt of court, because an identified person, specifically told to do or, as is more frequent in capital-labour disputes, not to do something will have defied the court’s command. Contempt of court is punishable by the imposition of a jail sentence, a fine, or any other kind of punishment the court sees fit to devise. This prospect usually forces strikers to go back to work, losing any advantage they might have had. The injunction is an ideal tool for officials involved in disputes where timing is of the essence.

It has been a draconian weapon, used with telling effect against striking workers. Courts were so pliable when asked to issue injunctions against trade unions at the behest of employers that it gave rise to a well-known joke. The story is that a judge, attending a baseball game, heard an umpire yell “Strike!” The judge leapt out of his seat and said: “Injunction granted.” This apocryphal story reflects an empirical truth. Historically, courts assumed that if an employer gave evidence that a strike was underway, or about to get underway, the employer was bound to suffer irreparable harm to its property and contract rights as the result of definable conduct. Judges would grant injunctions without more.⁸

⁸ Until some reforms were implemented, employers could obtain such strike-crippling injunctions by way of *ex parte* applications. This meant that employers swore an affidavit to testify to the existence of a strike or its imminence, adding a claim that this would lead to irreparable damage and that it had given notice to the union of its intention to apply for an injunction. As all this happened in a rush (because the supposition was that relief was needed instantly, if not sooner), it was often the case that unions were not represented at these hearings. The granting of anti-union injunctions in these circumstances brought the law and courts into disrepute. This led to several commissions of inquiry and recommendations for constraints on the all-too-willing courts: see A.W.R. Carrothers & E.E. Palmer, *Report of a Study on the Labour Injunctions in Ontario* (Toronto: Ontario Department of Labour, 1966); Ontario, *Report of the Royal Commission Inquiry Into Labour Disputes* (Toronto: Queen’s Printer, 1968) (Chair: I.C. Rand); and Canada, *Canadian Industrial*

The weapon was used so excessively in Ontario in the middle 1960s that law reforms had to be introduced. Curbs were put on the judiciary's ability and eagerness to protect employers from their disgruntled workers. Now, before a court can issue an injunction in a labour dispute in Ontario, it must be satisfied that every effort has been made by the applicant to avert the possibility of harm to its property and contract rights, including seeking the help of the police.⁹ The notion is that this procedural change will stop judges from assuming that employers will suffer irreparable damage as the result of a strike. The employer now has at least to adduce some evidence.¹⁰

The problem for the Harris government was that, as a government, it had no way to establish that it would suffer irreparable

Relations: The Report of Task Force on Labour Relations (Ottawa: Queen's Printer, 1969) (Chair: H.D. Woods) [hereinafter *Woods Task Force*].

⁹ See the *Courts of Justice Act* R.S.O. 1990, c. C.43. In British Columbia, an NDP government tried to take the jurisdiction of the courts over these issues away altogether: see H.W. Arthurs, "The Dullest Bill: Reflections on the Labour Code of British Columbia" (1974) 9 U.B.C. L. Rev. 280. A central point in this commentary is that it is not the simple bias of a few anti-worker, anti-trade union judges that is at issue, but the fact that the legal system, as an institution in liberal capitalist democracies such as Canada, is designed to defend individual capitalists against collectives of workers. This should mean that the change of forum attempted in British Columbia would have had little impact, except in a cosmetic way. There is evidence, in terms of outcomes, that the change in forum in British Columbia was not all that significant: see J.A. Manwaring, "Legitimacy in Labour Relations: The Courts, the British Columbia Labour Board and Secondary Picketing" (1982) 20 Osgoode Hall L.J. 274.

¹⁰ For a very good illustration of the way in which courts have seen (and continue to see) their role in capital-labour disputes, see *Daishowa Inc. v. Friends of the Lubicon* (1998), 39 O.R. (3d) 620 (Gen. Div.) [hereinafter *Daishowa*]. Picketing that in a capital-labour dispute would likely have been classified as secondary picketing and therefore automatically enjoinable was not so characterized (not very persuasively). The actions of the defendant picketers were perceived to be noble, a view rarely (if ever) taken by judges when dealing with a picket line supporting a strike. The Friends of the Lubicon were acting in support of a long-suffering group whose very existence was said to be threatened by the applicant, a profit-seeking transnational corporation. The picketers, unlike workers defending their *own* job security and way of life, were defending *other* people's interests. Their stance was seen to be political, not economic. The word "seen" is crucial: the distinction is nowhere nearly as clear as the finding in the *Daishowa* case purports it to be. It would be a poor liberal democracy, the court reasoned, that stood in the way of such selfless action, even if well-established law seemed to stand squarely in the way. In short, in order to reach a decision the court had to endorse the contentious distinction between the political and the economic spheres, a distinction that allows private property owners to resist the wishes of the majority in the private sphere and gives them more political clout than their numbers warrant in the public sphere. The distinction furthers the interest of the dominant economic class. This point will be taken up later in this commentary. For the moment, note that the judge who was so generous to the Friends of the Lubicon was MacPherson J.—the judge who, in the teachers' case, denied the Harris government an injunction. In that case, too, MacPherson J. would have liked to characterize the teachers' action as political, rather than economic. But, this distinction plainly made less sense in that context because the teachers' self-interest was palpable, even though they claimed to be acting in the public interest. This helps explain why the holding favouring the teachers was so narrow, and eventually, ineffective: see *infra* note 35 and accompanying text.

property or contract harm as a result of the strike. The Harris forces, therefore, had to allege the possibility of a different kind of harm, one that approximated the worst kind of harm imaginable in a capitalist society, something as important as a private property or contractual loss: interference with democratic representation. As a matter of law, it is permissible for a government to go to court to claim that it has a responsibility to guard the fundamental, established rights and needs of the people if the people cannot do so themselves.¹¹ This principle is what the government's legal team used to ground the application for a court order directing the teachers to cease and desist from their strike action. The claim was that the strike would do irreparable harm to the public interest and that this was definable at the government's behest. This contention had two strands.

The first was that the education of Ontario's children was being irreparably damaged by the strike,¹² a somewhat puzzling argument in that the government was busy telling the world that the striking teachers were not delivering much by way of useful education. Wrapped up with this argument about harm to the children of Ontario was a more realistic but somewhat distinct argument to the effect that working parents would be inconvenienced by the strike. Inasmuch as this was said to harm the public interest, evidence was needed. Three days into the strike this was not going to be easy. Indeed, MacPherson J., the judge who presided over the government's application, was to hold that the government had failed to provide the necessary evidence.

The government's lawyers understood the inherent weaknesses of these lines of argument, and had put forward a third, more fundamental and conceptual argument. Because of its nature, this third basis grounding the application did not require factual proof. The Harris government stressed the illegality of the teachers' withdrawal of labour.

¹¹ See *Gouriet v. Union of Postal Workers* [1978] A.C. 435 (H.L.); and *Ontario (A.G.) v. Dieleman* (1994), 20 O.R. (3d) 229 at 267 (Gen. Div.).

¹² The newspapers were replete with stories about poor toddlers with nothing to do, and advice about excursions and amusements that parents might be able to enjoy with their idle children: see, for example, M. Sheppard, "Parents Scramble for Childcare" *The Toronto Star* (29 October 1997) A6. This drew attention to the fact that primary schooling is about daycare as much as it is about education. Indeed, the government, trying to assure the public that it cared about its problems, offered a subsidy to parents who would need daycare should a strike materialize: D. Girard & P. Small, "Daily '\$40 for Care' Offer to Parents" *The Toronto Star* (23 October 1997) A1. This widely publicized tactic was not that useful to the government's lawyers, who were going to have to rest part of their case on the claim that education was being badly affected by the teachers' strike. More useful to them was the plethora of stories about high school students enrolled in semester courses in their final year and who, by losing a semester, or a large chunk of it, *might* lose the chance of being admitted to the university of their choice.

The argument was that, if a government permitted widespread, intentional breaches of a validly passed law to occur, this might be seen as *carte blanche* to dissidents to use extra-legal tactics. Such governmental inaction would undermine the fabric of our democratic society, which is governed by the rule of law. A government that stood idly by while dissidents violated the law would be renouncing its democratic duty.

This purported fervour for democracy by the Harris government did not ring true to many in the province. This was, after all, the government that had introduced Bill 26,¹³ which was passed without any meaningful scrutiny, though it was to abolish forty-seven laws and give the government new powers to close hospitals, as well as propose the serious dilution of the right to appeal administrative decisions. This was also the government that had tried to bar entry to the legislature of one of Canada's cultural icons when, accompanied by some of her allies, Karen Kain came to protest the government's cuts to the arts. This was the government that by regulation cut welfare benefits by 22 per cent. It was the government whose premier compared health care to "hula hoops," the government that passed Bill 103,¹⁴ forcing the amalgamation of local councils against the wishes of a considerable segment of the population. It was the government that had turned the legislative building into a fortress to avoid having to confront dissenting citizens and that, in one truly surreal episode, charged a few protesting and trespassing students with the antediluvian crime of intimidation of the legislature.¹⁵

Notwithstanding its public record, the government felt safe in using the "defender of democracy" position in court. It felt sanguine—and this is significant to the central point of this commentary—that the behaviour of the government, *i.e.*, its historical and political record, could not, and would not, be raised in a judicial proceeding addressing a legal question. This feature of the legal system speaks volumes about the way in which workers—whose only real political assets are their numbers and consciousness of their class

¹³ *Savings and Restructuring Act* S.O. 1996, c. 1.

¹⁴ *City of Toronto Act, 1997* S.O. 1997, c. 2.

¹⁵ See the *Criminal Code*, R.S.C. 1985, c. C-46, s. 51, which provides a maximum sentence of 14 years for anyone convicted of committing an act of violence to "intimidate Parliament or the legislature of a province." The government's use of enthusiastically repressive police officers forced it to set up a public inquiry into its attitude (as implemented by the guardian of the Legislative Assembly, the Speaker) to the public's civil rights, and into the behaviour of the police summoned to enforce this governmental attitude.

history—tend to be disempowered when politics are judicialized.

As it turned out, my claim that there is an inherent limitation on the potential of judicial politics was not supported directly by the result in this particular case. The government's conscious attempt to abstract the legal issues from political reality did not work, precisely because its efforts were too blatant. Success for the government in court would have endangered the zealously guarded legitimacy of the judiciary and, in the end, the need for the court to protect that legitimacy trumped the government's (much too) frank reliance on the structured anti-worker bias built into the law.

The source of the illegality the government relied upon in its case was the teachers' breaches of their respective collective agreements. When the strike began, the teachers' unions had extant collective agreements with the school boards, their members' employers. On this point the law is clear: it is unlawful to strike during the life of a collective agreement. Technically, therefore, the government's case that a law was being flagrantly contravened, and that this was inimical to the public interest, seemed an easy argument to make. The government counted on that, but its technically-correct argument was tainted by the context in which it was made, a context fashioned by the government itself. The collective bargaining law by which the teachers and their employers were bound was the very law that Bill 160 was to replace. In effect, the teachers were in breach of the technical requirements of collective bargaining law whose spirit and essence they were really trying to protect. While the government was willing to leave collective bargaining in place, its plan was to completely change the circumstances in which it was to occur. A court could only endorse this kind of argument—even if plausibly based on the state of the law—at risk to the judiciary's claim to be an independent institution. The need to preserve the legitimacy of the court was of vital concern to it, even if it did not articulate this need. Courts rarely explain their holdings on the basis that they are necessary to maintain the legitimacy of the judiciary—especially ones that defy apparently well-established principles of law. Justice MacPherson, therefore, offered different, legally plausible reasons that protected the perception that the court was acting autonomously.

IV. JUDICIAL POLITICS

The fact that the government could come to court on such a set of artificial arguments demonstrates the plausibility of the contention that, in a legal context, arguments can be presented that are divorced

from reality. Litigants are able to rely on the “internal logic” of the law. Within those confines, the Harris government felt confident that it would find itself on much more comfortable terrain than it occupied in the world of social relations and politics. In court it was going to be impermissible—because it was irrelevant to the internal logic of the law—for the teachers to raise any of the arguments that were gaining them so much support in the struggle for the hearts and minds of the people.

In this situation, the teachers’ lawyers were not going to be able to offer evidence of what, loudly and publicly, they took to be the despotic nature of the government. They were not going to be allowed to make the argument (which they were making concretely by having adopted a leadership role in the Days of Action activities¹⁶) that they were acting as the front-line troops in a war waged on behalf of the many workers of Ontario who were losing, or who had already lost, many of their hard-fought-for protections and bargaining rights. They were not going to be able to raise the issue that, in amalgamating municipalities and school boards, the government was attacking self-government and participatory rights of citizens. In short, in court the teachers were facing the government without any of the arguments that were important to them, arguments that relied on the recent historical context of the political struggle and that had stood them in good stead during the battle for public support. All that the teachers would be allowed to do, and did do, in court was to employ one technical and one civil libertarian argument. They won on the technical argument; neither the civil libertarian argument,¹⁷ nor any of the political arguments listed above, were addressed by the court.

The Harris forces failed to get the injunction they sought because, as a matter of technical law, the judge found them to be the

¹⁶ The “Days of Action” were arranged by labour and social movements in the Fall of 1995 as a series of protests against the Harris government and its “common sense revolution.” The protests were organized in a number of major centres around the province, including Toronto, Hamilton, London, and Kingston.

¹⁷ Justice MacPherson stated that time constraints forbade him from considering the merits of the *Charter* (i.e., civil libertarian) argument: *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. But, he did suggest that, as education policy was a political issue, the *Charter* argument might have had some merit: see *Ontario Teachers Federation* *supra* note 2 at 381. This is yet another manifestation of MacPherson J.’s desire to classify the strike as a political one and, therefore, not subject to the usual restraints imposed on strikes by the working classes. Yet, despite his predilections, MacPherson J. felt the weight of precedent and carefully noted that, soon enough, the strike might become an enjoined one (as any other workers’ strike would be), despite its political colouring.

wrong applicant. The government had to rely on the breach of the collective bargaining law under which the teachers were working. That law provided that, in the ordinary course of things, persons directly affected by such breaches were to have remedies that they could enforce. In the case of the teachers' walkout, their direct employers (the school boards) had the right to go to an administrative agency and ask it to declare the strike illegal. This could be accompanied by a cease and desist order that, when filed in court, would have the same effect as an injunction. The employers also had a right to seek to recover moneys for any pecuniary losses they might suffer as a result of the illegal strike. Other affected persons not as directly connected to the teachers as the teachers' employers, such as school board suppliers—bus companies, caterers, and cleaning service contractors—could also sue for any financial losses they incurred as a result of the teachers' breach of their obligation not to strike. In addition, the employers were entitled to impose disciplinary sanctions on their contract-breaching employees, the striking teachers.

In the end, the court held that, given that the potentially injured people could bring actions that would protect them and that could effectively put an end to the illegal strike, there was no need for the government to act on the public's behalf. Further, in the case of education, there is a readily available (and independent) guardian of the public weal, an agency called the Education Relations Committee, whose brief it is to act as an oversight agency. It may recommend that even a legal teachers' strike should be brought to a halt if, in its expert view, the strike puts the education of children in jeopardy. By the time the Harris government's lawyers made their application, the Education Relations Committee had not said a word.¹⁸ Considering all the circumstances, MacPherson J. held that he could not accept the Harris government's claim that a crisis for democracy existed that mandated the extraordinary use of the court's injunctive power at the government's behest—at least, not yet.

The court had found a way to preserve the perception of judicial independence without legitimating the teachers' strike. The strike was still said to be challengeable in court by the right parties. Nothing in the favourable decision held that the teachers were justified in using their collective economic power for political and economic goals. That is,

¹⁸ Justice MacPherson noted that, historically, the number of days that the Education Relations Commission permitted a strike to continue before it used its extraordinary power varied from a low of 27 to a high of 73. A three-day strike hardly presented an educational danger worthy of the name, even though, in this unusual case, all the schools were closed at the same time.

while the result in the case does not demonstrate directly that judicialization of a political struggle tends to disempower workers, the way in which the case was fought did reveal this, and, as will be seen, so did its fall-out. In the meantime, two further observations are offered to underscore the claim that judicial politics is useful to the propertied class and its political allies in that it enables them to avoid the political spheres where history, numbers, and social relations do matter.

First, the Harris government had a majority in the legislature. It could have passed legislation ordering the workers back to work, with stiff penalties attached to disobedience. This has become an increasingly popular strategy with Canadian governments of all stripes and in every jurisdiction when faced by militant public sector workers.¹⁹ That the Harris government did not use this option tells us that it judged it to be politically inferior to going to court. One reason for this decision was that, in order to pass back-to-work legislation, it would have had to permit the opposition parties to participate in legislative debate. They could be expected to make some of the teachers' real political arguments, arguments about the necessity of governmental accountability, about the lack of public consultation, about the alleged cutbacks to funding, about the alleged distortion of evidence in respect of the quality of Ontario education, and about the claimed disenfranchising of the parents. That is, they could be expected to use the legislative debate to raise many of the real political arguments that had prompted the job action and that had enabled the teachers to make a case that resonated with the public. This was not an appealing prospect. By contrast, these awkward arguments were certain to be deemed irrelevant in court.²⁰

The second point is to note that, while the ploy of using the court as a political forum permitted the government to make the argument

¹⁹ For overviews, see L. Panitch & D. Swartz, *The Assault on Trade Union Freedoms: From Wage Controls to Social Contract* 2d ed. (Toronto: Garamond Press, 1993); and D. Drache & H.J. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Toronto: Lorimer, 1992).

²⁰ There may have been other related reasons not to go the legislative route. In part, the government was surprised at the ability of the teachers' to maintain solidarity in a united front; it had hoped to beat the unions down. Its view was that the unions' call for a strike would be rejected by much of the thought-to-be conservative membership. The government, therefore, did not want to play its legislative card prematurely. In part, its strategy was tied to provoking a *partial* illegal walkout to help the government paint the striking teachers as isolated, selfish persons who did not care for their students. When this, belatedly, was seen not to work, the government may have thought that a declaration by a court that the strikers should return to work would allow it to regain some of the moral high ground that it had lost in the weeks leading up to the strike. I will return to this legitimating power of the court below.

that the teachers' behaviour threatened democratic institutions, the reverse was not true. There was no way in which the internal logic of the law allowed the workers to put forward evidence to show that it was the government's behaviour that was putting democracy at risk. This was also true of the civil libertarian claim that the teachers' lawyers advanced to ward off the government's legal case, should the government have succeeded in establishing the technical prerequisites for the granting of an injunction. As noted, the court was able to ignore this second strand to the teachers' bow, but its nature is of interest to the arguments in this commentary.

The teachers had also made the argument that the *Charter*²¹ guaranteed them the right to demonstrate, to speak freely, and to assemble. They were saying that, if the court granted the injunction in the terms the government had requested, it would have the same effect as a law passed by the government that expressly denied them rights guaranteed by the *Charter*, including the rights of free speech and of assembly. Such denial, if done by way of legislative act, would have given them an arguable case that a court should strike down such a law as unconstitutional. It followed that the court should not grant an injunction whose effects, if generated by a different institution, might have been ruled constitutionally flawed.²²

²¹ *Supra* note 17.

²² As a matter of case law, the argument the teachers were making was far from open-and-shut. The Supreme Court of Canada has handed down a decision that made this part of the teachers' case a difficult one. In *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*] the Supreme Court held that a judicial injunction of a secondary target picket interfered with the workers' right to free speech, but that this was not unconstitutional because a decree by a court was not a governmental act that was subject to the *Charter*. Note the bizarre form of logic that is integral to legal politics. Even McIntyre J., a member of the Supreme Court in *Dolphin Delivery* was moved to say that to hold a State-appointed judge, whose central task is to uphold the political-legal structure of the State, not to be a governmental actor might be incomprehensible to anyone not in law: *Dolphin Delivery ibid.* at 600. From the teachers' perspective, *Dolphin Delivery* presented a formidable obstacle. But legal logic is such that it was not an insurmountable one. There was a plausible argument to the effect that, unlike in *Dolphin Delivery*, in the teachers' case the government itself was applying for a court order, arguably making such an order, if made, a governmental act. And, in legal politics, an argument need not make political or real-world sense; it is sufficient if it is plausible. Lawyers may, and indeed are expected to make it. So, the argument would have been made and it would have been bolstered by another curious pronouncement of the Supreme Court, one made in *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214 [hereinafter *BCGEU*]. In *BCGEU* it was held that, when a judge issued an injunction without having been asked for it, the judge was not acting as a non-governmental actor as the judge in *Dolphin Delivery* had been held to be. In *BCGEU* the judge was a governmental actor because the judge's initiative was one to be used by the attorney general—clearly a governmental actor—and, therefore, the judge was just a surrogate of the attorney general. There is a plausible justification in law for the use of such sophistry, but it is not a justification that is politically acceptable. Note,

It is easy to see how different this kind of argument is to the ones raised in the public political sphere. The point of the civil libertarian argument was a claim to have a right to demonstrate, *simpliciter*, respected. What was being asserted were liberal citizenry rights. The *Charter* guarantees freedoms, subject to any reasonable limits that may be required by a free and democratic society. In a liberal democracy, the right to band together to speak, to petition, to lobby, and to support electoral parties, will be protected. These are the kinds of rights that the teachers claimed were being infringed. What was not being claimed by means of the *Charter* argument, then, was the ideological and political right of teachers to use their combined material-economic power to fight a politically repressive government. When using the *Charter*, the teachers were not relying on the claim that there was a compelling democratic need to meet a repressive government with force. What was not being sought in court by the teachers was the right to use their numbers and the withdrawal of their labour power to achieve both their political and economic aims. They claimed that they should have a right to speak, petition, lobby, and vote as individuals do. They were having to dress up what they were really doing (using the coercive power of the strike) in non-threatening clothes to make it attract *Charter* protection.

Eventually the teachers did win in court, and a win is better than a loss. It is perhaps more accurate to say that the government did not get what it wanted from the court. If the government's application had succeeded, there would have been a direct order by a court that, at the very least, would have told the public that an unbiased umpire had held the teachers and their unions to be acting anti-socially. The teachers might have gone back earlier than they did, although, logistically speaking, it could not have been much earlier. The "win" for the teachers, in reality, was that they did not lose any ground in the propaganda war. The government did not lose anything tangible and the teachers did not gain anything concrete.

V. THE ANTI-WORKER ARCHITECTURE OF THE LAW

Canada characterizes itself as a mature, liberal, capitalist democracy. The attributes of liberalism and electoral democracy help further the legitimacy of capitalism. Law not only supports the tenets of liberalism (and democratic forms within the framework of those liberal tenets), but also facilitates market transactions that, in turn, enhance

however, that the difficult-to-reconcile holdings in *Dolphin Delivery* and *BCGEU* led to the same result: the validation of an anti-worker injunction.

both the instrumental needs of capitalism and the ideology of liberal democracy. In addition, law embeds and naturalizes some essential features of capitalism. These include the ability of wealth owners to enter into enforceable agreements with non-wealth owners for the purchase of the only thing the non-wealth owners own: their labour power. While this commentary is not the place to debate the role of law in capitalist relations of production, a few observations will be offered to lay the basis for the central argument, namely, that as a result of law's liberalism and market-supporting roles, the legalization of politics—especially when capital and labour come into direct conflict—is likely to favour capital.

To assert that liberal law plays a central role in the maintenance and perpetuation of capitalist relations of production,²³ however, is not the same as saying that law automatically reflects the needs of capitalism. This would be too crude a view of the way in which law works. Law does more than reflect the fundamental needs of capitalism, in part because it is not clear what the precise scope of the needs it has in any one place at any one time.²⁴ The view I take I share with Eric Tucker;²⁵ namely that, in the result, law has some autonomy. The idea here is that law helps in the establishment and maintenance of the necessary conditions for capitalism to exist. Law also provides the tools to facilitate its workings and to establish a climate to make it acceptable.²⁶ In Marxian language, law plays a part in constituting both

²³ This section of the article relies heavily on the very useful analytical framework provided by E. Tucker, "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22 Osgoode Hall L.J. 213 [hereinafter "Law of Employers' Liability"]. See also R. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017.

²⁴ There are some very important scholars who do think of the law as merely reflective of capitalism's needs, although there is a good deal of debate amongst them about the mechanisms that allow law to behave reflectively: see L. Friedman, *A History of American Law* 2d ed. (New York: Simon & Shuster, 1985); M. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); R.A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown, 1992); G. Priest, "The Common Law Process and the Selection of Efficient Rules" (1977) 6 J. Legal Stud. 65; and P. Gabel, "Intention and Structure in Contractual Conditions" (1977) 61 Minn. L. Rev. 601.

²⁵ See "Law of Employers' Liability," *supra* note 23.

²⁶ As the law does not automatically reflect the needs of the base and, as the contents of the base are historically and materially contingent, to say that the law plays a dual role does not tell us how it does play that role. This problematic has given rise to much debate: see M. Tushnet, "Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies" (1979) 57 Texas. L. Rev. 1307; W. Holt, "Morton Horwitz and the Transformation of American Legal History" (1982) 23 Wm. & Mary L. Rev. 663; E.O. Wright, *Class, Crisis and the State* (London: Verso, 1979); and I. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law" (1977) 11 L. & Soc'y Rev. 572.

the (material) base and, as already noted, the (non-material) superstructure in the maintenance and furtherance of capitalist relations of production.

In mature capitalism, the base contains the constructs of private property and private contract. Alan Stone has argued that it is impossible to express property relations in anything but legal language, giving law a crucial role.²⁷ Again, for this statement to remain true, it is not necessary that the constructs of private property and private contract have to have a specific meaning or content. Indeed, it would be ahistorical, acontextual, *i.e.*, profoundly anti-Marxian, to hold that the meaning and content of these constructs be written in stone. Historical struggles and material conditions will dictate the scope of these constructs found in the base. It is a characteristic of mature capitalism that the scope of property rights and of the contract for wages (the defining attribute of mature capitalist relations of production) will have been cut down by a state that has been under prolonged pressure to offset the more adverse effects of the extraction of surplus value from the working class. This is what has happened in Canada and is reflected in the legal capital-labour regulatory regimes that have been developed.

A. *Legal Regimes*

There are three major regimes that govern labour relations in Canada. Under the common law of contract, many²⁸ employers and employees are related by an individual contract of employment. Its governing doctrines were developed by common law courts in the context of their overriding goals, namely the protection of private property and of the market-based notion that the terms of a contract are voluntarily entered into between *de jure* equal individuals and should be treated as sacrosanct. Second, precisely because the terms of contracts of employment turn out to be so miserable for so many of the workers left to bargain as discrete individuals, the State has mediated the harshness of these free market outcomes by imposing minimum standards (in respect of such matters as wages, hours of work, mandated vacation, and

²⁷ See A. Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype" (1985) 19 L. & Soc'y Rev. 39. Stone would include credit as a construct of the base in modern capitalism.

²⁸ An increasing number of workers are contract or contingent workers: see Industry Canada, *Small Business in Canada: A Statistical Overview* (Ottawa: Entrepreneurship and Small Business Office, 1995) [hereinafter *Small Business in Canada*]. See also discussion *infra* note 63.

minimum notice periods). This has been done by direct legislative intervention.²⁹ Third, there is statutorily permitted collective bargaining. This forces an employer—note the anti-liberal, anti-market character of this requirement—to negotiate in good faith with a trade union freely chosen as an agent by its employees in order to conclude a legally-binding collective agreement. The parties—the employer and the trade union—may resort to economic warfare (after satisfying a number of statutory requirements) to force the other party to come to terms. That is, after compelling employers and employees to bargain, the State wants the outcome to be the result of voluntary deal-making. This short account of the way in which capitalist relations of production have been mediated in Canada brings us to examine how the architecture of liberal law naturally favours capital's interests in the context of capital-labour disputes. The argument is that this privileging of capital is always part of the story, even when the State has set out specifically—as it has in establishing the collective bargaining regime—to offset some of the more obvious advantages unmediated liberal law bestows on employers.

The collective bargaining scheme of capital-labour regulations goes the furthest in terms of interference with the individual employer-employee model. Nevertheless, it remains posited on precepts that are integral to an individualistic competitive model.³⁰ The employer and its workers' bargaining agent, the local union, are supposed to be on an isolated economic island, divorced from other people's interests. The scheme, then, is really the individual employer-employee bargaining

²⁹ See, for example, *Employment Standards Act* R.S.O. 1990, c. E.14. In addition, other kinds of mediating State interventions emerged. Anti-discrimination laws in respect of employment opportunity, remuneration, and security, all play a part in off-setting some of the socially and politically unacceptable outcomes of a legal regulation system based on the pristine notions of the sacrosanct nature of private property ownership, and the unequal power it bestows on property owners over non-property owners in an unfettered market system.

³⁰ I have made this argument extensively in various places. See, for example, H.J. Glasbeek, "The Contract of Employment at Common Law" in J. Anderson & M. Gundersen, eds., *Union-Management Relations in Canada* (Don Mills, Ont.: Addison-Wellesley, 1982) 47; H.J. Glasbeek, "Labour Relations Law as Mechanism of Adjustment" (1987) Osgoode Hall L.J. 179; H.J. Glasbeek, "Agenda for Canadian Labour Law Reform: A Little Less Liberal Law, Much More Democratic Socialist Politics" (1993) 31 Osgoode Hall L.J. 233. See also the comments made by the *Woods Task Force* *supra* note 8 at para. 30, describing Canada's collective bargaining system as a functional component of political economy: "The underlying concepts of the free individual, private property and freedom of contract have produced an essentially capitalistic, although mixed enterprise economy." By contrast, Canada's leading liberal law pluralist, Bora Laskin, made it a lifetime project to propagate the idea that, with the advent of collective bargaining, the individual contract of employment no longer had any functional role in a unionized setting. Inasmuch as it was a manifestation of old class divisions and unequal power, it was, he implicitly argued, a dinosaur: see *Re U.A.W., Local 458 & Cockshutt Farm Equipment Ltd.* (1959), 9 L.A.C. 324; and *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718.

scheme, complemented by a limited privilege for the workers at that place of employment to bargain as a collective and to strike in certain very limited circumstances. Local unions with bargaining rights may call for a strike only for the purpose of reaching a collective agreement, and then only after they have gone through some compulsory delays. The right to strike really only exists at this scheduled point of time, only for this economic agreement-making purpose, and only in respect of the particular employer for which the bargaining agency exists. As a consequence all support for an employer's workers by way of secondary actions and boycotts is treated with deep suspicion by the institution charged with the protection of individual property and contract rights: the courts. Indeed, the judges have tended to treat such secondary activities as illegal "per se." While wrong, there is a case that is constantly cited in support of per se illegality: *Hersees of Woodstock Ltd. v. Goldstein*³¹

B. *Free Speech and Picketing*

What is most interesting about the hold of *Hersees* on the judiciary's vision of the legal status of secondary labour actions is that the decision was technically wrong. The defendants were restrained from engaging in a secondary boycott on the basis that they committed the tort of inducing a breach of contract, a cause of action specifically devised to provide added protection to property and contract rights. But, the applicant for the injunction was the party breaching the contract, rather than the victim of the breach of contract, as the cause of action requires.³² Yet, so deeply ingrained is the judicial instinctive understanding that it is the court's role to guard against the danger that workers might enlarge their collective bargaining privileges granted by special statute, that this poorly reasoned judgment is often seen as binding on a court to hold that there is no choice but to restrain secondary boycotts.

This entrenchment of anti-collectivism is what created difficulties for MacPherson J. in the *Daishowa* case.³³ The sympathy of this judge

³¹ *Hersees of Woodstock Ltd. v. Goldstein* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.) [hereinafter *Hersee*].

³² This fact is much commented upon. See, for example, H.W. Arthurs, "Picketing, Public Policy and Per Se Illegality" (1963) 41 Can. Bar Rev. 580; and H.W. Arthurs, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship" (1960) 38 Can. Bar Rev. 346.

³³ *Supra* note 10.

for the Friends of the Lubicon was even more obvious than his sympathy for the teachers' cause in the Bill 160 case. But he was faced with *Hersees* and its progeny. While *Hersees* was clear in its anti-worker bias, liberal law purports to be evenhanded. Justice MacPherson was confronted with the implicit argument that the *Hersees* logic applied to any secondary boycott. Rather than say that it only applied to the collective use of power by workers—a statement that would attract attention to the essential, but oft-denied, nature of law—MacPherson J. finessed the issue. He sidled out of the problem by characterizing the Friends of the Lubicon's boycott as a primary one and, therefore, not conduct that was automatically enjoined. This served the purpose: he was able to craft a progressive result while leaving a reactionary labour law rule intact.

The reason the *Hersees* conclusion has been challenged rarely, despite the flawed methodology that begot it, is that it was posited on the fundamental proposition that private property, or more directly the conduct of owners of private property, is to be protected from collectivized attacks by the non-propertied, by workers. That is, the leading judgment of Aylesworth J.A. in *Hersees* may always have been bad black letter law, but the fact that it explicitly reinforced law's role in fortifying the material base of capitalism made it a valuable judgment. After all, Aylesworth J.A. had made no bones about what the law ought to do, regardless of any formal, methodological requirements. He wrote that the picketed, property-owning secondary target "has a right lawfully to engage in its business of retailing merchandise to the public. ... Therefore, the right, if there be such a right, of the [union] to engage in secondary picketing of appellant's premises must give way to appellant's right to trade."³⁴ Justice Aylesworth had already found, wrongly, that there was no such right, indicating by this additional argument how clear he was that there should not be one. The right of the union to engage in secondary picketing, he wrote,

assuming it to be a legal right, is exercised for the benefit of a particular class only while the appellant's right to trade] 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.

This was a clear, and therefore welcome statement about the way in which liberal law should be expected to support existing class positions in Canada's version of capitalist relations of production. While it is rare for judges to acknowledge the class-based nature of the legal regulation of capital-labour relations, this starting point has helped to set the

³⁴ *Hersees* supra note 31 at 454.

³⁵ *Ibid.* [emphasis added].

boundaries for the statutorily devised collective bargaining schemes. But as the same judiciary that has created these limits on behalf of capital also is charged with the protection and promotion of liberal democratic values, it is bound to be conflicted from time to time. This problem was brought out by two recent cases.³⁶

In *KMart*,³⁷ the Supreme Court of Canada was confronted with an argument that its recently bestowed explicit mandate to safeguard the liberal values in the entrenched *Charter* required it to abandon the class-based approach to boycotts and picketing that pervaded judicial decisions and labour relations jurisprudence. In its response, the Supreme Court used purple prose to declare its devotion to the liberal idea of free speech—that is, to *Charter* values—while ensuring that the legal scope of secondary boycotts by trade unions was not enlarged beyond what a class-based approach to capital-labour relations demanded.

The facts were that a bargaining unit of (mostly) part-time female workers had been locked out for six months by two KMart stores. In desperation, the union handed out leaflets at other KMart outlets. These other stores were not (legally) involved with the dispute and, hence, were secondary sites. The leaflets alleged that the primary target KMart stores had engaged in unfair practices and urged customers to shop elsewhere. There were no attempts to slow the flow of customers and no physical barriers to ingress and egress were established. Nonetheless, this leafleting exercise was restrained by the appropriate labour relations agency because it violated British Columbia's collective bargaining statute.³⁸ The Supreme Court was faced with the argument that picketing was, in part, an exercise in free speech,³⁹ and that the impugned provision of the British Columbia statute violated section 2(b) of the *Charter*. The Court agreed. But the Court did not declare the spirit that underpinned *Hersees* and its offspring dead. To the contrary, the Court went out of its way to make sure that the freedom that it was granting trade unions to engage in secondary actions remained under

³⁶ See *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 [hereinafter *KMart*]; and *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P*, [1999] 2 S.C.R. 1136 [hereinafter *Allsco*].

³⁷ This discussion centres upon *KMart*. For the purpose of this commentary, the judicial reasoning in the companion case, *Allsco*, was the same.

³⁸ When the action arose this was the *Industrial Relations Act* R.S.B.C. 1979, c. 212. By the time the matter had reached the Supreme Court of Canada it had been replaced by the *Labour Relations Code* S.B.C. 1992, c. 82.

³⁹ It had been so declared by the Supreme Court of Canada in *Dolphin Delivery* *supra* note 22.

tight wraps. Its holding rested on the fact that, while in this case the leafleters' motive was to generate some economic pressure on the KMart enterprise to obtain a better deal from the primary target, their conduct left the economic freedom of the leafleted consumers totally unfettered. They were left to decide for themselves whether to deal with KMart or not. The pressure on them was no different in kind than that which was routinely exerted on them by radio, television, newspapers, or junk mail advertising.⁴⁰ According to the Court, this kind of marketplace freedom of speech should not be fettered and, to the extent it did so, the British Columbia legislation was held to be unconstitutional. But all other sorts of secondary boycotts and picketing could still be restrained.

The Supreme Court held that if the leafleters' message had been inaccurate;⁴¹ if they had suggested that the secondary sites were not neutral; if there had been enough leafleters to form something like a picket line that made people believe that they could not move freely; if there had been any trespass, assault, any inducing of breach of contract or commercial relations; if there had been any economic pressure on the secondary sites' employees not to work—if, in effect, any of the facts had existed that had motivated the decision in *Hersees*—legislative and administrative restraints would be constitutional, even if free speech rights had to be blunted.⁴² As if to drive home the narrow extent of its decision to allow some secondary picketing, the Supreme Court explicitly approved that portion of McIntyre J.'s judgment in *Dolphin Delivery* where he had acknowledged that, as economic conflict had been legitimated, "[i]t is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no

⁴⁰ See *KMart*, *supra* note 36 at 1115-16. This is not the place to discuss the point, but several things are of interest. First, the idea that free speech is worthy of protection if it is commercial speech, provided that it advanced idealized, atomized market operations, lies at the heart of this argument. This speaks volumes of the Court's instinctive support for liberal values provided they dovetail with the aims of its idealized notions of market capitalism. Second, the Court must have been aware that consumer boycotts aimed at some of the uglier exploitations in a globalized context—from South Africa, to Nike, Gap, and Levi-Strauss boycotts—were used by respectable civil libertarians who, in a market-oriented world, felt themselves forced to use market instruments. It must have been counter-intuitive to craft a decision that would apply a doctrine developed to contain the local powers of trade unions in a totally different political milieu to these kinds of political activities.

⁴¹ The placards in *Hersees* *supra* note 31, were said to be misleading because they suggested that the secondary site was not neutral. For an early example applying this *Hersees*-derived approach in the consumer protest setting, see *Canadian Tire v. Desmond*, [1972] 2 O.R. 60 (H.C.).

⁴² Of course, the legislators, courts, and boards never had made all apparently secondary boycotts enjoined, *per se*. Such picketing is lawful if the secondary target can be classified as an ally of the primary target and if no other unlawful acts are committed.

doubt, a legislative weapon to be employed in a labour dispute ... it should not be permitted to harm others.”⁴³

Without being explicit about it, the Supreme Court has reinforced the position that judge-made law is there to help confine the gains made by labour in the public democratic sphere to the extent this can be done within the tenets of liberalism. This dovetails with the Court’s approach to the right to strike. It is well known that the Supreme Court derisively dismissed the trade unions’ claim that the *Charter* guarantee of freedom of association prevented governments from suspending workers’ collective bargaining and, otherwise, legalized rights to strike. The Supreme Court held that the only right created—and only relatively recently, at that—was a statutory privilege to use collective power in a narrow setting for a limited purpose during a clearly defined time. This, said the justices, was hardly as fundamental a right as, say, free speech was. In the end the freedom of association guaranteed by the *Charter* turns out to be the right to associate to further the political rights of individuals, not the right to associate to pursue their economic and political rights as a class.⁴⁴ This constitutional chicken came home to roost in the struggles over Bill 160 that followed the strike.

C. Ontario Teachers’ Federation and Free Speech

Under the pre-Bill 160 legislative regime,⁴⁵ principals and vice-principals were included in the teachers’ bargaining units. Unlike their teaching colleagues, however, they were not allowed to go on strike

⁴³ *Dolphin Delivery*, *supra* note 22 at 591, McIntyre J. This is not to say that the *KMart* and *Allsco* decisions do not say anything new. In fact, the tolerance for consumer boycotts, when conducted in the approved manner, does away with the obfuscating reasoning to which MacPherson J. had resort in *Daishowa*, *supra* note 10. It is no longer necessary to assume that consumer boycotts are illegal, as was the case in earlier rulings: see, for example, *Pietro Culotta Grapes v. Moses* (1968), 1 O.R. 89 (H.C.); and *Darrigo’s Grape Juice v. Masterson*, [1971] 3 O.R. 772 (H.C.).

⁴⁴ See *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada (A.G.)*, [1987] 1 S.C.R. 424; and *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460. There were dissents by Dickson C.J. and Wilson J., who believed that freedom to associate should include both the right to bargain collectively and the right to strike, subject to section 1 of the *Charter*. Chief Justice Dickson found that the right to strike was constitutionally abrogated by the government in two of the cases before the Court; Wilson J. found no such justification. The majority, of course, never did have to get to the section 1 arguments. Their view was endorsed in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* [1990] 2 S.C.R. 367.

⁴⁵ See *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1990, c. S.2, particularly section 64.

when it became legal to do so for the bargaining unit. When the Harris government introduced its *Fewer School Boards Act*⁴⁶ it was widely rumoured that principals and vice-principals would lose their right to belong to the appropriate teachers' bargaining unit. Unsurprisingly, this issue became a subject of hot bargaining in the lead-up to the introduction of Bill 160. After all, there were about 3,000 principals and 5,000 vice-principals. If nothing else, the loss of 8,000 members would be a serious blow for the unions. As a consequence of the bargaining, the minister of education announced that the proposed restructuring of the education system would not require the removal of principals and vice-principals from teacher bargaining units.⁴⁷ True to its word, the government did not include such a requirement when it did introduce Bill 160.

Justice MacPherson handed down his decision denying the government's application for an injunction on 3 November. By 7 November, three of the striking unions had agreed to go back to work and by 9 November the hold-outs declared an end to their strike. But even before any of the workers decided to return to work, on 5 November the government had tabled its amendments to Bill 160. They included a draconian clause affecting the principals and vice-principals.⁴⁸ It was draconian because, while the government did not literally break its promise, it introduced legislation that had this effect. It gave principals and vice-principals an option: they could remain as principals or vice-principals or they could resign from their positions and become members of the appropriate teacher bargaining unit. Should they choose the former option, their conditions of employment would be set by the government. This put principals and vice-principals between a rock and a hard place.

The Teachers' Federation fought these amendments in court.⁴⁹

⁴⁶ *Supra* note 5.

⁴⁷ This was one of two concessions the government made before introducing Bill 160. The other concerned provisions that would have permitted non-certified persons (*i.e.*, cheaper people) to do some tasks ordinarily carried out by certified teachers. The Ontario College of Teachers, which sees it as its mandate to oversee and guarantee professional standards and ethics, managed to have these offending provisions withdrawn: see D.M. Kennedy "Prompt Action Wins Changes to Bill 160" *Professionally Speaking* (December 1997) at 4, 10-11.

⁴⁸ This underscores, like nothing else can, how little the judicial victory was worth to the teachers' unions.

⁴⁹ *O.T.F. v. Ontario (A.G.)* (1998), 37 C.C.E.L. (2d) 56 (Ont. Gen. Div.) [hereinafter *Ontario Teacher's Federation II*]. The Ontario Teachers' Federation is an umbrella group whose affiliates include the Ontario Public School Teachers' Federation, the Federation of Women Teachers' Association of Ontario, the Ontario Secondary School Teachers' Federation, the Ontario English

Its argument was that these provisions interfered with the *Charter's* guarantee of freedom of association and of free speech. It lost. Justice Southey gave the freedom of association claim short shrift. He pointed to a number of Supreme Court decisions⁵⁰ and held that it was now too late to claim that the guarantee of freedom of association bestowed a guarantee either of a right to bargain collectively or of a right to strike.⁵¹ The Teachers' Federation also had claimed that the legislative option given to the principals and vice-principals was an attack on their free speech rights. The argument here was that the government had introduced the option as a form of retaliation. The principals and vice-principals had honoured the teachers' picket lines during the strike, despite requests from some school boards, and hectoring from the government, to abide by the law that prohibited principals and vice-principals from participating in strikes. As picketing was a form of speech (as well as a tool of economic warfare),⁵² this legislative attack, it was argued, should be seen as a restraint on free speech because it was punishing people who were exercising their right to engage in it. Justice Southey did not accept this argument.

His Lordship went to great lengths to show that the question as to whether or not principals and vice-principals should be allowed to be

Catholic Teachers' Association and L'Association des enseignantes et des enseignants franco-ontariens.

⁵⁰ See note 44, *supra*.

⁵¹ In support, Southey J. cited the judgment of Sharpe J. in *Dunmore v. Ontario (A.G.)* (1998), 37 O.R. (3d) 287 (Gen. Div.). In that case it was held that the exclusion of agricultural workers from the benefits of association under the statutory labour relations regime did not violate the freedom of association of agricultural workers. In the context of this commentary's argument, it is worth noting that Sharpe J. pointed out that agricultural workers could still associate, and even form a union, if they so wished. The fact that this would not give them the rights and protection of the legislation and that they, therefore, could be easily victimized by employers did not concern him. They technically (uselessly) still had the freedom to associate and their likely victimization by private employers would not offend the *Charter* because it would not be the result of governmental conduct. The effective repressive use of private economic power is not to be recognized as the use of impermissible force in a liberal capitalist democratic economy. The significance of liberal law's distinction between the political and the economic could not be made more obvious. Similarly, Sharpe J. rejected an argument that agricultural workers, being denied legal rights granted to other workers, were being discriminated against contrary to section 15 of the *Charter*. His argument was that agricultural workers were not being picked on because of their individual traits (which were as varied as those found in the general population), nor was the occupational category of agricultural workers a category that attracts *Charter* protection as would a category based on gender or age. The idea that agricultural workers were part of a larger unified class, the workers-for-wages class, that should be accorded protection was not considered relevant because the basis of *Charter* protection is the assumption of a liberal pluralist polity. A class polity cannot be imagined. This, too, underscores the arguments put forward in this commentary: law plays a role in the maintenance of capitalist relations of production by hiding their class nature.

⁵² As has been accepted by the Supreme Court of Canada in *Dolphin Delivery* *supra* note 22.

members of teacher bargaining units had been the subject of inquiry and debate for many years. There always had been those who argued that as they had managerial functions, they should not be included in the same bargaining units. Hence, Southey J. held that, as the principals' and vice-principals' role in the strike had brought home the need to resolve the issue once and for all, the government's legislative measure had a plausible rationale other than the taking away of a *Charter* right. Justice Southey said: "The impugned legislation does not prohibit them [directly] from joining a teachers' strike ... The authorities which hold that there is no constitutionally protected right to strike are quite inconsistent with including the right to strike in activities protected by the *Charter's* guarantee of freedom of expression."⁵³ It was game, set and match: the mere *collectivist economic* tool of striking cannot be given the same standing as an *individual's political* right to speak, even if the former supports the latter.⁵⁴

D. *Limits of Law, Limits of Workers' Power*

Even in the sphere where workers have won the greatest protection from capital-labour regulating law—collective bargaining—the underlying architecture of law continues to favour individual property owners over the masses of non-property owners. It does so in two ways: by the continued privileging of private property and contract concepts and by splitting the political from the economic spheres whenever possible.

Property law starts off from the presumption that employers may do with their property (*i.e.*, their capital, their equipment, their workers) as they like. Only if the law or workers put restraints on them will it be

⁵³ *Ontario Teachers' Federation* *Id supra* note 49 at 67.

⁵⁴ This was buttressed by the Court's dismissal of another *Charter* argument. Section 7 of the *Charter* protects the life, liberty, and security of "everyone." The Court, in line with well-established authorities, held that section 7 does not protect mere economic interests and, therefore, legislation that made it impossible for principals and vice-principals to belong to a teacher bargaining unit did not contravene section 7. Presumably, the freedom to associate as they chose was merely economic because the goal of association in this case was economic collective bargaining only. The right to participate democratically in the setting of living standards and in the daily governance of workplace relations are at best incidental to economic activity and, apparently, have nothing to do with life, liberty, and security, even though, when the courts want to sound sympathetic in a context where their sentiments do not affect their decision, they will go on at length about the dignity and self-esteem derived from work: see *KMart, supra* note 36 at 1101-02. The artificiality of the legally endorsed distinction between the political and the economic spheres, on which capitalism thrives, could not be more plain.

otherwise. The law may do so where, say, the body count of dead and maimed workers gets so high that the legislature has had to step in to impose minimum standards of safety, or where a restriction on the number of hours a worker may be forced to work (as the result of a “freely” negotiated contract) has had to be imposed. Such legal rules are a reflection of working-class pressure from below and pressure from capitalists, who see the need to mediate to legitimate the system from which they profit, from above. The owners’ prerogative⁵⁵ may also be pared back if workers have enough bargaining power to limit it. But, whatever the extent of such limitations on the prerogative, there remain two largely untouched, but crucial ways in which the law supports the capitalist agenda. The law assumes, and thereby ensures, that the product of the worker’s labour belongs to the employer. In Marxian terms, the law assumes that the surplus value (the difference between the contractually-won wages and the value of the worker’s output) may be kept by the employer.⁵⁶ And, to make sure that the employer—who, through the contract of employment, purchases the worker’s capacity, *i.e.*, his or her labour power—can extract surplus value from the worker, the law imposes a duty on the worker to obey the employer’s reasonable orders.⁵⁷ In short, the starting position of the law encapsulates the coercive aspect of employment contracts. After all, only the employer—who has a choice as to whether or not to invest capital or to live on it—truly has a discretion as to whether or not to enter into an employment contract. The worker, in order to live, must enter into such a contract. If he or she is well placed, it may be possible to choose the employer to whom labour power is sold, but he or she must sell it. From

⁵⁵ Every collective agreement (and, of course, every individual contract of employment) contains an explicit or implied “prerogative of management” or “residual managerial rights” clause. The dictionary defines “prerogative,” *inter alia*, as: “a right or privilege exclusive to an individual or class ... [T]he right of the sovereign, theoretically subject to no restriction”: *The Concise Oxford Dictionary*, 8th ed.

⁵⁶ For a neat exposé of how this “natural” process is nothing of the kind, see R. Fischl, “Some Realism about Critical Legal Studies” (1987) 41 U. Miami L. Rev. 505 at 527.

⁵⁷ The fact that the word “reasonable” provides a contested terrain—especially in the unionized setting—does not affect the argument in the text, namely, that the law assumes and further embeds the superior-subordinate nexus of employment relations to the advantage of the employer. For the use of this revealing description of the nature of employment, see *Woods Task Force*, *supra* note 8 at para. 291; and O. Kahn-Freund, *Labour and the Law*, 2d ed. (London: Stevens & Sons, 1972) at 7: “There can be no employment relationship without a power to command and a duty to obey, that is without the element of subordination in which lawyers rightly see the hallmark of the ‘contract of employment.’”

the worker's perspective, the contract is never one freely entered into.⁵⁸

The law, then, has naturalized the coercive nature of the employment contract and has made employer-favouring (*i.e.*, property-favouring) rules seem normal, unexceptional. The law is effective in these ways because its legitimacy, as an institution, is rarely put in issue. Judges are given the trappings of independence. In populist renditions, they are portrayed as servants of norms and the appliers of rational evaluative criteria to these norms that came into existence without their help.⁵⁹ They are represented as trained experts, who owe no obligation except the integrity of the legal system and, therefore, will apply the shared consensus as they find it in law without fear of prejudice or hope of favour.

This gives clout to the legal system's efforts to maintain a separation between the political and the economic spheres. As noted, when the regulation of direct conflict between capital and labour comes before courts and labour tribunals, the limitations imposed on the use of collective economic power for political purposes are stringently enforced. The underlying legal logic is simple enough. Collective bargaining was initially designed for the private economic sphere only, and the permitted bargaining is to be engaged in on an employer-by-employer basis. It follows that workers cannot make political demands of the (private sector) employers. Such demands, especially if supported by strikes, will be inappropriate because the employer cannot satisfy them.

While this limitation on the use of collective worker power makes legal sense, it also makes capitalist sense. What it means is that workers cannot use their economic power to attain political goals. Their only economic right in the political setting is to "threaten" a government

⁵⁸ A founder of Australian conciliation and arbitration defended the scheme he helped establish to overcome the power of pristine private property and contract law, as follows:

The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse labour. Freedom of contract under such circumstances is surely misnamed; it should rather be called despotism in contract ... [t]he worker is in the same position as Esau, when he surrendered his birthright for a square meal, or as a traveller, when he had to give up his money to a highwayman for the privilege of life
Federated Engine-Drivers' & Firemen's Assn. of Australasia Broken Hill Proprietary Co(1911), 5 C.A.R. 1 at 2, Higgins J.

⁵⁹ Of course, few academics would say that judges never make law. But, the point of the text is that it is the imagery of the judiciary as an independent institution that has no desire or incentive to favour any one person, group, or class, that gives deeply coercive concepts, such as the judicially developed rights attached to private property and contract, their legitimacy. For an example of how this characterization of law's legitimacy works, note how, in the highly politicized unity battle, the federal government reached out to the Supreme Court of Canada in the hope that its "independent," "objective" opinion would give it political bargaining chips that would carry moral authority: see *Reference re Secession of Quebec*[1998] 2 S.C.R. 217.

that they will withdraw their labour as individuals: a weak threat. They cannot do so in combination. In contrast, an individual employer's threat to withdraw its "labour," *i.e.*, the capital it can make do "work," is a real threat. This gives property owners a most effective way to offset any advantage non-property owners may have in democratic electoral politics by dint of their numbers.

This brings us back to the Harris government's application for an injunction. It was losing or, at best, not winning, the political struggle. Given the way in which law favours the rich and disadvantages workers who try to use collective power, it is hardly surprising the government reached out to the court for help. We are now in a position to ask the question: why did the government's legal loss not translate into a political win for the teachers?

VI. JUDICIAL POLITICS FOR WORKERS, FOR PROPERTY OWNERS

When MacPherson J. handed down his decision denying the government the injunction it had sought, teachers hailed it as a moral victory.⁶⁰ A moral victory was all that it was. Within a week all the teachers were back on the job, their terms and conditions to be ruled by Bill 160. Worse: not only had they won no concessions from the government but, as seen, Bill 160 had been amended so as to effectively exclude principals and vice-principals from teacher bargaining units. This amounted to a loss of an important concession wrung from the government during the negotiations leading up to the strike.

How, in view of its judicial defeat, can the government's real-world triumph be explained? The answer lies in the fact that despite his evident sympathy for the teachers' cause, MacPherson J. could not bring himself to say that the teachers were entitled to use their collective withdrawal of labour to change the law.

The teachers had taken the position in court that they were not on strike in the usual sense of that word, one that denotes that the workers on strike are engaged in an effort to make an employer come to terms with them. They argued that their conduct was of a grander nature. While physically their conduct looked like a conventional economic strike, it actually should be seen as a protest aimed at the government of Ontario's education policies. These were said to be inimical to the public interest. The claim, then, was that teachers and

⁶⁰ See "Ruling a Moral Victory: Teachers" *The Toronto Star*(4 November 1997) A6.

their unions (rather than the attorney general) were defenders of the public interest.⁶¹ Their strike, the teachers had said, was a political struggle, not an economic one. That MacPherson J. was sympathetic to their presentation can be gauged from the way he wrote. He distinguished the teachers' conduct from that of other defendants who had been enjoined from continuing illegal action to attain their political goals:

The conduct of the teachers does not, in my view, come close to this definition of flout, or to the conduct of the defendants in *Bear Island Foundation* or *Grabarchuk*. The teachers' decision was not made with disdain. They had never engaged in a province-wide strike before last week. The record demonstrates that they made their decision in a careful, concerned and reluctant fashion. Moreover, there is not a hint of mocking or jeering in their conduct since the strike began. The strike has been remarkably peaceful, especially in light of the fact that approximately 126,000 teachers are involved. Finally, the teachers do not believe that they are openly disregarding the law.⁶²

But as we have seen, MacPherson J. did not base his decision in favour of the teachers on a finding that the teachers should be allowed to strike illegally. Rather, he ruled the Ontario government failed because its case had not been made out. The public's interest was not sufficiently endangered and the government could show no irreparable property or contract loss of its own. What underlay his eventual failure to endorse the teachers' characterization of the strike as validating their conduct was MacPherson J.'s instinctive understanding that, in a liberal capitalist democracy such as Canada, it is law's role to privilege the credo of individualism over the rights of collectives, even when a collective—as he thought in this case—behaves meritoriously.

Just as a single employee may withdraw his or her labour power from a particular employer (after giving the agreed upon contractual notice) or refuse to sell her labour power to any employer in the first place,⁶³ so an individual wealth owner is free to refuse to enter into

⁶¹ This argument had some judicial respectability. It had been supported by Sopinka and Cory JJ. in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, where they suggested that other groups, as well as the attorney general, could raise issues of public interest in court. In that case, of course, the private citizens claiming to be raising a public interest issue were tobacco peddlers who purported to be defending the free speech rights of all Canadians. This reinforces the argument of this commentary to the effect that judicial politics have an internal logic that is totally divorced from reality.

⁶² *Ontario Teachers' Federation* *supra* note 2 at 376, MacPherson J.

⁶³ This is conventional wisdom. It is understood as a given that there is to be no enforcement of contracts of service in a liberal polity because that would amount to slavery. The validity of this claim is contestable. Canada makes it hard for anyone able to sell his or her labour power to get employment insurance benefits or welfare payments if he or she does not. In order to qualify he or she must show willingness, if able, to sell to someone. Given that it is the lack of capacity to

contracts of employment for productive purposes or to withdraw such funds as already have been invested (provided the contractually agreed-upon notice provisions are satisfied). This is quintessential liberal law: individuals, regardless of wealth, are given equal rights and obligations. It is easy to show the way in which this enables liberal law to perpetuate inequalities.

During the life of a collective agreement the workers may not conduct a strike; they may not withdraw their labour in concert to resolve a dispute, nor may the employer lock out the employees, *i.e.*, withdraw its capital to resolve a dispute. But just as every worker may, as an individual, withdraw his or her labour, every individual employer may withdraw its capital, provided it does not do so in order to force the workers to accept different conditions of employment than those provided for in the existing collective agreement.⁶⁴ This “even-handedness,” typical of liberal law’s treatment of equality, helps turn the prerogative of management’s teeth⁶⁵ into fangs.

Further, in a private ordering economy in which governments rely on the private sector to generate overall economic welfare, the threat of non-investment by capitalists must be taken seriously by any government. Bluntly, the economic acts of individual employers have tangible political consequences. The threat of any individual worker not to work creates no apprehension in government circles. Law’s tight control over the use of workers’ collective economic power, therefore, makes it easier for the political sphere to be dominated by wealthy individuals whose sphere of economic political action is virtually

maintain oneself that, in the first place, turns a person into a worker-for-wages, the notion that we are giving people a true choice as to whether or not to sell their labour power to some employer is a threadbare one, even if it occasionally looks as if choices are being made. Currently, as the private economy is proving itself less and less able to provide jobs, people have been forced into becoming entrepreneurs, that is, self-employed. In 1993 there were nearly two million self-employed persons, comprising over 15 per cent of the total workforce. By 1996, that number had increased to over two million people: see *Small Business in Canada*, *supra* note 28. In R. Spence, “Entrepreneurial Nation” *Profit: The Magazine for Canadian Entrepreneur* (September 1995) 22 at 24, the author writes that “corporate downsizing and government belt-tightening have had the effect of pushing thousands of Canadians into entrepreneurship.” This hardly proves that non-wealth owners have a real choice as to whether to work or not. Many of these entrepreneurs are dependent on one or two persons with whom they contract. This makes them as vulnerable, often more vulnerable, than workers-for-wages in the standard job sphere. While this is not the place to expand on this, note that this is why we have dependent contractor provisions in collective labour relations statutes, and why we have an increasing number of cases in which small business owners seek to take advantage of the minimum conditions provided by the employment standards acts of the nation that set out to protect the most vulnerable of workers.

⁶⁴ See *U.E., Local 504 v. Westinghouse Canada Ltd*, [1980] O.L.R.B. Rep. 577; and *S.E.I.U., Local 204 v. Doral Construction Ltd*, [1980] O.L.R.B. Rep. 310.

⁶⁵ See notes 55-57, *supra*, and accompanying text.

unbounded.

The only way in which workers can come close to the exercise of political power that individual capitalists are able to wield is by combining their efforts.⁶⁶ But such is the ideological and concrete material impact of the law that actions by workers using their collective economic power to attain political goals will rarely be undertaken as such. Instead, workers tend to play on the fact that law is not just capitalist law; it is also meant to be liberal democratic law. As a consequence, when they act politically, workers and their allies seek to justify their collective economic efforts (which amount to illegal strikes) by declaring to the world that they are not using their collective power for economic purposes, but for civil libertarian ones.⁶⁷ From the perspective of this commentary, note that unions, workers, and their allies, when taking this stand, are buying into the private-economic versus public-political dichotomy that liberal law maintains to the advantage of wealth owners.

These efforts to justify collective workers' actions by clothing them in liberalism's vestments rarely succeed.⁶⁸ While a liberal polity must tolerate mass demonstrations, it does not have to do so when these demonstrations also amount to interferences with existing private

⁶⁶ The property-favouring nature of liberal law is even more pronounced than the account in the text asserts it to be. In employer-employee relations, the employer, more often than not, is a corporation. It is not an individual in human terms, *i.e.*, in pristine liberal terms. Nor is it functionally an individual. The corporation, by functional definition, is a collective of people and things, the very opposite of the atomistic individual who is posited to be, both by liberal political and market economic ideologies, the fulcrum of the system. To treat the withdrawal of its capital as the act of an individual, for legal purposes, is to bias the law even more in favour of property owners than the text claims it to be.

⁶⁷ This is the way in which the trade union movement sought to characterize its national one-day strike aimed at the Trudeau anti-inflation legislation. The workers did not call their walkout a general strike, which is what it was. They named it a "National Day of Protest." This did not fool anyone, and some employers went to labour relations boards and grievance arbitrators, contending that, as extant collective agreements were breached, the strike was illegal. They met with success: see *Domglas Ltd. v. U.C.G.W.* (1976), 76 C.L.L.C. ¶16,050 (O.L.R.B.); and *Robb Engineering v. U.S.W.A., Local 4122* (1978), 25 N.S.R. (2d) 298 (S.C.A.D.). In British Columbia, the Labour Relations Board, chaired by Paul Weiler, a person sensitive to the need to legitimate the regime, sidestepped the problem by ruling that the concerted withdrawal of labour for political purposes was not an economic strike and, therefore, not a strike regulated by the collective bargaining statute: see *British Columbia Hydro & Power Authority, I.B.E.W., Locals 213 & 258* [1976] 2 Can. L.R.B.R. 410 (B.C.). This "progressive" approach does not create a safe legal haven for workers striking for political reasons: the common law courts will fill any space left by the legislative scheme, and they are hostile to all collective workers' actions.

⁶⁸ In addition to the cases cited in note 67, *supra*, the recent Days of Action in Ontario, aimed at the same government that had attacked the teachers, produced similar results: see *General Motors of Canada Ltd. v. C.A.W.-Canada*, [1996] O.L.R.B. Rep. 409.

property and contract rights. This makes political strikes vulnerable. While this seems to limit the freedom that should be available in a liberal political society, this restriction can be justified in liberal terms. Where the rights interfered with are those of employers functioning in the private-economic sphere, the workers' demands for public-political change—which is what is civil libertarian about the mass demonstration—cannot be responded to adequately by private property owners. Hence, the enjoining of the workers can be justified on the basis that private profit-seeking employers cannot be made to bear the burden of political self-assertion by their workers. But this rationale should have no validity when the scene shifts to the public-economic sphere. There, the asserted dichotomy between the economic and the political—which, a Marxist would argue, is a misleading one—cannot be maintained so easily. The Ontario teachers' strike is illustrative of this dichotomy.

The teachers' demands were generated by their desire for job security and the maintenance of good conditions, as are all worker strikes against their employers. But, to succeed they needed a re-ordering of government political and spending priorities. The political and the economic were indivisible. This is why the teachers were pointing to the unacceptable nature of the government's existing priorities and to the undemocratic way in which the elected majoritarian government had behaved thus far. Not only were they seeking to defend their material interests but, in so doing, they were questioning the legitimacy of the acts of a legally elected government with plenary powers.

This is always at the centre of disputes between governments and their employees. Governments are aware that, in their special setting, employees with legalized collective bargaining power have been given the potential to exert an unusual amount of political influence, something akin to what large employers have in the private sector. It is not surprising, therefore, that a number of strategies have been adopted by governments to make sure that public sector workers do not get political power through the use of private sector collective bargaining-type rights. Public sector workers' collective bargaining and strike rights, therefore, are severely curtailed in Canada.

Public sector employees did not get anything akin to the collective bargaining rights that private sector employees had won at the close of World War II until the late 1960s and early 1970s. Some public sector workers still do not have any collective bargaining rights at all,⁶⁹

⁶⁹ Ontario's public servants only obtained this right in 1993: see *Crown Employees Collective Bargaining Act, 1993* S.O. 1993, c. 38.

and many of those public sector workers who have been granted bargaining rights of some kind have very limited ones. For instance, health care workers are allowed to unionize but do not have the legal right to strike⁷⁰ and federal public servants may bargain only about a limited number of work conditions.⁷¹ In addition, the natural confluence of the political and the economic arising out of public sector labour disputes explains why, when public sector workers do have full blown rights to strike and try to use them, governments routinely take them away.⁷² Given the ideology, propagated by liberal law, that holds that collective economic pressure by workers is legally and morally wrong and is only to be used for narrow, selfish purposes within limited time periods, it is usually easy for governments, notionally elected to represent everyone's interests, to get popular support for any such anti-strike measures. Their employees are easily characterized as selfish, as engaged in quests for narrow economic gains at the expense of the well-being of the wider community represented by the government.

The teachers who opposed Bill 160 were not only faced by the fact that their co-ordinated collective action would fall foul of the collective bargaining law that regulated them, but also that it would run counter to the accepted wisdom that endorses the limitation of collective action by public sector workers. It is easy to understand, then, why teachers and their unions sought to defend themselves in court on the basis that they were acting on behalf of the whole of the community and that their otherwise unacceptable lawlessness was justified. It is equally easy to see why MacPherson J. groped for a way not to endorse that position. His intuitive understanding that law's role is to draw a sharp line between the economic and the political spheres is reflective of the way in which law is meant to work. His view, like that of other judges, was informed by the unarticulated assumption that, in a mature liberal democracy, the political sphere in which the "one person—one vote" principle reigns, is to be restricted so as to not overwhelm the economic sphere where the reign of "one dollar—one vote" is crucial to the dominance of wealth owners. The strength of this rarely articulated premise is brought out nicely by the episode of judicial politics generated

⁷⁰ See, for example, *Hospital Labour Dispute Arbitration Act* R.S.O. 1990, c. H.14.

⁷¹ See *Public Service Staff Relations Act* R.S.C. 1985, c. P-35. For a historical sketch of the developments of public sector bargaining rights in Canada and in Quebec, as well as an evaluation, see Drache & Glasbeek, *supra* note 19.

⁷² Favoured governmental techniques include legislative freezes on conditions of employment, back-to-work legislation or the designation of workers as essential workers who will be required to work, regardless of their union's legalized use of the strike: see Panitch & Swartz, *supra* note 19.

by the Bill 160 dispute.

Before this challenge is analyzed, we might note that the teachers had organized and militated in an unprecedented way. The elementary, secondary, public and Catholic teachers, women teachers, and Franco-Ontarian teachers had formed an apparently united front. Whatever their past sectoral differences had been, for the moment they were politically committed to the repeal of Bill 160. They also saw that it would be very helpful to their struggle to help all Ontario workers in their fight to halt the Progressive Conservative attack on their rights. It is fair to say that the Days of Action protests mounted by the social movements and organized labour against the government would not have had the huge turnouts they did (*e.g.*, 15,000 in London, 100,000 in Hamilton, and between 200,000 and 400,000 in Toronto) had it not been for the teachers' enthusiastic participation. This cannot help but have had an impact on the teachers themselves. As a result of their opposition to Bill 160, many must have been more aware than before that some of their interests and concerns were more congruent with those people they had seen as "workers" rather than as "professionals." This meant, as well, that teachers organized in different sectors of the educational system may have grasped the commonality of their interests as never before. At the least their actions implied that they were forging alliances because they had a common enemy.

All this held true until the return to work and the subsequent constitutional challenge to Bill 160. At that point, to make their legal case, teachers drew back from their mass, co-ordinated resistance to what, up until then, they so loudly had claimed to have been the undemocratic nature of the government's conduct. They had argued that they were entitled to use extra-legal strategies to defend democratic principles. In essence, they had contended that the principles of the "one person—one vote" sphere were justifiably defended by their extraordinary conduct. Now, as they re-entered the judicial arena to attack the constitutional validity of Bill 160, they made very different arguments.

The nub of their constitutional challenge was that, while government always had provided much of the funding by appropriating money from its general revenues, Bill 160 removed the power of elected school boards to raise funds directly from property owners (the boards' electors). The teachers argued that section 93 of the *Constitution Act, 1867*⁷³ preserves the right of Catholic Ontarians to provide for separate

⁷³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

education for their children.⁷⁴ The inability of school boards to levy funds might undermine the autonomy necessary to the effective exercise of this right. In short, the argument was that a special right to pursue a specifically protected religious path is endangered by Bill 160. Property owners no longer have as much leverage over their local school region's educational policies. Hence, if there are special needs, or a particular area has greater expenses than others, the fear is that the power to correct these local problems by locally funded responses will no longer exist. This fear is fostered by the fact that Bill 160 empowers the minister of education to supervise or suspend the operation of a school board if it runs into certain defined difficulties. In effect, the argument is that Bill 160's formula undermines democratic practices.

Catholic teachers were successful at trial, but lost at the Ontario Court of Appeal.⁷⁵ An appeal to the Supreme Court of Canada has been lodged.⁷⁶ This commentary is not the place to debate the merits of these claims and the dispositions of the courts. It would be premature to do so, in any case, as the case is on appeal. More germane to this commentary, however, is the nature of the claims.

If successful on appeal, this challenge will yield one concrete result the teachers have been seeking: the abrogation of Bill 160. But success (if it comes) will have come at a cost, one imposed by the judicialization of politics. If Bill 160 is repealed, it is likely that this will be so because teachers have been able to characterize their claims as being those of non-workers. The essence of their claims is the need to protect religious freedom, namely the agency of some property owners. Inherent to this claim is the principle that private property owners have fundamental democratic rights based on their ownership. It is precisely because these constitutional challenges to Bill 160 are not based on the use of workers' collective power to attain democratic ends that teachers have some chance of legal success. In short, the law may permit workers to achieve political change if they can characterize themselves as the protectors of property owners' rights. While the end result may satisfy

⁷⁴ The drafters' understanding was that governments, likely to reflect the Protestant majority's point of view, might be insensitive to Catholics' desire to have their children's family-fostered convictions reinforced by the school curriculum.

⁷⁵ *Ontario English Catholic Teachers' Assn. v. Ontario (A.G.)* (1998), 162 D.L.R. (4th) 257 (Ont. Gen. Div.), Cumming J., rev'd (1999), 44 O.R. (3d) 7 (C.A.) [hereinafter *OECTA*]. Five members of the Court of Appeal sat on the appeal (rather than the usual three), reflecting the judiciary's awareness of the political significance of the case.

⁷⁶ [1999] S.C.C.A. No. 314, online: QL (SCCA). See also L. Brown "Supreme Court to Decide School Funding Issue" *The Toronto Star* (15 October 1999) A4.

the teachers,⁷⁷ there is no question that it will come at a political cost.

To make their claims in court, the teachers have had to abandon their common front. Catholic teachers are making a claim separate from—indeed, opposed to—that of public school teachers. At trial, Catholic teachers “won.” Justice Cumming upheld the claim that their employers, Catholic school boards, could not be deprived of their right to levy funds. That is, those teachers won the right not to have Bill 160 apply to them because they were able to establish to the satisfaction of the trial court that their interests were fundamentally different to those of the public school teachers with whom, a few moments before, they had made common political cause in the real world.⁷⁸ Moreover, Catholic school teachers abandoned their allies by taking a stand that made no real political sense. The Catholic school boards knew that it was not realistic for them to levy sufficient funds for their special needs from property owners in their various franchises. After all, non-Catholics in those areas (often a majority) might very well refuse to pay such levies, leaving the school boards well short of their targets. Precisely because, when proposing Bill 160, the government had agreed to a new, more generous, funding formula for Catholic school boards, their trustees had sided with the government in the defence of Bill 160 from constitutional challenge. In short, the Catholic teachers won by making an argument that made sense in terms of the internal logic of the law, but not in terms of the concrete circumstances in which the fight was being waged. Ironically, if they win, their school boards will not be in any position to give them what they might ask for in collective bargaining in a post-Bill 160 circumstance, unless the Bill 160 formula is retained.

On the other side, the public school teachers and their boards lost their argument at trial, and they appealed, arguing that if Catholics could control financial and religious goals, public teachers and boards

⁷⁷ In my view even this is highly unlikely. The total invalidation of Bill 160 would unravel the complex new taxation system the government has established, based on restructured governmental and municipal roles and functions. Whatever courts may think of the Harris government's policies, it would be radical for them, as a result of a decision in a case pulling at one strand of a complex web of legislative fiscal policies, to unravel a democratically elected government's plans. This feeds my anxiety about the constitutional challenge: I do not think that, in the end, it will be won, and a great deal of useful political capital will have been destroyed.

⁷⁸ On appeal, this finding was reversed, the court of appeal holding that section 93 of the *Constitution Act, 1867* *supra* note 73, could be respected without giving boards the right to levy funds. All that was needed was a safeguard of separate schooling, not a particular means of protection. In *OECTA* *supra* note 75 at 20, the Ontario Court of Appeal wrote that the taxing power is not essential, but that “the fundamental necessity in financing denominational education is having the financial and physical resources to operate the separate school system.” This will be the major bone of contention when the case reaches the Supreme Court of Canada.

should have the same right. That is, they argued that non-Catholic property owners should be extended the same right to be levied by elected school boards and, thereby, to give them some control over local education. As the Ontario Court of Appeal rejected the right of Catholic school boards to levy funds if denominational schools were otherwise protected, the public school teachers' and boards' argument became moot. But, in the meantime, their stand has led to more splintering. Vulnerable non-Catholic groups have been forced to oppose their erstwhile political allies. The Association des écoles publiques de l'Ontario—trustees of Ontario's French-language district school boards—was forced to side with the government on appeal because, like Catholic boards, the right to tax was a luxury they could not afford.

In short, to win in court, the teachers have had to renounce their hard-won common front. Emphasis had to be placed, by then, on their differences. It is true that similar fragmentations existed before the passage of Bill 160, but they were not exploited as calculatedly as the Harris-led government has done, and continues to do.⁷⁹ The constitutional challenge to Bill 160 has pitted the fragments of teachers' organizations against each other. Before Bill 160, the teachers had been discretely organized and had bargained separately. The fragmented structure had prevented them from combining to help each other. But they had not actively opposed each other as the logic of the school funding fight in court is causing them to do.

The teachers' unions might argue that they do not really mean to harm each other, that they are still comrades-in-arms, and that they are only pretending to have distinct interests in court to enable them to attain their common goal, namely to have Bill 160 declared invalid. This is a dangerous path to tread. Will it really be possible for union leaders to convince their members, after the judicial proceedings, no matter how they turn out, that they should pick up the threads of the common front forged during the province-wide strike? And how will the general public perceive the teachers? What political education lessons will it glean from the teachers' posturing in court? Will the teachers' formal and apparently earnest advocacy of the importance of differences strengthen or cloud a vision of the common interest of working class people?

⁷⁹ While the school funding issue remains before the courts, the teachers must negotiate with school boards charged with the implementation of Bill 160. Teachers, faced with cuts and increasingly harsh work conditions, have been striking and some have been locked out. From the perspective of this commentary, the most obvious fact is that teachers are fighting these battles one school board at a time, as would have been the case before Bill 160. Although the fragmentation, per se, is not the result of Bill 160, before it was passed teachers were never faced with such a fierce barrage of roll-backs.

Present events suggest there is cause for pessimism. The point here is not a romantic or sentimental one; it is not the case that the teachers' militance was the beginning of a political revolution. Rather, it is that the Ontario school teachers' struggle held promise for the advancement of the cause of real democracy, and that the change of political terrain—from the electoral sphere to the picket line to the court—changed the nature of the struggle that the teachers had begun.