

TWENTY YEARS OF LABOUR LAW AND THE *CHARTER*®

BY DIANNE POTHIER*

This article critically reviews the *Charter* jurisprudence of the Supreme Court of Canada relating to labour law. The rejection of the right to strike and to bargain collectively as part of freedom of association reflect substantial judicial deference to legislative policy choices. Recently, however, a constitutional right of unfair labour protection for particularly vulnerable workers shows some judicial willingness to intervene. While freedom of expression provides significant scope to union supporters, picketing and leafleting are still subject to wide restraint, the exact parameters of which remain unclear. The *Charter* has had only a modest effect on labour law. Even successful challenges have produced results well within the dominant legislative model in Canada.

Cet article offre une révision critique de la jurisprudence issue de la Cour suprême du Canada en matière du droit du travail et de la *Charte*. Le fait de ne pas reconnaître le droit de faire la grève et la garantie du droit de négocier collectivement comme faisant partie intégrale de la liberté d'association démontre la retenue donnée aux choix politiques législatifs. Récemment, un droit constitutionnel protégeant les ouvriers particulièrement vulnérables a démontré une volonté judiciaire d'intervenir en matière de pratiques déloyales. Les piquets de grève et la distribution de tracts demeurent restreints par des paramètres flous, malgré que la liberté d'expression prévoit une portée considérable pour les partisans des syndicats. La *Charte* n'a eu qu'un impact modeste sur le droit du travail. Même les contestations couronnées de succès ont produit des résultats qui s'insèrent au niveau du modèle législatif dominant canadien.

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* Professor, Faculty of Law, Dalhousie University, Halifax. The author wishes to thank her friend and colleague, Innis Christie, for his helpful comments.

I. INTRODUCTION

Robert Fulford, one of the early critics of the *Canadian Charter of Rights and Freedoms*,¹ used labour issues as a prime example of the ill-advisedness of an entrenched *Charter*, predicting that “the result may be chaos,”² and that “the *Charter* is now threatening the future of the labour movement.”³ In contrast, one of the early *Charter* proponents, New Democratic Party (NDP) Member of Parliament Svend Robinson, cited a legacy of blatantly anti-union legislation as part of the historical justification for why an entrenched *Charter* was necessary to protect rights.⁴ After twenty years of litigation of labour issues under the *Charter*, neither Fulford’s fears nor Robinson’s hopes have been realized. After nineteen years, it would have been apt to say that the *Charter* had only a marginal effect on labour law in Canada. Three major Supreme Court of Canada decisions⁵ in the past year have created the potential for a more significant impact, but it is still too early to know the full implications of these recent decisions.

This article will review the scope of *Charter* guarantees, particularly of freedom of association and expression, in the labour context. The first part of this article will analyze the relevance of the *Charter*, especially section 2(d), freedom of association, to union organization rights. The following parts will consider the significance of section 2(b), freedom of expression, for unions and employers, and the impact of the *Charter* on union security provisions.

II. THE *CHARTER* AND UNION ORGANIZATION

During the process leading up to the adoption of the *Charter*, labour issues were not pre-eminent in the debate. In the proceedings of the Special Joint Senate-House of Commons Committee (Hays-Joyal Committee) considering the draft constitutional resolution, Progressive Conservative Member of Parliament Jim Hawkes observed the following: “[w]e have sat over 90 presentations. Conspicuous in those presentations has been the lack of

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

² Robert Fulford, “Charter of Wrongs” 101:12 (December 1986) *Saturday Night* 7 at 8.

³ *Ibid.*

⁴ Svend Robinson, “The NDP, the Charter and the Constitution” *Canadian Forum* (June-July 1981) 14 at 14.

⁵ *R. v. Advance Cutting & Coring Ltd. et al.*, 2001 SCC 70 [*Advance Cutting*]; *Dunmore v. Ontario (A.G.)*, 2001 SCC 94 [*Dunmore*]; and *Pepsi-Cola Canada Beverages (West) Ltd. v. Retail, Wholesale and Department Store Union, Local 558*, 2002 SCC 8 [*Pepsi*].

representation from what I would call the world of work.”⁶

The list of witnesses appearing before the Special Joint Committee did not include any union representatives.⁷ However, there was one proposed amendment to the resolution that was of special interest to unions. Robinson proposed that section 2(d) of the *Charter* be amended from simply “freedom of association” to “freedom of association including the freedom to organize and bargain collectively.”⁸ The proposed amendment was defeated in the Special Joint Committee by a vote of twenty to two,⁹ with only the NDP Members of Parliament (Svend Robinson and Lorne Nystrom) voting in favour. The official Liberal government explanation for opposing the amendment was provided by Acting Minister of Justice, Robert Kaplan:

Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that it is already covered in the freedom of association already in ... the *Charter* and that by singling out association for bargaining one might tend to diminish all other forms of association which are contemplated—church associations, associations of fraternal organizations or community organizations.¹⁰

However, things have not worked out that way—collective bargaining has not been held to be included in freedom of association.

There have been seven Supreme Court of Canada decisions dealing with the impact of the *Charter* on the rights of labour organization. In 1987 a trilogy of cases dealt with the question of whether section 2(d) included the rights to strike and/or bargain collectively; union arguments to this effect were ultimately unsuccessful. The lead case was *Reference Re Public Service Employee Relations Act (Alberta)*;¹¹ the companion cases were *Public Service Alliance of Canada v. Canada*,¹² and *Retail, Wholesale and Department Store Union v. Saskatchewan*.¹³ Three years later, the results of the trilogy were reinforced in *Professional Institute of the Public Service of Canada v.*

⁶ Canada, *Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, No. 33 (9 January 1981) at 90.

⁷ *Ibid.* No. 57 (9 January 1981) at 54-89. Written submissions were received from the Canadian Labour Congress, the British Columbia Federation of Labour, the British Columbia Provincial Council of Carpenters, and the Christian Labour Association of Canada.

⁸ *Ibid.* No. 43 (22 January 1981) at 69.

⁹ *Ibid.* at 79.

¹⁰ *Ibid.* at 69-70.

¹¹ [1987] 1 S.C.R. 313 [*Alberta Reference*].

¹² [1987] 1 S.C.R. 424 [*PSAC*].

¹³ [1987] 1 S.C.R. 460 [*Saskatchewan Dairy Workers*].

Northwest Territories (Commissioner),¹⁴ so much so that a 1994 challenge of back-to-work legislation based on section 7 was deemed to warrant only a two-paragraph oral judgment applying the section 2(d) reasoning to section 7.¹⁵ In the two most recent cases, *Delisle v. Canada (Deputy Attorney General)*,¹⁶ and *Dunmore*,¹⁷ the premise that section 2(d) does not include the right to collective bargaining was taken as a given. Instead, the focus was on the application of section 2(d) to unfair labour practice protection.

What is especially noteworthy about these cases is that all seven involved claims where the union was simply trying to plug into the general framework of collective bargaining legislation in Canada. The cases all dealt with situations where, for various reasons, the union could not invoke the generally applicable labour law regime; only in *Dunmore* did the union have even limited success challenging the exclusion of agricultural workers. What requires emphasis is that none of the seven cases sought to challenge the basic framework of Canadian collective bargaining law; rather they sought to join it. The significance of this point is that the general statutory rights to strike and bargain collectively that were targeted for constitutional recognition are very circumscribed rights. Yet even these circumscribed rights remain dependent on statutory recognition, without constitutional underpinning.

The constitutional litigation about union organization rights is a powerful affirmation of the comments made by Professors Judy Fudge and Harry Glasbeek:

The practical politics of these worker efforts is not to question the values and assumptions of the PC 1003 model, but rather to change its coverage and reach. This confers a status on this collective bargaining model which it ought not to have; it treats the regime as the optimal product of the evolution of capital-labour regulation, rather than just a valuable compromise which labour squeezed out of capital at a propitious time. PC 1003 was a compromise. It did not abandon the fundamental tenets of the pre-existing capital-labour entente which had served to keep labour at a disadvantage.¹⁸

In broad terms, the 1944 compromise embodied in Order-in-Council *PC 1003*,¹⁹ borrowing from the 1935 American *Wagner Act*,²⁰ and implemented

¹⁴ [1990] 2 S.C.R. 367 [*PIPS*].

¹⁵ *International Longshoremen's and Warehousemen's Union - Canada Area Local 500 v. Canada*, [1994] 1 S.C.R. 150.

¹⁶ [1999] 2 S.C.R. 989 [*Delisle*].

¹⁷ *Dunmore*, *supra* note 5.

¹⁸ Judy Fudge & Harry Glasbeek, "The Legacy of PC 1003" (1995) 3 C.L.E.L.J. 357 at 399.

¹⁹ *Wartime Labour Relations Regulations*, P.C. 1944-1003, [*PC 1003*].

²⁰ *National Labor Relations Act* 29 U.S.C. §372 (1935).

both federally and provincially after World War II as the general framework of Canadian labour relations law, is as follows: the concessions to unions are that union members are granted unfair labour practice protection (protection against retaliation for engaging in union activities), and a union that can demonstrate majority support in a bargaining unit is entitled to be certified as the exclusive bargaining agent of all employees in that unit. Exclusive bargaining agent status compels the employer to bargain with the union, with the strike weapon as the union's ultimate bargaining chip. The *quid pro quo* limitations of the *PC 1003* model, however, are that the strike weapon is precluded for union recognition and during the currency of a collective agreement. The certification process displaces recognition strikes, and for the most part certification is for a unit (and often multiple units) of a single employer, resulting in a very splintered bargaining unit configuration. Grievance arbitration displaces strikes during the collective agreement, despite the fact that matters not covered in the collective agreement are not amenable to grievance arbitration.²¹ These conditions significantly constrain the collective economic clout that can lawfully be exercised by workers.

Charter litigation by unions has not come remotely close to a radical critique of this predominant model. Instead, *Charter* litigation has been mostly unsuccessful in its attempt to extend the dominant model. The changes, both gains and losses, in the organization rights of labour over the last twenty years have been legislative rather than constitutional, and have been within the framework of the *PC 1003* model.²²

A. Strikes

The tenor of the Supreme Court of Canada's approach to freedom of association was set in the 1987 trilogy.²³ *Alberta Reference* concerned the validity of Alberta statutes that precluded strikes by firefighters, police, hospital workers, and provincial civil servants. Compulsory arbitration was substituted for strikes, but under significant constraints. *PSAC* involved federal legislation that extended the life of public sector collective agreements by two years, thereby postponing the right to strike, and imposing wage increases limited to 6 per cent and 5 per cent, respectively, in each of the two years.²⁴ *Saskatchewan Dairy Workers* involved *ad hoc* back-to-work legislation, and compulsory

²¹ See Brian A. Langille, "Equal Partnership in Canadian Labour Law" (1983) 21 Osgoode Hall L.J. 496 and Paul C. Weiler, "The Role of the Labour Arbitrator: Alternative Versions" (1969) 19 U.T.L.J. 16.

²² Fudge & Glasbeek, *supra* note 18.

²³ See *supra* notes 11 to 13.

²⁴ Given inflation rates at the time, those wage increases were considered harsh.

arbitration in response to a general lockout and partial strikes in the dairy industry.

The majority in *Alberta Reference* used both conceptual and institutional arguments in concluding that freedom of association does not include the right to strike. The institutional argument was that the courts are ill-suited to the determination of the substantive content of labour law—the complex balancing properly characterized as a legislative determination.²⁵ I have always been ambivalent about the results of the 1987 trilogy. While, as I am about to explain, I find the majority’s conceptual analysis fundamentally flawed, that conceptual weakness itself reinforces the institutional arguments.²⁶ I contend that the Court’s conceptual arguments display a fundamental misunderstanding of basic labour law principles, such that entrusting the judges to develop labour law principles in accordance with the *Charter* would be a very dangerous exercise.

As a reason for concluding that the right to strike and the right to bargain collectively are not fundamental rights included in section 2(d), Justice Le Dain, speaking for half of the Court in *Alberta Reference*, relied on the fact that the rights claimed were the modern creation of statute.²⁷ Why a recent creation of statute cannot be a fundamental right is not really explained by the majority.²⁸ By this theory, the equality rights guaranteed by section 15 of the *Charter* are inapt, since it took the introduction of human rights legislation for Canadian law to accept that non-discrimination rights could trump freedom of contract.²⁹ The fact that World War II was being fought against the racism of Nazi Germany did not preclude the Supreme Court of Canada, at the start of that war, from refusing to make a claim against discrimination cognizable in Canadian law.³⁰

One element that all members of the Court recognized as part of freedom of association is what Chief Justice Dickson labelled as the constitutive

²⁵ *Supra* note 11 at 391-92, Le Dain J. (Beetz and La Forest JJ., concurring), and at 414-20, McIntyre J.

²⁶ It should be noted that Chief Justice Laskin, the most noted labour law expert to sit on the Supreme Court of Canada, died before any *Charter* labour cases were heard by the Supreme Court of Canada. From the late Chief Justice’s death in 1984 until the appointment of Justice LeBel in 2000, none of the Supreme Court of Canada judges had a labour specialty prior to judicial office.

²⁷ *Supra* note 11 at 391. See also the comments made by Justice McIntyre, *supra* note 11 at 413.

²⁸ This argument was specifically rejected by Chief Justice Dickson, dissenting (Wilson J., concurring), *ibid.* at 360.

²⁹ Walter S. Tarnopolsky, “The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada” (1968) 46 Can. Bar Rev. 565.

³⁰ *Christie v. York*, [1940] S.C.R. 139.

approach,³¹ namely, the right to establish, belong to, maintain, and participate in an association's lawful activities.³² If freedom of association did not include at least that, it would have absolutely no content at all. Nonetheless, the majority in *Alberta Reference* somehow missed the point that one element of the challenged Alberta legislation did run afoul of this principle in expressly forbidding police officers from belonging to unions.³³ However, more recently, in *Delisle*, all members of the Court recognized that precluding police officers (in this case, the RCMP) from belonging to a union is a breach of section 2(d). Still, the majority concluded that the exclusion of the RCMP from the *Public Service Staff Relations Act*³⁴ did not have that purpose or effect.³⁵

In *Alberta Reference*, the Court was also in agreement with what Chief Justice Dickson labelled the derivative approach: that freedom of association covers the right to the collective exercise of rights constitutionally protected for individuals.³⁶ For Justice Le Dain, speaking also for Justices La Forest and Beetz, the constitutive and derivative approaches were as far as they were prepared to go in defining the scope of freedom of association, a conclusion to which Chief Justice Dickson, with Justice Wilson concurring, gave short shrift:

What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities involving independent constitutional rights, but rather, that the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms.³⁷

In accepting a third proposition as a proper application of freedom of association, Justice McIntyre agreed with that aspect of the Chief Justice's decision, specifically, the collective exercise of activities lawful for the individual.³⁸ Yet the half of the Court that agreed that this was a proper basis for analyzing freedom of association also agreed it could not support a

³¹ *Alberta Reference*, *supra* note 11 at 335.

³² Support for the proposition that freedom of association encompasses at least the constitutive definition was expressed by Chief Justice Dickson, *ibid.* at 363, Justice Le Dain, *ibid.* at 391, and Justice McIntyre, *ibid.* at 407. For Justice McIntyre, this constitutive definition is the first of his six propositions as possible approaches to freedom of association.

³³ *Police Officers Collective Bargaining Act*, S.A. 1983, c. P-12.05, s. 2(1). Section 2(1)(a) gave the right to belong to and participate only in a police association. Only Chief Justice Dickson's dissent identified this as a section 2(d) breach *ibid.* at 362.

³⁴ R.S.C., 1985, c. P-35.

³⁵ *Delisle*, *supra* note 16.

³⁶ *Supra* note 11 at 391, Le Dain J.; *ibid.* at 407, McIntyre J.; and *ibid.* at 364, Dickson C.J.C.

³⁷ *Ibid.* at 364.

³⁸ *Ibid.* at 408.

constitutionally protected right to strike:

When this definition of freedom of association is applied, it is clear that it does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual. ... Modern labour relations legislation has so radically altered the legal relationship between employees and employers in unionized industries that no analogy may be drawn between the lawful actions of individual employees in ceasing to work and the lawful actions of union members in engaging in a strike. ... It is apparent, in my view, that interpreting freedom of association to mean that every individual is free to do with others that which he is lawfully entitled to do alone would not entail guaranteeing the right to strike. I am supported in this conclusion by the Chief Justice, who states at p. 367 in his judgment, "There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than *quantitatively* different."³⁹

In a critique of this decision, David Beatty and Steven Kennett challenged the conclusion that a strike is qualitatively different,⁴⁰ but implicitly accepted the judges' contention that if it were qualitatively different, that would bring it outside Justice McIntyre's third proposition.

I do not agree that the qualitative/quantitative distinction is a sensible one in this context. In my assessment, to accept it undermines the real point of Justice McIntyre's third proposition in drawing a parallel between individual and collective activities. In large measure, it is precisely because collective action is qualitatively different from individual activity that people choose to engage in collective action; it is often the collective exercise which turns ineffective action into effective action. Take as an example a collective exercise of freedom of expression, which all agree is protected by freedom of association. The comparison between a single person and ten thousand people demonstrating on Parliament Hill is not just a quantitative difference. The power of numbers, which explains why people engage in collective action, also makes the whole more than the sum of its parts. Few people would be interested in being the lone demonstrator, but group demonstrations have a dynamic of interaction that prompts people committed to a cause to join in. It is this qualitative difference that is the essence of associational activity. Therefore, to say that activities lawful for the individual are constitutionally protected for the group only in cases of quantitative, but not qualitative difference, undercuts the point of drawing an analogy between individual and group activity. If associational activity is to be genuinely valued through constitutional protection, the quest should be for broad analogies rather than rigid comparisons between individual and collective activity.

³⁹ *Ibid.* at 409-12, McIntyre J. [emphasis in original].

⁴⁰ David Beatty & Steven Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 *Can. Bar Rev.* 573 at 589.

It is from this perspective that I approach the question of whether or not the right to strike can be seen as constitutionally protected as the collective exercise of something lawful for individuals. Justice McIntyre rejected the argument that there was a right to strike based on an individual right to refuse to work on two bases: “First, it is not correct to say that it is lawful for an individual employee to cease work during the currency of his contract of employment.”⁴¹ Since the right to strike generally applicable in Canadian law is all that was being claimed, and this right to strike arises only prior to the first or after the expiration of any subsequent collective agreement, it is hard to identify where the analogy between the individual and the collective breaks down. Justice McIntyre continued:

The second reason is simply that there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation. The individual has, by reason of the cessation of work, either breached or terminated his contract of employment. It is true that the law will not compel the specific performance of the contract by ordering him back to work as this would reduce “the employee to a state tantamount to slavery” (I. Christie, *Employment Law in Canada* (1980), p. 268). But, this is markedly different from a lawful strike. *An employee who ceases work does not contemplate a return to work, while employees on strike always contemplate a return to work.* In recognition of this fact, the law does not regard a strike as either a breach of contract or a termination of employment. Every province and the federal Parliament has enacted legislation which preserves the employer-employee relationship during a strike....⁴²

It is Justice McIntyre’s sharp distinction between an individual quit and a collective strike that I consider insensitive to the real dynamics of the world of work. While it is generally true that individuals who quit their jobs do not contemplate a return to work, that does not make it impossible to use quitting as a bargaining tactic to attain better terms and conditions that would prompt a return to work. The fact that this rarely happens is not because it is conceptually incoherent, but because most individuals realize that they do not have enough bargaining clout to make this an effective tactic. If we individually quit our jobs in an effort to gain better terms, the odds are very high that the employer will simply accept the resignation. So, as an individual action, quitting is a very risky move if one does not really want to leave. What makes a strike more common, and qualitatively different, is that a collective withdrawal of services puts a lot more economic pressure on the employer, making it a lot more difficult to resist the contract demands. Furthermore, while it is generally true that strikers contemplate a return to work, it is not inevitably true that it will happen. Although the mere act of striking does not terminate job status under current labour statutes—something not necessarily part of a constitutional right

⁴¹ *Alberta Reference*, *supra* note 11 at 410.

⁴² *Ibid.* [emphasis added].

to strike—a strike may be lost to such an extent that jobs disappear, either because the employer goes out of business or downsizes. Less drastically, a striker disillusioned by a strike’s ineffectiveness may take a permanent job elsewhere. These are exceptional circumstances, just as an individual who quits in furtherance of contract demands is exceptional. Strikers normally contemplate a return to work precisely because they think their collective bargaining power will preserve their jobs. Thus, the real difference between an individual quit and a collective strike as a bargaining tactic is that someone engaged in the latter has a much greater chance of succeeding, and a much lesser chance of ending up jobless. Is this difference not precisely the point of protecting freedom of association, namely to enable people to be more effective by acting together?

The ultimate connection between individual quits and a collective strike has been illustrated in contexts where a collective mass resignation has been used as a bargaining tactic in cases where strikes were prohibited by law. For example, in 1973, Nova Scotia nurses working in government-run hospitals, without a statutory right to strike, submitted resignations *en masse*, a tactic that ultimately produced concessions in a contract owing to the reality that the large numbers of nurses could not, as a practical matter, be replaced. Although resignation was a risky move for individual nurses, the illegal strike tactic was fruitful because of the effective collective bargaining power it gave the nurses.⁴³ In 2001, by which time most nurses in Nova Scotia had acquired a statutory right to strike (that the provincial government then took steps to remove), a mass resignation was again contemplated as a tactic, but was averted by an agreement with the government on final offer selection arbitration.⁴⁴ The withdrawal of services can be a bargaining tactic in whatever form it takes, but it is only likely to be an effective tactic when undertaken as a collective action. Therefore, the prohibition of a collective withdrawal of services through a strike should be considered an interference with freedom of association, as an application of the principle that freedom of association protects the collective exercise of activities lawful for an individual.

Although in *Alberta Reference*, Chief Justice Dickson did not accept a constitutional right to strike based on this principle, he ultimately did endorse a constitutional right to strike as something that had no individual counterpart. In his dissent, he sought to take freedom of association beyond Justice McIntyre’s first three propositions: “If freedom of association only protects the

⁴³ Sarah McGinnis, “Nurses may turn to past strike tactics: Resignation of 700 nurses in 1973 crippled hospitals” *The [Halifax] Chronicle-Herald* (27 June 2001) A3.

⁴⁴ Amy Smith & Susan LeBlanc, “Back from the brink: Health workers, province agree to arbitration to avoid strikes” *The [Halifax] Chronicle-Herald* (6 July 2001) A1.

joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.”⁴⁵

The Chief Justice spoke eloquently of the significance of collective bargaining, and ultimate resort to strikes if necessary, in giving working people some element of control over working conditions given the relative economic vulnerability of most workers compared to that of their employers. He concluded that collective bargaining and striking were essential to the attainment of the objects of unions, and therefore, merited constitutional protection under section 2(d).⁴⁶ Yet, he never clearly articulated what it was about the objects of unions that would determine what kinds of objects of other associations would merit constitutional protection.⁴⁷ It was this uncertainty that led the majority of the Court in the *Alberta Reference* to reject the notion that the objects of an association were protected under freedom of association, and to conclude that the right to strike was, therefore, not protected.⁴⁸ Constitutional protection of the objects of an association was considered unwarranted since there is no generalized protection for the objects of individuals.⁴⁹

In *PIPS*, in an often quoted passage, Justice Sopinka encapsulated the approach of the majority in *Alberta Reference*:

Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the section 2(d) guarantee of freedom of association emerge from the case: first, that section 2(d) protects the freedom to establish, belong to and maintain an association; second, that section 2(d) does not protect an activity solely on the

⁴⁵ *Supra* note 11 at 362-63.

⁴⁶ *Ibid.* at 371. Nonetheless, what the Chief Justice gave with one hand, in assessing a *prima facie* breach of section 2(d), he largely took back with the other by adopting a very deferential approach under section 1; *PSAC*, *supra* note 12 at 442. He also said that inflation as a section 1 objective did not have to rise to what was necessary to invoke the emergency doctrine of peace, order and, good government. (*PSAC*, *ibid.* at 440). Since the standard for POGG emergency from *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 is itself extremely deferential, that underscores the extent to which the Chief Justice ultimately shared his colleagues' concern that the courts were ill-equipped to determine labour policy.

In all three cases in the trilogy, Chief Justice Dickson concluded that the right to strike could be substituted with compulsory arbitration in a broad range of circumstances. Although Justice Wilson concurred with Chief Justice Dickson in *Alberta Reference*, she adopted a less deferential stance on section 1 in *PSAC* and in *Saskatchewan Dairy Workers*, *supra* note 13.

⁴⁷ In *PIPS*, *supra* note 14 at 392-93, Justice L'Heureux-Dubé made the following comment:

Section 2(d) was never meant, in my opinion, to protect this broad range of activity. Though the pursuit of them may be lawful, the objects of some associations may be either sexist or racist or in some other fashion contemptible. To my mind it is difficult to suggest that the freedom envisaged by section 2(d) was ever meant to embrace these objects. The practical implications of such an approach militate strongly against its adoption.

⁴⁸ *Alberta Reference*, *supra* note 11 at 390-91, Le Dain J.

⁴⁹ *Ibid.* at 404, McIntyre J.

ground that the activity is a foundational or essential purpose of an association; third, that section 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that section 2(d) protects the exercise in association of the lawful rights of individuals.⁵⁰

It is possible, however, to find a constitutionally protected right to strike without a generalized right for associations to pursue their fundamental objects. In his dissent, Chief Justice Dickson articulated that notion in *Alberta Reference*:

All three enactments prohibit strikes and, as earlier stated, define a strike as a cessation of work or refusal to work by two or more persons acting in combination or in concert or in accordance with a common understanding. What is precluded is a collective refusal to work at the conclusion of a collective agreement. There can be no doubt that the legislation is aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike, and its *raison d'être*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual.⁵¹

This theme was picked up fourteen years later by the majority in *Dunmore*. Speaking for all but Justice Major, dissenting, and Justice L'Heureux-Dubé, concurring, Justice Bastarache (after reviewing Justice Sopinka's summary in *PIPS*) said the following:

As these dicta illustrate, the purpose of section 2(d) commands a single inquiry: has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by section 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J., in *PIPS*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which 1) are not protected under any other constitutional freedom, and 2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J., in the *Alberta Reference*, *supra*, such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(d). ... [T]he collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot.⁵²

While Justice Bastarache, speaking for the majority in *Dunmore*, was

⁵⁰ *PIPS*, *supra* note 14 at 401-02. Justice La Forest recorded the following qualification at 390-91: "I find it unnecessary, however, to say anything about whether the right of association must include the freedom of persons to join together in pursuit of objects they could lawfully pursue as individuals."

⁵¹ *Alberta Reference*, *supra* note 11 at 371.

⁵² *Dunmore*, *supra* note 5 at para. 16 [emphasis in original]. Justice Bastarache's pre-judicial experience with minority language education issues (see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851) perhaps explains his greater appreciation of collective rights compared to the majority in *Alberta Reference*.

thereby adopting the analysis of Chief Justice Dickson's dissent in *Alberta Reference*, he nonetheless endorsed the conclusions reached by the majority in *Alberta Reference* and *PIPS*, namely that freedom of association does not include the right to strike or the right to bargain collectively. The conclusion that the rights to strike and to collective bargaining are not included in freedom of association was based on prior Court rulings,⁵³ but there was no principled defence of this position in *Dunmore*.

B. *Collective Bargaining*

On what basis had previous Court rulings held against collective bargaining as part of freedom of association? In his dissent in *Alberta Reference*, Chief Justice Dickson considered the rights to strike and to bargain collectively together; it would be rather illogical to conclude that a right to strike is protected while a right to bargain collectively is not. But, the reverse is not necessarily true; it would be quite possible to reject a right to strike, as covered in freedom of association, while endorsing collective bargaining as covered. Although in *Alberta Reference* Justice Le Dain purported to agree with Justice McIntyre in concluding that neither the right to strike nor the right to bargain collectively are covered under freedom of association,⁵⁴ in *PSAC* Justice McIntyre said otherwise: "My finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may receive *Charter* protection under the guarantee of freedom of association."⁵⁵

In a book heavily relied on by Justice McIntyre in *Alberta Reference*, issues surrounding the right to strike and the right to collective bargaining were considered distinct enough to warrant separate essays.⁵⁶ Justice McIntyre also relied on the fact that strike issues were considered separate from collective bargaining issues in the proceedings of the Special Joint Senate-House of Commons Committee considering the draft *Charter*.⁵⁷ In *Dunmore*, Justice Bastarache relied on those proceedings in support of the proposition that the right of labour organization is included in freedom of association⁵⁸ without

⁵³ *Ibid.*

⁵⁴ *Alberta Reference*, *supra* note 11 at 390.

⁵⁵ *PSAC*, *supra* note 12 at 453.

⁵⁶ Joseph M. Weiler, "The Regulation of Strikes and Picketing Under the Charter"; Paul Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively" both in Joseph M. Weiler & Robin M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986).

⁵⁷ *Alberta Reference*, *supra* note 11 at 412-13.

⁵⁸ *Dunmore*, *supra* note 5.

mentioning that in the same sentence quoted from the acting Minister of Justice, Robert Kaplan, had also expressed the view that collective bargaining is also included in freedom of association.⁵⁹ Although it is clear from the *BC Motor Vehicle Reference*⁶⁰ that views expressed in the Joint Committee are not binding on the courts, they are clearly admissible evidence. One might have expected the Supreme Court of Canada to have at least referred to the Committee's view that collective bargaining is covered in freedom of association, if only to explain why they were wrong. However, this has not occurred.

Only Justice Sopinka's decision in *PIPS* contained a clear articulation of an argument specifically directed at why collective bargaining is not covered in freedom of association:

The above propositions concerning s. 2(d) of the *Charter* lead to the conclusion, in my opinion, that collective bargaining is not an *activity* that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented.⁶¹

It is the last point of the above noted passage that is the most questionable. In rejecting the application of Justice McIntyre's third proposition to collective bargaining, it was rather strange for Justice Sopinka to rely on the displacement of individual negotiation by collective bargaining where collective bargaining has been recognized by statute. Since individual bargaining is a lawful right where collective bargaining is *not* recognized, it should follow that non-recognition of the right of collective bargaining in particular circumstances is indeed a rejection of the right to do collectively what is lawful to be done individually. Justice Sopinka's analysis has the perverse effect of declaring that because collective bargaining is sometimes recognized by statute, it cannot have constitutional recognition in the contexts in which it is withheld. Even though the analogy between individual and collective bargaining is quite clear, collective rights are thwarted.

The issue in *PIPS* was the attempt by *PIPS* to retain its bargaining status after the employees that it represented moved from being nurses employed by the federal government to being nurses employed by the government of the Northwest Territories, while continuing to perform the same jobs. The official

⁵⁹ See text accompanying note 10.

⁶⁰ *Reference Re Section 94(2) of the Motor Vehicles Act*, [1985] 2 S.C.R. 486 [*BC Motor Vehicle Reference*].

⁶¹ *PIPS*, *supra* note 14 at 404 [emphasis in original].

barrier preventing *PIPS* from continuing on as the bargaining agent for the nurses was territorial legislation that required incorporation under statute to be a bargaining agent. *PIPS* was not so incorporated; only the Northwest Territories Public Service Association (NWTPSA) was. The majority in *PIPS* thought the *Alberta Reference* to be dispositive of the case. According to Justice Sopinka:

Ultimately, the appellant's arguments on the failure of this legislation to provide for certification as of right founder on the fact that since the activity of bargaining is not itself constitutionally protected, neither is a legislative choice of the bargainer. ... Given that a government has no common law obligation to bargain at all and can suspend a statutory obligation to bargain altogether, as the federal government did in *PSAC*, it would be inconsistent now to hold that associational rights are created when a government grants employees the right to bargain but reserves to itself the power to choose the form of the employees' representative; that is to say, if a government does not have to bargain with anyone, there can be no constitutional impediment to its choosing to bargain with someone.⁶²

It might have been thought that, even if there is no constitutional right to collective bargaining, if government chooses to bargain with its employees, the organization must have some claim to be representative of those employees. This was an argument Justice Cory made in dissent in *PIPS*.⁶³ The difficulty with this argument in *PIPS* was a factual one. On the face of the legislation, it looked like the government was arbitrarily designating a bargaining agent. But in reality, *PIPS* would have had a very hard time challenging the actual representativeness of the NWTPSA. *PIPS* was not claiming that it, rather than the NWTPSA, had the support of the majority of all the Northwest Territories government employees. Rather *PIPS* was trying to carve out a separate bargaining unit for the nurses that it had previously represented. It is particularly difficult to construct an argument that the *Charter* guarantees particular bargaining unit structures, which presumably explains why *PIPS* directed its argument to the absence of a certification process in the Northwest Territories legislation. However, in doing so, the real issue was obscured. Accordingly, *PIPS* was not a very good case for determining the issue of whether there is a right to collective bargaining encompassed within freedom of association. Still, *PIPS* is a fundamental foundation for the premise in *Dunmore* that collective bargaining has no constitutional protection.

C. *New Directions?*

The issue in *Dunmore* was the exclusion of agricultural workers from

⁶² *Ibid.* at 406.

⁶³ *Ibid.* at 379-80.

the coverage of the Ontario *Labour Relations Act, 1995*.⁶⁴ The easy answer, and perhaps the expected one in light of earlier decisions, was the one given by Justice Major, dissenting, namely that there was no section 2(d) violation since there is no right to collective bargaining under section 2(d) and any problems preventing agricultural workers from organizing arise at the hands of their employers who are not government actors.⁶⁵ The majority in *Dunmore* found no breach in the denial of collective bargaining rights, but did decide that the lack of unfair labour practice protection for agricultural workers was a breach of section 2(d). Given the limited nature of the breach, it was easy to conclude that a section 1 justification was impossible for the government to meet; how could anyone deny the rights of agricultural workers simply to organize?⁶⁶

Dunmore is a significant development in placing some responsibility on government for the actions of private actors. The evidence of the extreme vulnerability of agricultural workers clearly had an impact on the Court:

This is the first time this Court has been asked to review the total exclusion of an occupational group from a statutory labour relations regime, where that group is not employed by the government and has demonstrated no independent ability to organize. ... In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(d) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms. ... The record shows that the ability to establish, join and maintain an agricultural employee association is substantially impeded in the absence of such statutory protection and that this impediment is substantially attributable to the exclusion itself, rather than to private action exclusively. Moreover, the freedom to establish, join and maintain an agricultural employee association lies at the core of s. 2(d) of the *Charter*; the appellants' claim is ultimately grounded in this non-statutory freedom.⁶⁷

Delisle was distinguished on the basis that the RCMP, unlike agricultural workers, did have the ability to organize without legislative protection.⁶⁸

Thus, *Dunmore*, although qualified as exceptional, does mark an important departure in giving some level of protection to union organization rights in the private sector. Still, the limits of *Dunmore* must be recognized. The remedy in *Dunmore* gives the Ontario legislature eighteen months to enact

⁶⁴ S.O. 1995, c. 1, Schedule A. This legislation brought to an end a brief period, under the NDP, where agricultural workers had been granted statutorily recognized collective bargaining rights, but not the right to strike. The appellants in *Dunmore* were not arguing for a right to strike.

⁶⁵ *Dunmore*, *supra* note 5.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at paras. 2, 20, 67.

⁶⁸ *Ibid.*

legislation consistent with the Court's findings.⁶⁹ It must be emphasized that the legislature is invited to extend unfair labour practice protection, but to withhold collective bargaining rights. In other words, it would be permissible to tell agricultural employers that while they cannot retaliate against agricultural workers for their union activities, they are still entitled to completely ignore any demands for collective bargaining. The gains for agricultural workers arising from *Dunmore* are not negligible, but they cannot be described as anything more than modest. A substantial element of the *PC 1003* model's concessions to unions, the obligation of an employer to bargain with a union that can demonstrate majority support in a bargaining unit, is still not incorporated.

Dunmore may be the thin edge of the wedge for future expansion of section 2(d), but it is unclear how far that may be expected to go. On its own terms, *Dunmore* only deals with issues on the margins of collective bargaining legislation. Does *Dunmore*'s repeated emphasis that collective bargaining is not covered by freedom of association represent the final nail in the coffin for such arguments? Or, does *Dunmore*'s lack of articulation of a clear rationale for excluding collective bargaining from freedom of association signal the possibility of re-opening that issue in future? Only time will tell.

There is, however, one further indication that the Court is quite determined in its lack of sympathy for constitutional claims for collective bargaining. *Dunmore* was argued on both section 2(d) and section 15 claims, but the Court held there was no need to answer the section 15 question in light of the success of the section 2(d) argument.⁷⁰ "I am also of the view that it is not necessary to consider the status of agricultural workers under s. 15(1) of the *Charter*; assuming without deciding the existence of a s. 15(1) violation, such a violation would not alter the remedy I propose."⁷¹

It is hard to understand how the Court could reach this conclusion, given its exclusion of collective bargaining from the scope of section 2(d). A section 15 claim, had it been successful, would have given agricultural workers a right to collective bargaining. The section 1 analysis in *Dunmore* did not purport to determine the result if a right to collective bargaining were encompassed in the prima facie breach. A section 15 right would not be an independent right to collective bargaining, but a dependent one; that is, it would be dependent on the legislative recognition of collective bargaining rights of others. As a comparative analysis, the section 15 breach would be to grant collective bargaining rights in a discriminatory fashion. Justice Major, dissenting in *Dunmore*, avoided this result by concluding that agricultural

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at para. 2.

workers could not establish an analogous ground.⁷² Justice L'Heureux-Dubé, in contrast, did find an analogous ground in *Dunmore*,⁷³ but inexplicably did not pursue the implications for collective bargaining rights. Ontario could avoid the section 15 issues by repealing the *Labour Relations Act* and giving collective bargaining rights to no one, but that is not remotely in the cards. In *Delisle*, arguing that police officers could establish an analogous ground was a doomed argument, but agricultural workers had at last a plausible claim in light of the treatment of analogous grounds in *Corbière*.⁷⁴ It is mysterious how the majority in *Dunmore* thought it had successfully ducked the issue of whether the denial of collective bargaining rights of agricultural workers constitutes an analogous ground. The majority somehow adopted a section 2(d) argument that excluded collective bargaining rights while ignoring a section 15 argument that, if successful, would have embraced collective bargaining rights.⁷⁵

Ultimately, *Dunmore* leaves many questions unanswered. Even with *Dunmore*, the legacy of twenty years of the *Charter* is that legislatures still have a free reign in deciding what to do in relation to strikes and collective bargaining. In the summer of 2001, the Nova Scotia legislature passed legislation not only to take away the right to strike in the health care sector, but also to allow unilateral imposition of a contract by the government.⁷⁶ This went far beyond the legislation in any of the cases in the 1987 trilogy, but ironically, the only section of the Nova Scotia statute seriously vulnerable to successful constitutional challenge was the section that purported to make the statute immune from constitutional challenge.⁷⁷ It was political pressure, not legal proceedings, that ultimately forced the government to back down.⁷⁸

⁷² *Ibid.* One of the prerequisites for a section 15 breach is that there must be either an enumerated or analogous ground of discrimination. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 493.

⁷³ *Dunmore*, *ibid.*

⁷⁴ *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. Here the Court adopted an expansive view of analogous grounds in concluding that members of an Aboriginal band not ordinarily resident on the reserve could claim an analogous ground of discrimination.

⁷⁵ Avoiding the section 15 argument in *Dunmore* also leaves unclear the section 15 potential for labour standards arguments. Even if there were constitutional protection for collective bargaining rights for agricultural workers, it is not at all clear that even collective bargaining power would be very effective in improving terms and conditions of employment. Access to guaranteed statutory minima may be of much greater significance.

⁷⁶ *Healthcare Services Continuation (2001) Act*, S.N.S 2001, c. 27.

⁷⁷ *Ibid.*, s. 13. This section was in clear disregard of the principle that statutes are always reviewable in the courts for constitutional validity; *Amax Potash Ltd. et al. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

⁷⁸ See *supra* note 44.

If legal proceedings have any future potential given the roadblocks of section 2(d), section 15 may provide more significant developments. Yet, *Dunmore* seems to represent an extreme reluctance to engage section 15 in the labour context.

III. THE CHARTER AND FREEDOM OF EXPRESSION

Free expression issues in the labour context can involve claims made by unions and their supporters, by union opponents, and by employers. Most of the Supreme Court of Canada discussion, which will be assessed in this part, has involved claims by unions and their supporters.⁷⁹ Claims by union opponents have arisen in the context of union security issues, which will be dealt with in the next part.

There has been limited opportunity for the Supreme Court of Canada to deal with employer's free expression issues. In *Slaight Communications Inc. v. Davidson*,⁸⁰ forced speech, along with forced silence, were the employer's free expression issues. The case involved an adjudication of an unjust dismissal claim, upheld by the adjudicator. Having concluded that reinstatement was not viable, the adjudicator ordered, as a remedy, that the employer provide a letter of reference written by the adjudicator to Davidson's prospective employers and, in addition, he ordered that the employer say nothing further. The Supreme Court of Canada easily concluded that both compelled speech and compelled silence are a *prima facie* breach of freedom of expression, but the majority upheld the order as a reasonable limit to give an unjustly dismissed employee a realistic chance of obtaining new employment. Since this case was very fact specific, it did not go very far in articulating general principles regarding employer expression. In contrast, the Supreme Court of Canada has had several opportunities to comment on the general principles relevant to union expression.

A. Union Expression: Introduction

Union free expression issues are closely intertwined with the exercise of freedom of association. Yet the free expression issues have been easy to separate from freedom of association issues because they have arisen in contexts where the unions were involved in lawful strikes or lockouts. Where there was no issue as to the legality of the strike or lockout—because it was clear that the exertion of some economic pressure was lawful—the free expression issues have focussed on the extent of the permissible economic pressure.

⁷⁹ For ease of reference, these will be referred to as "union" claims.

⁸⁰ [1989] 1 S.C.R. 1038.

As discussed in the previous part, the Supreme Court of Canada has created significant hurdles to establishing a *prima facie* breach of section 2(d). In contrast, making out a *prima facie* infringement of section 2(b), freedom of expression, has been relatively easy; the cases almost always turn on a section 1 analysis.⁸¹ The starting premise has been to recognize the importance of free expression for workers, as explained by Justice Cory in *United Food and Commercial Workers, Local 1518 v. KMart Canada Ltd.*:

It follows that workers, particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. For employees, freedom of expression becomes not only an important but an essential component of labour relations. It is through free expression that vulnerable workers are able to enlist the support of the public in their quest for better conditions of work. Thus their expression can often function as a means of achieving their goals.⁸²

Until recently, however, union expression claims have failed because of the successful invocation of section 1 justifications.

Two main issues in the union expression cases have been the analysis of the “signal effect” of labour picketing and the treatment of “secondary sites” to a labour conflict.

B. *The “Signal Effect”*

The leading authority on section 2(b), *Quebec (A.G.) v. Irwin Toy Limited et al.*,⁸³ is not a labour case; however, a labour case, namely, *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*,⁸⁴ set the stage for *Irwin Toy*. The fact that *Dolphin Delivery* was a freedom of expression case has been overshadowed because it was the first major *Charter* application decision of the Supreme Court of Canada. Moreover, the ultimate conclusion that the *Charter* did not apply to the common law in the absence of a government actor meant that the Court’s comments on freedom of expression rights were technically *obiter*.

The freedom of expression issue in *Dolphin Delivery* was whether or not peaceful labour picketing is expressive behaviour.⁸⁵ The Court, with the exception of Justice Beetz, readily concluded that peaceful labour picketing

⁸¹ The text of section 1 is: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁸² [1999] 2 S.C.R. 1083 at 1101-1102 [*KMart*].

⁸³ [1989] 1 S.C.R. 927 [*Irwin Toy*].

⁸⁴ [1986] 2 S.C.R. 573 [*Dolphin Delivery*].

⁸⁵ The specific context for that issue will be dealt with in more detail below.

falls within the scope of free expression, as activity that conveys meaning. Justice Beetz concluded that peaceful labour picketing fell outside the scope of section 2(b) for the reasons given by the majority of the Court of Appeal.⁸⁶ Specifically, Justice Beetz contended that picketing is a signal to action—to not cross the picket line—rather than discourse or dialogue.⁸⁷ In so holding, Justice Beetz could at least claim consistency; in a pre-*Charter* division of powers case, Justice Beetz, speaking for the majority in *Canada (A.G.) et al. v. Dupond et al.*,⁸⁸ went well beyond rejecting the implied bill of rights theory in upholding a Montreal bylaw prohibiting demonstrations: “Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.”⁸⁹

Although the rest of the Supreme Court of Canada in *Dolphin Delivery*⁹⁰ did not accept this argument as reason enough to preclude a section 2(b) claim from its inception, the “signal to action” notion has nonetheless since remained important in the section 1 analysis in permitting significant restrictions on labour picketing. The authority that the Supreme Court of Canada repeatedly invoked in identifying the signal effect of labour picketing is someone with considerable labour expertise, Paul Weiler,⁹¹ who was, among other things, former Chair of the British Columbia Labour Relations Board.

In *British Columbia Government Employees’ Union v. British Columbia (A.G.)*,⁹² the “signal to action” assumption was a substantial explanation of why enjoining the picketing of courthouses by court workers lawfully on strike was so easily upheld, so as to avoid any impeding of access to courts.⁹³ It never seemed to occur to the Supreme Court of Canada that people, especially those with no legal obligation or responsibility to appear in court, might rationally choose not to exercise their right of access to courts.⁹⁴

⁸⁶ *Supra* 84 at 604.

⁸⁷ *Ibid.* at 587.

⁸⁸ [1978] 2 S.C.R. 770 [*Dupond*].

⁸⁹ *Ibid.* at 797.

⁹⁰ By the time of *Dolphin Delivery*, Justice Beetz was the only member of the *Dupond* majority still sitting on the Supreme Court of Canada.

⁹¹ See generally, Paul C. Weiler, *Reconcilable Differences* (Toronto: Carswell 1980).

⁹² [1988] 2 S.C.R. 214 [*BCGEU*].

⁹³ For Justice McIntyre, concurring, the pre-eminence of not impeding access to courts precluded even a prima facie breach of section 2(b).

⁹⁴ See A. Wayne MacKay & Dianne Pothier, “Developments in Constitutional Law: The 1988-89 Term” (1990) 1 Supreme Court L. R. (2nd) 81 at 131-135.

In both *KMart* and *Allsco Building Products Ltd. v. United Food and Commercial Workers International Union, Local 1288P*,⁹⁵ the “signal effect” of conventional picketing was critical to the conclusion that conventional picketing is subject to more stringent limitations than consumer leafleting. Justice Cory, speaking for the Court in *KMart*, described conventional labour picketing in a way very similar to Justice Beetz’s description of demonstrations in *Dupond*:

Conventional picketing is characterized by picket lines which have a “signal effect”. It is often understood as attracting an automatic reflex response from workers, suppliers and consumers. Its existence impedes access to picketed sites. This impediment to movement may discourage some people from making rational choices based on persuasive discourse. ... The decision for people, whether employees, suppliers or consumers, not to cross the picket line may be based on its coercive effect rather than the persuasive force of the picketers.⁹⁶

I have little difficulty with the general descriptive accuracy of the “signal effect”; conventional picket lines are designed to induce people not to cross, and are largely effective in that aim. What I fail to understand is why the “signal effect” in any way detracts from picketing being expression worthy of protection, or makes respect of a picket line irrational.

Much of human expression is an attempt to persuade others to act in a particular way, and signals are very common speech. Consider commercial signs, which the Supreme Court of Canada went to great lengths to protect in *Quebec A.G. v. Chaussure Brown’s Inc., Ford, et al.*⁹⁷ If a store has a sign saying “Brown Shoes” or “Chaussure Brown’s Shoes” or “Chaussure Brown’s,” the sign, in whichever language (the issue in this case), is designed to have a signal effect. If you are interested in buying or looking at shoes, you are invited to enter the store. If you have no interest in shoes that day, you are expected to pass by. Such a signal is obviously less contentious than that of a typical picket line; my point is simply that the fact of its being a signal to action is itself innocuous. What matters is what kind of action, and how it is being signalled.

If the picketers are so numerous and concentrated that it is physically impossible to cross the line, or if there is some genuine reason to believe that picketers will use their signs to physically harm people if they try to cross, such a picket line is indeed properly described as coercive. But how can genuinely peaceful picketing be properly described as coercive if the only consequence of crossing is the wrath of the picketers? Picketing in conjunction with a lawful strike or lockout is, by definition, in connection with a lawful dispute. Asking

⁹⁵ [1999] 2 S.C.R. 1136 [hereinafter *Allsco*].

⁹⁶ *KMart*, *supra* note 82 at 1110, 1112.

⁹⁷ [1988] 2 S.C.R. 712 [*Chaussure Brown’s*].

people to take sides in that dispute cannot be anything other than an exercise of free expression worthy of strong protection. That it may be unpleasant or tense simply underscores the point that free expression encompasses the right to profoundly disagree. Furthermore, even if the target of the message declines to cross, simply to avoid an argument, rather than as an expression of genuine support, that does not render the initial message coercive. Choosing to avoid a confrontation is itself an exercise of free expression.

The assumption that the reflexive nature of observing a picket line makes it irrational is even more troubling. The automatic response does not indicate an automaton state; instead, it means that the issue has been previously thought through. Refusal to cross a picket line is a political and ideological statement of union solidarity; the fact that others may not share the same ideology does not make it irrational. The equation of solidarity to irrationality attacks the core values of both freedom of expression and freedom of association,⁹⁸ despite the fact, as noted in the previous part, that the Court so readily accepted the principle that freedom of association includes the collective exercise of freedom of expression.

The fact that picket lines do not often give rise to long conversations with those who might contemplate crossing should not be a relevant factor. What does brevity of expression have to do with the degree of constitutional protection? Free expression does not mean that people start with a blank slate with every new exchange of views. Even very brief encounters can carry a significant amount of meaning. Whether a picket line prompts a tooted horn in support or a yelled invective from a passing car, there is a two-way conveyance of meaning that all concerned understand from a much larger context than the few seconds of contact.

In *KMart* and *Allsco*, the Supreme Court of Canada gave constitutional protection to consumer leafleting at “secondary sites”⁹⁹ on the assumption that consumer leafleting is not an invocation of the “signal effect”:

Consumer leafleting is very different from a picket line. It seeks to persuade members of the public to take a certain course of action. It does so through informed and rational discourse which is the very essence of freedom of expression. Leafleting does not trigger the “signal” effect inherent in picket lines and it certainly does not have the same coercive component. It does not in any significant manner impede access to or egress from premises. ... It is true that both leafleting and secondary picketing seek to achieve the same objective, that is to bring economic pressure on the employer. However, it is the means utilized to achieve that pressure which distinguishes these actions. The public has a right to know the factual background and nature of a labour dispute.¹⁰⁰

⁹⁸ Michael MacNeil, “Labour Picketing and Consumer Boycotts: Judicial Ideology in *KMart* and *Allsco*” (2000) 8 C.L.E.L.J. 79 at 91-92.

⁹⁹ The location issue will be dealt with in Part III.C.

¹⁰⁰ *KMart*, *supra* note 2 at 1113-1115.

I fail to understand how a consumer leaflet is any less of an attempt to invoke a “signal effect” than a conventional picket line. Both are used to convey the message not to deal with the adjacent premises. The fact that more words are typically on a leaflet than on a sign is hardly a compelling case to tip the scales of rational discourse. Leafleters have no responsibility to, and make no effort to, give both sides of the story. I am sure neither KMart nor Allsco would have agreed the leaflets gave the reader sufficient information on which to make an informed choice; at the very least they would have put a different spin on the factual information in the leaflet. Freedom of expression does not require one side in a dispute to give a balanced account to the public; it is up to each side to decide what message to convey, and with how much detail. The number of words should not have constitutional significance. I have never heard it suggested that an election sign is undeserving of constitutional protection because there is not enough on the sign to generate rational discourse.

The real significance of the number of words is not rationality, but visibility. Leafleting is trying to invoke the “signal effect” just as much as the conventional picket line, but it is simply much less effective in doing so because the signal is less readily conveyed. Picket signs can be seen from a distance whereas delivering the signal via leafleting requires close proximity. In deciding that consumer leafleting is protected expression in a context where a conventional picket line would not be, the Court’s underlying reason for protecting consumer leafleting turns out to be its relative ineffectiveness! Although *KMart* and *Allsco* expanded the scope of protected union speech in protecting consumer leafleting at secondary sites, the change is a marginal one.

In its decision in *Pepsi*, the Supreme Court of Canada, speaking through Chief Justice McLachlin and Justice LeBel, was itself critical of the “signal effect” analysis. In *Pepsi*, the Court observed that the effect of the signal depends on the circumstances¹⁰¹ and what the signal is attempting to accomplish,¹⁰² and remarked that there should not be special rules for signalling, or for union speech.¹⁰³ At one point the Court seemed to be ready to abandon the “signal effect” analysis altogether:

It is difficult to see how a signal can be other than expressive; by definition, a signal is meant to convey information to others. Indeed, the underlying concern of *KMart* is that the signal will express too much, that it will be too effective. It seems better to us to admit that signalling is expression, the limitations of which must be justified.¹⁰⁴

¹⁰¹ *Pepsi*, *supra* note 5.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at para. 97.

¹⁰⁴ *Ibid.* at para. 96.

However, the Court ended its discussion of signalling on a more equivocal note:

We should therefore be mindful not to extend the application of the signal effect to all forms of union expression. ... Given the diverse range of activities captured by the term “picketing,” it is apparent that the signal effect operates to a greater degree in some situations than in others. We conclude that signalling concerns may provide a justification for proscribing secondary picketing in particular cases, but certainly not as a general rule.¹⁰⁵

The “signal effect” discussion was somewhat peripheral in *Pepsi*, which was more focused on the question of location, the subject of the next subsection. As will be discussed below, while *Pepsi* clarified some matters, it also left many questions unanswered. How much significance is left to the “signal effect” will depend on where it fits into the economic torts referred to below, something not genuinely explored in *Pepsi*.

C. “Secondary Sites”

Unless the strikers are court workers, in which case *BCGEU* makes it clear that all bets are off, it has long been accepted that it is lawful to engage in peaceful picketing or leafleting on public property adjacent to the struck or locked-out premises, assuming that access to entrances is not blocked. The battleground over the limitation on picketing or leafleting has been whether it is lawful at “secondary sites.”

In *Dolphin Delivery*, the employees represented by the appellant union had been locked out by their employer, Purolator. Dolphin had previously done business with Purolator, but Dolphin was now doing business with Supercourier, which the union considered to be a front for Purolator. The evidence before the Court did not disclose the exact nature of the relationship between Supercourier and Purolator. When the union threatened to stage a picket in front of Dolphin’s premises, Dolphin obtained an interlocutory injunction. Although the Supreme Court of Canada concluded that the *Charter* did not actually apply in the absence of a government actor,¹⁰⁶ Justice McIntyre did indicate that the injunction would, in any event, be consistent with section 1.

This case involves secondary picketing—picketing of a third party not concerned in the dispute which underlies the picketing. The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible, work out their own agreement. ... While picketing is, no doubt, a legitimate weapon to be employed in a labour dispute by the employees

¹⁰⁵ *Ibid.* at para. 100.

¹⁰⁶ The case arose before Purolator was bought by Canada Post.

against their employer, it should not be permitted to harm others. ... It is my opinion then that a limitation on secondary picketing against a third party, that is, a non-ally, would be a reasonable limit in the facts of this case.¹⁰⁷

What is extraordinary is that this conclusion was reached without any serious analysis of the distinction between primary and secondary picketing, without any discussion of what it takes to constitute an “ally,” and without any knowledge of the effect of Dolphin’s dealings with Supercourier on the dispute between Purolator and the union to demonstrate that Dolphin was indeed “uninvolved.” Moreover, the Court accepted the application of the tort of inducing breach of contract, without any analysis of the tort. I cannot resist commenting that it is the Supreme Court of Canada that is circumventing rational discourse. When unions target premises for picketing other than those of the struck employer, it is presumably on the assumption that there is some connection with the labour dispute, or it would be a complete waste of time and effort.¹⁰⁸ The legal analysis should focus on whether or not the extent of the connection is sufficient to warrant the exercise of economic pressure, and if so, how.

In *KMart*, the secondary analysis was quite surreal. Although the free expression claim was sustained on the basis of it being consumer leafleting, the “secondary” nature of the leafleting was accepted as fact. Throughout the judgement reference was made to “neutral sites” and “neutral third parties.” Yet the labour dispute and the leafleting all involved KMart. The union was certified at two locations of KMart and was leafleting other locations. Although arguments could be made about not extending the dispute beyond the particular bargaining unit, it strains credulity to claim that this has anything to do with neutrality when a single company is involved.¹⁰⁹ In *Allsco*, the targeted premises were at least independent companies, but they were retailers or users of Allsco products. Whether or not they wanted to be involved in Allsco’s labour dispute, their connection to Allsco meant that they were, at least in some sense, implicated.

It was not until *Pepsi* that the Supreme Court of Canada took a hard look at the primary/secondary distinction. There had been picketing at several non-Pepsi locations, notably including distributors of Pepsi products; an injunction against that picketing was ultimately ruled invalid. The issue was

¹⁰⁷ *Dolphin Delivery*, *supra* note 84 at 590-92.

¹⁰⁸ This point is acknowledged in *Pepsi*, *supra* note 5 at para. 104.

¹⁰⁹ Over fifty years ago, in *Williams v. Aristocratic Restaurants Ltd (1947)*, [1951] S.C.R. 762, the Supreme Court of Canada recognized other locations of the same employer as legitimate targets for picketing, seemingly as an instance of primary picketing. See *Pepsi*, *ibid.*, at 370. See also Patrick Macklem, “Secondary Picketing, Consumer Boycotts and the *Charter*” (2000) 8 C.L.E.L.J. 1.

framed as whether secondary picketing is illegal per se at common law, as held by the Ontario Court of Appeal in *Hersees of Woodstock Ltd. v. Goldstein*.¹¹⁰ There was no legislation at issue; thus, the case was analyzed in accordance with *Charter* values, rather than *Charter* rights. According to *Hill v. Church of Scientology of Toronto*,¹¹¹ *Charter* values are to be used to develop the common law incrementally. The Court approached the issue from the following perspective:

Therefore, third parties are to be protected from *undue* suffering, not insulated entirely from the repercussions of labour conflict Even primary picketing frequently imposes costs, often substantial, on third parties to the dispute, through stoppages in supplies or the loss of the primary employer as a customer ... [y]et this impact on third parties and the public has never rendered primary picketing illegal per se at common law to protect the interests of third parties. So we are left with this: innocent third parties should be shielded from “undue” harm. This brings us to the question that lies at the heart of this appeal. How do we judge when the detriment suffered by a third party to a labour dispute is “undue”, warranting the intervention of the common law? At this stage, it suffices to note that the protection of innocent third parties from the economic fallout of labour disputes, while a compelling consideration, is not absolute. Some economic harm to third parties is anticipated by our labour relations system as a necessary cost of resolving industrial conflict.¹¹²

The Court reviewed three possible approaches: the illegal per se doctrine, where all secondary picketing is unlawful, and primary picketing is strictly defined; the modified illegal per se doctrine, where all secondary picketing is unlawful, but primary picketing is more broadly defined to include allies and other associated entities; and the wrongful conduct model, where picketing is lawful unless it amounts to criminal or tortious activity.

The Court rejected both the strict and the modified illegal per se doctrines on the basis that they are based on a distinction that is ultimately arbitrary, and are too inflexible—they are unresponsive to the wide variety of circumstances of secondary picketing. This is the typical fate of blanket rules

¹¹⁰ [1963] 2 O.R. 81 (C.A.) [*Hersees*].

¹¹¹ [1995] 2 S.C.R. 1169. Justice Cory explained:

Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

¹¹² *Pepsi*, *supra* note 5 at paras. 44-45 [emphasis in original].

under the *Charter*.¹¹³ It is difficult to meet the minimal impairment test where there is no account of nuance, and/or where the balance is one-sided against the constitutionally protected right.

The Court instead embraced the wrongful conduct model on the basis that it *is* responsive to particular circumstances:

Torts such as trespass, intimidation, nuisance and inducing breach of contract, will protect property interests and ensure free access to private premises. Rights arising out of contracts or business relationships will also receive basic protection. Torts, themselves the creatures of common law, may grow and be adapted to current needs.¹¹⁴

Still, the Court reached the conclusion that the economic torts are sufficiently protective of free expression, incorporating an appropriate balance, with virtually no analysis of those torts. Even a limited survey would have revealed that the economic torts are a conceptual minefield.¹¹⁵ The Court in *Pepsi* conceded that “a great deal”¹¹⁶ of picketing will be caught by the various torts, and also indicated that where legislatures choose to regulate picketing, considerable deference would be accorded to legislative line drawing.¹¹⁷

While the Supreme Court of Canada clearly rejected the illegal per se doctrine that had been articulated almost forty years earlier by the Ontario Court of Appeal, the substituted wrongful conduct model is one of very uncertain application. Thus, it is quite unclear how much of a change in the law is really involved. Moreover, the Court’s emphasis that location is not the sole determining factor in the legality of picketing¹¹⁸ may raise the possibility that primary picketing might be more vulnerable to future challenge than it historically has been.

What is ultimately missing in *Pepsi* is a clear articulation of principles to determine how far a labour dispute can be legitimately extended through the exercise of workers’ freedom of expression.

IV. THE *CHARTER* AND UNION SECURITY

¹¹³ See e.g. *Chaussure Brown’s*, *supra* note 97.

¹¹⁴ *Pepsi*, *supra* note 5 at para. 73.

¹¹⁵ Harry Arthurs, “Comments—Labour Law—Secondary Picketing—Per Se Illegality—Public Policy” (1963) 41 Can. Bar Rev. 573. Arthurs notes at 579 that the purported application of the tort of inducing breach of contract in *Hersees* was fundamentally flawed in allowing the would-be contract breaker to bring the action.

¹¹⁶ *Pepsi*, *supra* note 5 at para. 103.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* at para. 75.

North America is unique in having a collective bargaining system based on majority rule, with a union being the exclusive bargaining agent for all the employees in the unit, whether or not they are members of the union. This raises potential issues related to the infringement of dissident employees' rights.¹¹⁹

*Lavigne v. Ontario Public Service Employees Union*¹²⁰ involved a claim by an employee of a community college who was, in accordance with the collective agreement, covered by a Rand formula. He was not required to belong to the union, but he was required to pay the equivalent of union dues. The theory of the Rand formula in a system based on an exclusive bargaining agent is that non-members of the union who gain the benefits negotiated in a collective agreement should not be entitled to be "free riders." Lavigne did not challenge that basic premise, and he was prepared to accept his obligation to pay to cover the union's collective bargaining expenses. However, he objected that "his" money was being used for what he considered to be non-collective bargaining expenses. He won at trial, and as a remedy, Justice White ordered an *ad hoc* arbitration process to determine what constituted non-collective bargaining expenses from which non-members could exempt themselves. The practical implications of this remedy are noteworthy. Although the basis for the *Charter* applying to the issues in this case was the fact that the employer, as a party to the collective agreement, was a government actor, the remedy only implicated the union, not itself a government actor. Furthermore, the process for determining what constituted non-collective bargaining expenditures would likely have been more costly than the amount of the disputed expenditures. These discordances probably contributed to the Supreme Court of Canada's reversal of the trial decision.

The Supreme Court of Canada was unanimous in rejecting Lavigne's claims, based on both freedom of expression and freedom of association. However, there were several different routes employed by the various judges in reaching this decision. The best way to understand *Lavigne* is probably not by dissecting the various judgments, but rather by appreciating the significance of Justice Wilson's candid remarks:

Beginning with the *Alberta Reference* and culminating most recently in the decision in *P.I.P.S.*, *supra*, this Court has repeatedly stated that s. 2(d) does not protect the objects of an association. Unions have accordingly been denied constitutional protection for activities which are central, indeed fundamental, to their effective functioning within our system of collective bargaining. Mr. Lavigne submits, however, that while the objects of an association are irrelevant to the claims of collectivities of working people, they may legitimately be taken into account when assessing the claim of an individual who objects to being associated with the objects of such a collectivity. I do

¹¹⁹ David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Montreal: McGill-Queen's University Press, 1987).

¹²⁰ [1991] 2 S.C.R. 211 [*Lavigne*].

not believe it is open to the Court to engage in one-sided justice of this kind. Since s. 2(d) protects both individuals and collectivities, if the objects of an association cannot be invoked to advance the constitutional claims of unions, then neither, it seems to me, can they be invoked in order to undermine them.¹²¹

The Rand formula, even the expenditure of monies for non-collective bargaining purposes, is too close to the core of our current system of collective bargaining for the Supreme Court of Canada to be willing to upset the apple cart.

In contrast, compulsory union membership does not produce as clear deference. The recent decision in *Advance Cutting*¹²² involved a very complex factual and legislative context in the Quebec construction industry in which construction workers were required to belong to one of five unions. As in *Lavigne*, there were multiple judgments with divergent reasoning. But unlike in *Lavigne*, the Court in *Advance Cutting* was sharply split on the outcome. The legislative provisions survived constitutional attack, but just barely, on a five-to-four split. This may mean that compulsory union membership may be vulnerable in the future. If so, I think the explanation would be that, while the Rand formula is considered central to our current scheme of collective bargaining, compulsory union membership is considered peripheral, partly owing to the fact that it is not common outside the construction industry. In the judges' eyes, that makes it more open to challenge.

V. CONCLUSION

In the first seventeen years of the *Charter* and labour law in the Supreme Court of Canada, there was a lot of ink spilled simply to stand still. It was only in 1999, with the decisions in *KMart* and *Allsco*, that *Charter* interpretation first discernibly changed the law, by giving constitutional protection to consumer leafleting. Although a modest change, this seemed to signify that the earlier judicial deference to legislative policy choices in labour law has its limits. In the past year, that has been confirmed, especially in *Dunmore*. Yet even *Dunmore* can only be described as tinkering on the margins. Moreover, *Dunmore* involved a reinforcement of the dominant model, not a challenge to it. In *Pepsi*, where the specific issue was about the common law rather than legislation, the dominant legislative model was still in the Court's mind: "In summary, a wrongful action approach to picketing allows for a proper balance between traditional common law rights and *Charter* values, and falls in line with the core principles of the collective bargaining system put in place

¹²¹ *Ibid.* at 264.

¹²² *Advance Cutting*, *supra* note 5.

in this country in the years following the Second World War.”¹²³

While recent cases indicate greater willingness on the part of judges to intervene on *Charter* issues in labour law, it is still well within the *PC 1003* model. Despite Robertson’s and Fulford’s predictions, the *Charter* has not been the source of either revolution or counter-revolution in labour law. That is not likely to change. Politics still explains much more about labour law than constitutional law does.

¹²³ *Pepsi*, *supra* note 5 at para. 74.