Courts and Liberal Ideology: An Analysis of the Application of the *Charter* to Some Labour Law Issues

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The adoption of the *Canadian Charter of Rights and Freedoms* has increased the political power of Canadian courts. However, the author submits that the judiciary has extended the common law's traditional reluctance to accord independent rights to collectivities into the *Charter* era. Three important aspects of trade union rights that have been the subject of recent judicial decisions are examined in detail: the right to strike, the right to picket and the extent to which unions may spend their funds in a manner that is unacceptable to a minority of workers that it represents. The author maintains that the basic tenets of liberal ideology that have been applied in these decisions are untenable on their terms. Furthermore, these liberal tenets represent only one vision of Canadian political history. The author concludes that the courts must give greater consideration to the importance of communal values if the law is to be brought into the reality of modern society.

L'adoption de la *Charte canadienne des droits et libertés* a augmenté le pouvoir politique des tribunaux canadiens. L'auteur soutient, cependant, que les cours ont perpétué, dans l'application de la *Charte*, la réticence traditionnelle de la *common law* à reconnaître aux collectivités des droits indépendants. L'auteur étudie trois pratiques que les syndicats perçoivent comme des droits et sur lesquelles les tribunaux se sont récemment prononcés : le droit de grève, le droit de faire du piquetage et le droit de dépenser des fonds syndicaux à des fins qu'une minorité des travailleurs désapprouve. L'auteur soutient que les principes de l'idéologie libérale sur lesquels sont fondées ces décisions sont, en eux-mêmes, insoutenables. De plus, ces principes ne représentent qu'une seule vision du Canada. L'auteur conclut que les tribunaux doivent accorder une plus grande importance aux valeurs communautaires s'ils veulent que le droit réflète la réalité de la société moderne.

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Synopsis

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I. Introduction

The embedding of a constitutional bill of rights inevitably leads to a considerable accretion of political power exercised by the courts. The judges in such a system are not only guardians, but are masters of the constitution.[1] Labour law in particular is likely to be significantly affected by the granting of political power to courts. There has been a traditional reluctance of the judiciary, in the absence of statutory regulation, to encourage or even permit trade unions' pursuit of workers' interests by engaging in effective industrial action. Common law doctrine is biased against collective action because it is incompatible with an individualistic vision of private ordering. Much of the past judicial creed was consistent with a liberal political ideology. Initial results under the *Canadian Charter of Rights and Freedoms*[2] indicate the continuing predominance of liberal ideology in the judicial analysis of labour

[1]O. Kahn-Freund, "The Impact of Constitutions on Labour Law" (1976) 35 Cam. L.J. 240 at 257 quoting A.V. Dicey, *Law of the Constitution*, 10th ed. by E.C.S. Wade (London: MacMillan & Co., 1959) at 175.

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

law. In this paper, some of the tenets of that ideology will be identified and their application to several labour issues will be analyzed.

Trade unions have a range of functions which include the representation of the interests of their members through collective bargaining and through the exertion of political pressure. Although treated by the common law as without legal personality,[3] the extensive statutory grant of rights and imposition of duties on trade unions frequently leads to their being treated as juristic persons.[4] Nevertheless, there is a fundamental problem in defining the exact nature of the trade union as a rights-bearing entity. From one perspective, the trade union can be regarded as little more than the network of contracts of the individual members with each other.[5] It is an unincorporated association,[6] and any rights accorded to it must be the result of a statutory grant or be derivative of the rights of individual members. From another perspective, the trade union can be seen as a group which transcends the individuality of its members; it is more than the sum of its parts. As a group of persons joined together in solidarity, the trade union is a form of community to which may be attributed rights that are not convertible to statements about the rights of individual members.

Western liberal democracies are ambivalent about the extent to which groups should be treated as rights-bearing entities. Both legal and political theorists have struggled to articulate a role for groups which is consistent with some of the fundamental liberal assumptions which predominate in such democracies. It is always difficult to identify the core principles upon which liberals agree, as there are many disagreements among those who would classify themselves as liberals about the basis of liberal philosophy. However, there are four key concepts identified with liberalism which will form the basis of this analysis. The first concern of liberalism is with the primacy of individual autonomy. A second feature is the emphasis on the rule of law and its particular form of legal equality. A third requirement is that the state be neutral in allowing individuals to pursue their own life goals. The fourth element claims that there is a need to separate the public world of politics from the private world of social and economic life. It will become apparent that these assumptions are closely interrelated.

This article seeks to explore these issues in the narrower context of the rights of trade unions. In particular, there are three aspects of trade union

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[3]G. Adams, *Canadian Labour Law* (Aurora, Ont.: Canada Law Book, 1985) at 817.

[4]See *International Brotherhood of Teamsters* v. *Therien*, [1960] S.C.R. 265, 22 D.L.R. (2d) 1, 60 C.L.L.C. 15,273. It is ironic that unions have come to be treated as legal persons in key cases where the issue was union liability for acts of individuals.

[5]See *Orchard* v. *Tunney*, [1957] S.C.R. 436, 8 D.L.R. (2d) 273, 57 C.L.L.C. 15,319.

[6]In the province of Quebec trade unions have the option of securing legal status by incorporating a syndicate under the *Professional Syndicates Act*, R.S.Q. c. S-40, s. 1.

rights that neatly demonstrate the theoretical difficulties involved. One of the most important rights claimed by trade unions is the right to strike. However, there have always been severe restrictions on that right in Canada,[7] and the Supreme Court of Canada has recently announced that there is no constitutional protection for that right.[8] A second aspect is that even when strikes are lawful, the ability of unions to enlist the support of their fellow workers and sympathizers in the general public can be severely curtailed by the imposition of legal constraints on the use of picketing. The right of the group to act in pursuit of its own interests through strikes and through picketing demonstrates the dilemma for liberalism in promoting individual autonomy while at the same time restricting the rights of individuals acting through the group. The third issue is the extent to which unions may engage in practices acceptable to the majority of members, but objectionable to some individuals who are nevertheless required to support the union either through the terms of the collective agreement or pursuant to a statutory decree. The tension between the individual and the group highlights the question of the extent to which the individual should be required to defer to the group interest where the group is less than the all-encompassing polity.

Through an examination of recent court decisions involving these three aspects of trade union rights, I intend to lay the framework from which to examine and evaluate alternatives to the predominantly liberal ideology.

II. The Limits of Liberalism

All of the constitutive elements of liberalism have conceptual difficulties embedded within them. The liberal emphasis on individualism presents a fundamental contradiction. Individualism makes certain assumptions about human nature. It emphasizes the concept of the individual as a morally self-sufficient being who seeks and is justified in seeking her or his own satisfaction, whether as a consumer of utilities or as an exerter and developer of potentialities.[9] Promoters of individualism, although recognizing that

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[7]See A.W.R. Carrothers, E.E. Palmer & W.B. Rayner, *Collective Bargaining Law in Canada*, 2d ed. (Toronto: Butterworths, 1986) c. 3 and 23.

[8]*Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, [1987] 3 W.W.R. 577, 87 C.L.L.C. 14,021 [hereinafter *The Alberta Reference* cited to S.C.R.]; *Public Service Alliance of Canada* v. *R.*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249, 87 C.L.L.C. 14,022 [hereinafter *P.S.A.C.* v. *R.*]; *Government of Saskatchewan* v. *Retail, Wholesale and Department Store Union, Locals 544,496,635 & 955*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277, [1987] 3 W.W.R. 673, 87 C.L.L.C. 14,023 [hereinafter *R.W.D.S.U.* v. *Saskatchewan*]. These cases will collectively be referred to as the "right-to-strike trilogy."

[9]C.B. Macpherson, "Pluralism, Individualism, and Participation" in C.B. Macpherson, ed., *The Rise and Fall of Economic Justice and Other Papers* (Oxford: Oxford University Press, 1985) 93 at 95.

individuals live in society, do not perceive the individual as being necessarily constituted, even partially, by their relationships within communities.

Central to the theory of individualism is the ascription of rights to individuals[10] and the denial of the importance of the principle of belonging. The "existence of social and political communities, are secondary and derivative, because they are conditional on an individual's consent or because they promote individual interest."[11] But an individual can be free only to the extent that her or his freedom is protected by the communal enforcement of the corresponding obligations on others to respect that freedom. Others, including parents, friends and cultural figures, are responsible for our development as persons. At the same time, our existence as members of collectivities imposes on us hierarchical structures of power, welfare and access to enlightenment, whether based on birth, social class, or the accident of genetic endowment.[12] A number of recent critiques of liberalism have emphasized the community as an important element in defining who we are as individuals.[13]

In particular, these critiques reject the proposition that the individual self can be considered to be constituted in complete independence of one's relations with others. The essence of selfhood cannot be adequately accounted for without a consideration of the position of the individual in various groupings such as family, geographic community, nation, cultural community, linguistic community, etc. Thus, the individual can never be truly free or voluntarily define with complete independence the role that he or she will play. Because of the importance of community in defining who we are, there is a need to work out in greater detail what this may mean for the conception of group rights.

Deference to the rule of law connotes a concept of legal equality which emphasizes that all individuals are equal before the law. Individuals must

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[10]There is a "widely accepted conception of rights, which relies on the idea that the rights-bearing person is an autonomous individual capable of exercising choice for personal ends and able to protect personal freedom from the pressure and power of others." M. Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860 at 1882.

[11]N. Abercrombie, S. Hill & B. Turner, *Sovereign Individuals of Capitalism* (London: Allen & Unwin, 1986) at 88.

[12]D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205 at 211-12.

[13]*E.g.*, D. Cornell, "In Union: A Critical Review of *Toward a Perfected State*" (1987) 135 U. Pa. L. Rev. 1089; A. McIntyre, *After Virtue: A Study in Moral Theory* (London: Gerald Duckworth & Co., 1981) at 204; M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); M. Sandel, "The Political Theory of the Procedural Republic", in A. Hutchinson and P. Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 85; R. Garet, "Communality and Existence: The Rights of Groups" (1983) 56 S. Cal. L. Rev. 1001.

be stripped of their personal circumstances in determining the nature of their legal rights. "Special determinants of legal status based on property, religion, nobility, race, sex or other qualifications tend gradually to disappear with the development of the law."[14] The application of this formal equality, however, tends to have discriminatory effects. Even when this is recognized, the ideological impact of the rule of law remains very powerful. Additionally, the extension of rights to corporations as legal persons entitled to the equal treatment of the law in one sense conflicts with the liberal emphasis on individual autonomy while masking the conflict by referring to the corporation as a person. Furthermore, the unequal treatment accorded to unincorporated groups such as trade unions forces careful consideration of arguments based on equality when determining rights as between workers and employers.

The need for political decisions to be independent of any particular conception of the good life, or conception of what gives particular value to life, has been identified by Ronald Dworkin as one of the core features of liberalism.[15] This is closely connected to the idea that individuals must be treated equally and are entitled to equal respect, because, if the government favours some conceptions of the good life over others, it appears not to be treating individuals equally. Furthermore, the best means of remaining neutral among competing conceptions is, according to Dworkin's interpretation of this liberal tenet, to allow the operation of the economic market and representative democracy. The ability of individuals to pursue their individual preferences in the marketplace respects individual autonomy. Representative democracy allows for the adjustment of competing demands for public goods.[16] Governmental intervention in the market is justified, however, to balance some substantive inequalities (such as talents, initial wealth, etc.), but not to favour individual preferences. Similarly, limits may be placed on the elected representatives in a democracy to protect the right that each person has to equal respect.

There are conceptual difficulties in claiming that the state in carrying out the liberal agenda is in fact remaining neutral among competing preferences. Furthermore, objections may be raised to the desirability of excluding value preferences in determining public policy.[17]

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[14]R. Cotterell, *The Sociology of Law: An Introduction* (London: Butterworth's, 1984) at 124.

[15]R. Dworkin, "Liberalism" in S. Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978) 113 at 127.

[16]C.B. Macpherson, "The False Roots of Western Democracy" in F.R. Dallmayr, ed., *From Contract to Community* (New York: Marcel Dekker, 1978) 17.

[17]See M. Sagoff, "Liberalism and Law" in D. MacLean & C. Mills, eds, *Liberalism Reconsidered* (Totowa, N.J.: Rowman & Allanhead, 1983) 12.

The distinction between private and public life (*i.e.*, between civil and political society) is an important feature of liberal thought. One of the incidents of private society is that individuals have their own private ends which are independent of or in competition with the goals of others. Participation in public life is a necessary burden to ensure that public institutions maximize the ability of citizens to pursue their own private ends.[18] The emphasis on the importance of the private tends to lead to the protection and the promotion of the market as the quintessential means of enabling the pursuit of private ends. The role of public institutions is to regulate the private to the minimum extent necessary to ensure efficient ordering. Again, there are conceptual difficulties in defining the borderline between the public and the private, that is, between what is political and what is not. These difficulties force one to question the usefulness of the distinction as a guide in making decisions about the nature and extent of constitutional rights.[19]

These conceptual difficulties with liberal ideology arise at least in part from the failure of liberal theory to adequately address the role of community in defining and constituting the individual. By failing to acknowledge community in the process of the interpretation of rights, courts may create boundaries between individuals, groups and society as a whole which do not reflect social reality. The process of giving content to such ambiguous concepts as freedom of association requires a sensitivity to the ways in which the community itself engages in a process of formulating and promoting claims. It requires sensitivity to the historical and social conditions that define the nature of community. Courts should not proceed on the basis of theoretical assumptions about the primacy of the autonomous individual. This is not to deny that rights have a very important role to play in protecting and promoting individual values. It is necessary, however, to recognize that groups and various forms of community are also important to the individual, and that rights which protect and promote communal forms of action are equally important and compatible with our constitutional history.[20]

III. The Right to Strike

Canadian trade unions have accepted extensive regulation of the right to strike in return for the legal protection of bargaining rights. Strikes are prohibited unless the union has formally obtained bargaining rights, either through voluntary recognition, or much more likely, through certification. A union with bargaining rights may strike only after it has complied with

[18]J. Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press, 1971) at 521.

[19]See *infra*, section III.C. for a discussion of the public/private distinction.

[20]See *infra*, note 28 and accompanying text.

any of a variety of steps such as conciliation, the giving of notice and the holding of a formal strike vote. In addition to these restrictive statutory provisions, there are many groups which are denied the right to strike, whether permanently, as the result of statutory intervention during a particular dispute, or as a consequence of the imposition of temporary wage controls.

Unions claim that these denials of the right to strike are a fundamental violation of the rights of trade unions to engage in effective collective bargaining. In a number of recent cases, they have argued that freedom of association includes the freedom to act in association, and that the right to strike is an essential element to individuals pursuing their ends through the means of a trade union. In a recent trilogy of cases, the Supreme Court of Canada has categorically denied that the right to strike is in any way a fundamental freedom.[21] Consequently, it gave a relatively narrow reading of the concept of freedom of association and, in particular, one which failed to consider the importance of communitarian values as a balance to individual values.

In *The Alberta Reference*[22] unions challenged Alberta legislation which denied the right to strike to public service employees, fire fighters, hospital workers and police officers. In *R.W.D.S.U.* v. *Saskatchewan*[23] the Saskatchewan government introduced *ad hoc* back-to-work legislation to prohibit a strike by workers at eleven dairies in the province, and to prohibit lockouts by their employers. In *P.S.A.C.* v. *R.*[24] the applicant sought a declaration that federal legislation implementing wage controls for public service employees was in violation of *Charter* guarantees because it limited collective bargaining rights and prohibited strikes.

In each of the three cases, there is a plurality opinion by LeDain J. with Beetz and La Forest JJ. concurring, a separate, concurring opinion by McIntyre J. and partially or wholly dissenting opinions by Dickson C.J. and Wilson J. The leading opinions are set out in *The Alberta Reference* on which further analysis will concentrate.

The brevity of Justice LeDain's opinion is startling given that it forms the plurality. He clearly rejects the idea that freedom to associate generally includes a constitutional guarantee of the activities of the group. There are a number of more or less implicit assumptions that lurk beneath the surface of his terse decision. McIntyre J., in his concurring opinion, and Dickson

[21] *Supra*, note 8.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

C.J. in dissent, provide a much more extensive analysis, although once again there are crucial assumptions that are not developed in any detail.

A. Individual Autonomy

The aspect of liberal ideology that is most apparent in the decisions of LeDain and McIntyre JJ. is the respect for individual autonomy. Firstly, LeDain J. characterizes freedom of association as important for the exercise of other fundamental freedoms.[25] These other fundamental freedoms, such as freedom of expression, freedom of religion and freedom of conscience, are guaranteed to the individual. This instrumentalist view of freedom of association sees the freedom as merely derivative of individual rights. In other words, it adheres to the liberal ideology that perceives the individual as the only rational bearer of rights. According to McIntyre J., the realization of individual rights and aspirations is the central concern of the constitutional order.[26] Groups are granted only very specific constitutional rights (*e.g.*, language rights, aboriginal rights and denominational schools) and these are not of sufficient weight to alter the individualist tenor of the *Charter*.

In determining the nature of freedom of association, McIntyre J. placed great reliance on American writers. For example, he referred to the classic article by Professor T. I. Emerson which states:

> [A] theory of association must begin with the individual. In a society governed by democratic principles it is the individual who is the ultimate concern of the social order. His interests and rights are paramount. Association is an extension of individual freedom. It is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties.[27]

One can dispute both the theoretical conclusion about the derivative nature of associational rights and the empirical observation about the balance between individual and group rights as set out in the *Charter*. With respect to the latter point, Dickson C.J.'s dissenting opinion rejects the view that freedom of association must be seen as derivative of individual constitutional rights. In doing so, he alludes to "our Constitution's history of giving special recognition to collectivities or communities of interest other than the government and political parties."[28] The extent of these constitutional guarantees to various collectivities provides a dramatic contrast

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[25]*The Alberta Reference*, *ibid.* at 391.

[26]*Ibid.* at 397.

[27]T.I. Emerson, "Freedom of Association and Freedom of Expression" (1964) 74 Yale L.J. 1 at 4.

[28]*The Alberta Reference*, *supra*, note 8 at 324.

with the emphasis on individuality in the American jurisprudence on which McIntyre J. relies.[29]

Indeed, there are important differences between Canadian and American society. These differences are manifest in such features of our polity as the strength of a political party espousing socialistic policies, greater willingness to use the state to control and direct economic development, and greater deference to authority and desire for stability. As Monahan puts it, "[w]hatever the explanation, the important point for present purposes is that Canadian political culture cannot be portrayed as uniformly individualist. The Canadian polity has a rich and continuing commitment to collectivist, organic values in addition to individualist ones."[30]

Blishen claims that there is a collectivist impulse evident in Canadian developments, especially in relation to state intervention in the economy and the provision of a wide range of social security benefits.[31] This commitment to collectivism, when combined with other values predominant in Canada such as diversity, equality, change and achievement, as well as a heightened group identity and an emphasis on self-expression, creates the conditions for a form of communalism. Blishen points to claims made by francophones, women, indigenous peoples and visible minorities as evidence of the growth and importance of groups in promoting the interests of their members.[32] He claims that the importance of organizations is indicative of an inability of Canada's democratic institutions to create the conditions that would allow individuals to voice their demands and needs more effectively in the democratic process. Although Blishen does not directly include unions in his analysis, they clearly should be included among the groups to which rights must be extended to ensure a greater likelihood of participation of workers in democratic processes. It is necessary for the state to recognize various forms of communalism and for the courts, in their interpretation of ambiguous concepts that clearly have a group orientation, to be sensitive to Canadian conditions which are more hospitable to group action and less deferential to individual autonomy.

It is possible to conceive of the right of association as having a status independent of other individual rights. Ronald Garet,[33] for instance, works

[29]*E.g.*, J. Magnet, "Collective Rights, Cultural Autonomy and the Canadian State" (1986) 32 McGill L.J. 170.

[30]P. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87 at 135.

[31]B. Blishen, "Continuity and Change in Canadian Values" in A. Cairns & C. Williams, eds, *The Politics of Gender, Ethnicity and Language in Canada* (Toronto: University of Toronto Press, 1986).

[32]*Ibid.* at 18-22.

[33]*Supra*, note 13.

out a theory of rights which places group rights on a plane equivalent to individual and social rights. They each have a common foundation in the concept of existence. Groups have a right to maintain their existence and to pursue their distinctive courses because belonging to and acting within community is one of the ethical constituents of our humanity. To exist in a human way is to be related to others through a wide variety of groups. The individual members of a group share in defining the nature of the group and the group itself shares in defining the nature of the person. "Personhood, communality, and sociality are structures of existence, or necessary aspects of human being."[34] The implication of this theory is that one should accord to groups rights that are not merely derivative of individual rights.[35] This is not to imply that there is no room for individual rights, but rather that there is a need to be sensitive to the unique role that groups play in defining our human situation. In the context of a right to strike for trade unions, this leads to the recognition that the pursuit of workers' interests through group action has an intrinsic value of its own which need not be translated into some form of individual right. While there may be situations in which the interests of workers as a group are in conflict with a general societal interest, these interests should be balanced on a case by case basis, rather than rejecting group rights summarily.

In the specific context of labour unions, Staughton Lynd[36] describes the labour movement as based on communal values more than any other institution in capitalist society:

> This distinctive experience of solidarity, underlying the right to engage in concerted activity, has three unusual attributes. First, the well-being of the individual and the well-being of the group are not experienced as antagonistic.[37]
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> Second, the group of those who work together—the informal work group, the department, the local union, the class—is often experienced as a reality in itself.[38]
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> Finally—and again in dialectical tension with the attribute just emphasized—the solidarity of workers articulated in the right to engage in concerted activity can and must be individually exercised.[39]

Lynd is careful to distinguish between different kinds of rights. Although he identifies both individualistic and communal rights, he stresses that most rights are not neatly divided into ones which are inherently individual or

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[34]*Ibid.* at 1016.

[35]See also D. Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1.

[36]S. Lynd, "Communal Rights" (1984) 62 Texas L. Rev. 1417.

[37]*Ibid.* at 1426.

[38]*Ibid.* at 1427.

[39]*Ibid.* at 1428.

inherently communal. Some rights have a property-like nature such that the exercise of the individual right diminishes the rights of others. Communal rights, on the other hand, are such that their exercise by one person enhances the rights of others. Most rights are sufficiently ambiguous that they can be pushed in different directions by political and intelleetual struggles. Furthermore, communal rights are not the opposite of individual rights. Communal rights can be exercised by both groups and individuals. They are "rights characteristic of a society in which the free development of each has become the condition of the free development of all. The opposite of a communal right is any right which presupposes that what is accessible to one person is therefore unavailable to another."[40] Thus, Lynd cautions against the danger of viewing the communal rights as exercisable only by the group or society at large to the exclusion of the individual.

The application of this conception of rights to worker participation in striking, picketing, union organization and other forms of union activity supports an interpretation of freedom of association that would treat these activities as constitutionally protected rights. By engaging in these activities workers are not merely acting each out of their own self-interest, but out of interest for all the other members of the group. One cannot make a distinction between the rights of individuals to act in their own self-interest and collective action for mutual interest. Group participation and individual self-realization reinforce each other.

This is the approaeh taken by Dickson C.J. in *The Alberta Reference.*[41] The recognition of the importance and value of group activity leads to an enrichment of the individual — an acknowledgement that certain things done in unity have no individual equivalent. While individuals should be permitted to engage in aetivities as members of an association which they would be permitted to do acting alone, they should also be permitted to engage in activities which do not have an individual counterpart.

McIntyre J. was willing to hold that freedom of association includes the freedom to associate for the purpose of activities which are lawful when performed alone. However, he claimed both that an individual's refusal to work would not be considered lawful and that, in any event, a strike is not comparable with an individual's refusal to work, and therefore no protection

[40]*Ibid.* at 1422-23.
[41]*Supra*, note 8.

should be granted to that activity.[42] Only individual action is seen as having any inherent worth, and the benefits which arise from solidarity and acting in community are ignored.

B. Legal Equality

> In assuming that the reign of law guarantees liberty to the whole community, we are assuming that it is impartial .... Liberty in this respect implies equality. Hence the demand of Liberalism for such a procedure as will ensure the impartial application of the law.[43]

There are several different aspects of equality that should be kept separate in our discussion. First of all, there is the formal legal equality described by Hobhouse in the above quotation. It is a mechanistic equality in which legal rules are applied to all legal persons without regard to their special circumstances. It opposes the granting of special treatment and demands impartiality. A second aspect of equality is that in which individuals achieve substantive equality in economic and social status. This form of equality is the antithesis of the results achieved through the operation of market forces, especially if there are initial inequalities in wealth and consideration is given to the wide range of natural endowments of individuals. There is no expectation in liberal ideology that formal legal equality will result in substantive equality, and indeed there are many justifications proffered for continuing substantive inequalities. For instance, Rawls claims that social and economic inequalities are just "if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."[44] Finally, one should consider the issue of political power. An initial tenet of liberal democratic ideology was that each individual had political power exercisable through the right to vote. Political rights were defined in terms of having an equal voice in choosing the government that would exercise political authority. More recent variants of liberal ideology, recognizing the role of political parties and of interest groups in the political arena, use a pluralist analysis, claiming that individual interests in the political process are adequately represented through the exercise of political power by pressure groups. An assumption is made that there is an equality among the various pressure groups that justifies these forms of political brokerage.

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[42] *Ibid.* at 410-12. The claim that an individual refusal to work is unlawful and that therefore no protection should be extended to a collective refusal to work fails to note the fundamental difference in remedies for breach of the individual contract of employment and for an illegal strike. In the first instance, the individual cannot be ordered to return to work, whereas in the latter situation, the strike may be prohibited by injunction with the consequence that workers as a collectivity are required to return to work.

[43] L.T. Hobhouse, *Liberalism* (London: Oxford University Press, 1911) at 24.

[44] *Supra*, note 18 at 14-15.

LeDain J. makes the claim in the plurality opinion in the right-to-strike trilogy that there is no valid distinction among various types of organizations, and hence, that trade unions cannot be treated differently from other kinds of organizations.[45] In his view, freedom of association is not a codeword for trade union rights, but is a general right that must apply to all types of associations. He fears the consequences of allowing all associations to engage in activities which further their aims and objectives. What is implied, but not stated, is that the constitutional entrenchment of protection of group activity for all associations would have serious negative effects on society.[46] As a result, trade unions cannot be given a preferred status, because of the liberal prescription of legal equality. There is an unstated hypothesis that the granting of equal legal rights is all that is required to ensure justice. No note is taken of the differences in power, status and wealth which may determine the extent to which individuals or groups with equal legal rights are able to benefit from this formal equality. The situation is more complex than just stated. Legal equality cannot be separated from questions of political equality. LeDain J. describes the rights granted to labour (to collectively bargain and to strike) as the result of a balancing of competing interests in a field in which the courts have no expertise.[47] The implicit assumption here is that the state is a neutral arbiter among competing interests, and that, because there is a rough equality of power between the competing groups, the outcome of the balancing process produces a just result.

McIntyre J. puts it more forcefully when he claims that freedom of association plays an indispensable role in the functioning of democracy.[48] Individuals, acting through groups, are able to limit the exercise of state power and to influence the formation of government and state policy. McIntyre J. goes on to claim that our labour laws are based on a political and economic compromise between organized labour and the employers of labour which are equally powerful socio-economic forces. One group con-

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[45]*Supra*, note 8 at 390.

[46]Although LeDain J. does not give any examples, McIntyre J. does. *Ibid.* at 404-05, he adopts an illustration of P. Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword" in J. Weiler & R. Elliot, eds, *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 245 at 247. Gall points out that a government may have the right to ban the individual ownership of guns without infringing on any individual constitutional rights. However, if freedom of assocation includes the right of the association to pursue its objects, does this mean that the ownership and use of guns by members of the gun club is constitutionally protected? The conclusion is that the right to bear arms is not constitutionally protected, whether carried out by the individual or by the association. Hence, the right of organizations generally to pursue their goals is said not to be protected.

[47]*Supra*, note 8 at 391.

[48]*Ibid.* at 397.

cedes certain interests in exchange for concessions from the other.[49] While Justice McIntyre claims that there is no correct balance that gives permanent satisfaction to both groups, he appears to accept that this essential equality should not be interfered with by entrenching a right to strike. The parties to the collective bargaining process define for themselves an acceptable balance using both collective bargaining and political processes. The state acts as an impartial arbiter for the groups, balancing their claims against the interests of other groups and putting the final compromises into legal effect.

The assumption that the state is a neutral arbiter and that there is an equality of some kind among the competing groups is unjustified.[50] The judgements reflect an influential strand of political thought in the last fifty years which emphasizes and applauds the pluralist nature of many Western democracies. "In its simplest form, pluralism suggests that the outcomes of the political process necessarily reflect the public interest. This theory assumes that the public interest consists of nothing more than the [aggregate of the interests of individuals] and that the political process provides a fair method of aggregation."[51]

Offe and Wiesenthal claim that the concept of 'interest group' serves to obscure categories of social class by equating the unequal.[52] Labour and capital show substantial differences with respect to the functioning and performing of their associations. They point out that "unions are associations of members who, *before* they can become members of unions, are already members of other organizations, namely employees of capitalist enterprises."[53] Thus, unions are only secondary organizers. The capital of an enterprise is by its nature merged and united from the beginning, whereas the labour power of workers is atomized, individual and indivisible. Workers on their own have little bargaining power because each worker individually faces the spectre of being replaced by other workers or machinery if she or he makes excessive demands. Unions, as the association representing workers, develop as a response to the 'association' that has already taken place on the part of capital.[54] Because the labour power of workers is inseparable from their persons, unlike capital which is physically and legally separate from the capitalist, unions must represent a wide range of interests that are directly affected by the exchange of labour power. This makes the organizing

[49]*Ibid.* at 414.

[50]L. Panitch, "Recent Theorizations of Corporatism: Reflections on a Growth Industry" (1980) 31:2 *British Journal of Sociology* 159.

[51]L. Seidman, "Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law" (1987) 96 Yale L.J. 1006 at 1013 n.31.

[52]C. Offe & H. Wiesanthal, "Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form" (1980) 1 Political Power and Social Theory 67 at 72.

[53]*Ibid.* at 72.

[54]*Ibid.* at 79.

and representing of workers much more difficult than the organizing of business interests. Differences between these groups in the class structure lead to inequalities in power and differences in associational practices, or logics of collective action, by which organizations of labour and capital try to improve their position vis-à-vis each other.

Finally, Wiesenthal and Offe claim that pluralistic models are at fault in assuming that different class groups are equally able to perceive and articulate their group interests. Indeed, they demonstrate that for a variety of reasons there is a much greater likelihood of misperception of interests by the working class than by the capitalist class under capitalist relations of production. Thus, differing organizational forms are needed to overcome these specific distortions.

The idea that the legislature balances the claims of business and unions fails to acknowledge that the logic of collective action for unions and business associations is quite different and that the legislative balance is likely to favour business interests.

Lowi describes the working model of interest group liberalism as having three components: (1) organized interests are homogeneous and easy to define; (2) organized interests emerge in every sector of our lives and adequately represent most of those sectors, so that one organized group can be found effectively answering and checking some other organized group as it seeks to prosecute its claims against society; and (3) the role of government is one of insuring access to the most effectively organized, and of ratifying the agreements and adjustments worked out among the competing leaders.[55] However, Lowi claims that it is faulty to assume that groups confront other groups in some kind of a competition. Even where there is a multiplicity of groups, there is no assurance that there will be competition amongst them. Given these faulty assumptions, there is no justification for the view that the particular regime of rights granted by the state is the proper result of a legitimate balancing of the claims of diverse groups.

Furthermore, Dahl notes that what he calls 'democratic pluralism', through its tendency to mutual accommodation, can be a stabilizing force that is highly conservative in the face of demands for innovative structural change. The result is that existing inequalities in wealth and power are reinforced or exacerbated.[56] Furthermore, the unequal resources available to organizations allow them to exert disproportionate influence in determining which issues will be on the public agenda. Some groups are clearly

[55]T. Lowi, *The End of Liberalism*, 2d ed. (New York: W.W.Norton & Co., 1979) at 51.
[56]R. Dahl, *Dilemmas of Pluralist Democracy* (New Haven: Yale University Press, 1982).

much more powerful than others, and some interests are underrepresented, or not represented at all.[57] C. Wright Mills expresses it well when he states:

> "Balance of power" implies equality of power, and equality of power seems wholly fair and even honorable, but in fact what is one man's honorable balance is often another's unfair imbalance. Ascendant groups of course tend readily to proclaim a just balance of power and a true harmony of interest, for they prefer their domination to be uninterrupted and peaceful.[58]

Mellos[59] analyzes the juridical construction of trade unions and corporations as groups with equal rights. The juridical construction treats labour constituted through the form of a trade union as a collective group subject, equal with, but different from capital as a collective group subject.

> The group becomes the collective actor differentiated one from another not by a power disparity or other forms of inequality but simply by the distinguishing feature which constitutes its asset and marks its particular identity. All groups in this ideological sense are equal, as were previously the individuals—equal in the pursuit of their interests, subjects as centers of initiative, singular units of action.[60]

Thus, the Supreme Court's view of the state as the neutral arbiter among competing groups fails to consider both the tendency of the balancing process to support existing inequalities and the varying impact of groups depending on their ability to effectively marshal their resources.

The question is whether there is any alternative to accepting the balance that has been established by the legislature. If one is to accept that judicial review of legislative action has become an inevitable feature of the Canadian political and legal system, then it is not sufficient to assume that the particular balancing achieved by the legislature is necessarily correct. One approach would be to extend the pluralist approach to judicial review. One would justify judicial intervention on the basis of defects in the political process whereby individual interests are aggregated to determine the public interest. The exclusion or underrepresentation of various groups from the process may be remedied by the courts to protect less powerful groups from hostile legislation.[61]

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[57]R.J. Harrison, *Pluralism and Corporatism* (London: George Allen & Unwin, 1980) at 69. See also R.A. Dahl, *A Preface to Economic Democracy* (Berkeley: University of California Press, 1985).

[58]C. Wright Mills, "The Theory of Balance" in E. Malecki & H.R. Mahood, eds, *Group Politics: A New Emphasis* (New York: Charles Scribner & Sons, 1972) 289 at 292.

[59]K. Mellos,"The Group in Pluralist Ideology and Politics" (1986) 10:3 Can. J. of Political and Social Theory 24.

[60]*Ibid.* at 33.

[61]Seidman, *supra*, note 51 at 1013.

Clearly, if the legislative balance involves an interference with fundamental freedoms, the courts may intervene to adjust the balance. When it comes to the specific rights of trade unions, and the right to strike in particular, the analysis is very complex. If the right to engage in collective bargaining is in any way fundamental,[62] as I believe it to be, then one can argue that effective collective bargaining within our labour relations system is impossible if workers do not have the right to stop work collectively. Trade unions cannot exist and function if effective collective bargaining is impossible.[63] If workers are truly free to join together to pursue their economic interests, to deny that the right to strike is fundamental is to deny effective associational practice. The balancing of power can still be controlled in many ways by the placing of reasonable limits on the exercise of the right, the use of picketing, etc.

An often expressed fear is that the right to strike should not be regarded as fundamental because engaging in strikes harms others who are not involved in the conflict, and creates the danger of a group of workers coercing employers, other employees, or the state into arrangements that they would not freely have agreed to. The right of workers to take coercive action against their employers can be justified by the unequal and authoritarian nature of the employment relationship.[64] It is unfortunate that the actions of strikers have an adverse impact on others who are not a party to the strike. But this is no reason to fetter strikes, especially when one considers the harmful consequences of corporate decisions to lay-off workers, close or relocate plants, etc.

It is important to note the implicit fear that guaranteeing a right to strike will create an imbalance of power which favours the trade union. Of course, this assumes that there is a proper balance in the absence of a strike—a view which serves to reinforce structural inequalities. There is a deep ambivalence in the liberal attitude towards the influence exercised by groups. On the one hand, there is the belief that all interests should be represented.

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[62]It is important to note that it is still an open question whether any aspects of collective bargaining are protected by freedom of association. In *P.S.A.C.* v. *R.*, *supra*, note 8 at 453, McIntyre J. stated that his finding that s.2(d) of the *Charter* did not include a constitutional guarantee of a right to strike did not preclude the possibility that other aspects of collective bargaining may receive *Charter* protection under the guarantee of freedom of association. On the facts of the case, however, he held that the limitations on bargaining rights imposed by the federal 6 and 5 wage restraint legislation were not sufficiently intrusive on the bargaining process to amount to a violation of freedom of association. Thus, of the six justices participating in the decision, only three held that there are no *Charter* guarantees in the collective bargaining process.

[63]O. Kahn-Freund & B. Hepple, *Laws Against Strikes* (London: Fabian Society, 1972) at 53.

[64]L.J. MacFarlane, *The Right to Strike* (Harmondsworth, England: Penguin Books, 1981) at 184.

On the other hand, there is the belief that some interests are dangerous and suspect and thus ought to be discounted.[65]

It is not surprising that trade union activity is one of the interests considered dangerous. Fox has detailed a number of reasons why unions are mistakenly seen as exercising an undue degree of power in comparison with employers.[66] First, owners and controllers of resources seldom need to publicly exert more than a small fraction of the power at their disposal. Second, the social institutions, mechanisms and principles which support the power of property owners are themselves seen as legitimate. There is no need to exert power to change the status quo. Labour, however, has to constantly marshal its forces to fight for marginal adjustments.

The myth of union equality or even dominance has obviously played a large role in the decision of the Supreme Court of Canada. It is unfortunate that a more sophisticated analysis of interest group participation and trade union power was not undertaken.

C. Public/Private Distinction

In Western culture we apprehend a great deal of our social world by distinguishing things that are public and things that are private.[67] The characterization of the interests at stake in any particular activity as either public or private is likely to depend on who will be better or worse off for whatever is in question. Classical liberalism emphasized the role of the private agent pursuing private ends as the best means of promoting the public interest. Adam Smith's doctrine of the 'hidden hand' applauded the egoistic pursuit of self-interest through the exchange of commodities.[68] In particular, the act of contracting should ideally be carried out in a realm free from state interference. More recent versions of liberalism emphasize an organic view of the public interest which, in many circumstances, justifies state regulation of private affairs to promote the public interest.[69]

Those liberals who favour more extensive state intervention in private affairs are likely to do so because they believe that the public interest requires a greater equality of wealth and power in society, necessitating vigorous

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[65]S. Benn & G. Gauss, "The Liberal Conception of the Public and the Private" in S. Benn & G. Gauss, eds, *Public and Private in Social Life* (London: Croom Helm, 1983) 31 at 59.

[66]A. Fox, "Industrial Relations: A Social Critique of Pluralist Ideology" in B. Barrett, E. Rhodes & J. Beishon, eds, *Industrial Relations and the Wider Society: Aspects of Interaction* (London: Collier MacMillan, 1975) at 302.

[67]S. Benn & G. Gauss, "The Public and the Private: Concepts and Action" in S. Benn & G. Gauss, *supra*, note 65, 3 at 6.

[68]B. Fine, *Democracy and the Rule of Law* (London: Pluto Press, 1984) at 37.

[69]G. Gauss, "Public and Private Interests in Liberal Political Economy, Old and New" in S. Benn & G. Gauss, *supra*, note 65, 183 at 196.

government redistributions. Those liberals who oppose extensive state intervention in private affairs fear the coercive power of the state. Judicial review of government action is justified as a means of preserving the private sphere.[70]

The maintenance of the public/private distinction rests on and results in a limited view of the nature of equality rights. Equality before the law, rather than equality of social, political and economic status, is likely to be considered a right that can be and is constitutionally guaranteed. A full commitment to the latter status would inevitably lead to a complete breakdown of the public/private distinction. Only by extensive state intervention in the formerly private sphere could the necessary redistribution take place.[71]

Our legal system has demonstrated a bifurcated approach to collective bargaining. Entering into collective agreements is often described as a voluntary process. Although an employer may be required to bargain with a union when the majority of workers desire to be represented by the union, there is no duty to reach an agreement. The collective contract governing terms and conditions of work is a private matter for the parties to decide upon subject to a number of limited exceptions.[72] It is not seen as the proper role of the state to interfere in the contracting process. However, the exercise of power by trade unions is often seen as having a significant public impact. The fear that strikes will unduly harm the economy, lead to spiralling inflation, interfere with the delivery of essential services, endanger health or engender any number of similar deleterious consequences is proffered as justification for extensive government regulation of industrial relations. The public interest is said to demand such intervention.

This intertwining of the public and private aspects of collective bargaining suggests that any attempt to justify regulatory approaches or to justify constitutional interpretation on the basis of categorizing collective bargaining as falling within one sphere or the other is likely to defy rational argument. Nevertheless, McIntyre J. makes such an attempt. He suggests that the overall structure of the *Charter* is not concerned with economic rights.[73] With limited exceptions, the *Charter* addresses the political and democratic rights of individuals. Given that trade unions are primarily,

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[70]Seidman, *supra*, note 51.

[71]See R.K. Winter Jr., "Changing Concepts of Equality: From Equality Before the Law to the Welfare State" [1979] Wash. U. L. Q. 741.

[72]These exceptions normally include a ban on strikes during the term of the collective agreement, the requirement to set up a mechanism for resolution of grievances, and limits imposed by employment standards legislation. In some jurisdictions, a first collective agreement may be imposed in certain limited circumstances and the union may be entitled to have union dues deducted from non-members.

[73]*The Alberta Reference*, *supra*, note 8 at 405.

albeit not exclusively, concerned with promoting the economic interests of their members, it follows in Justice McIntyre's opinion, that there is no protection for the right of the trade unions to engage in strikes.

The concern about entrenching economic rights in the *Charter* is indeed a legitimate one. There is a danger that the constitutionalizing of economic rights could easily put extreme fetters on the regulatory powers of government.[74] Indeed, the movement to entrench property rights in the *Charter* may in part be seen as an attempt by business interests to fetter the regulatory actions of the state. However, it is not clear that there is an equivalence among all kinds of economic rights. The right to pursue a livelihood is one of the exceptions that is partly protected by the mobility rights provisions in section 6 of the *Charter*.

Furthermore, it is possible to characterize workers' interests in employment as encompassing more than economic concerns. Dickson C.J. states in his dissenting opinion that, in determining the importance of the right to strike, one is concerned with interests that go beyond that of a merely pecuniary nature.[75] Employment is an institution through which, in David Beatty's terms, "most of us secure much of our self-respect and self-esteem."[76] Trade unions, by playing a vital role in enabling individuals to participate in ensuring fair wages, health and safety protection and equitable and humane working conditions, are engaged in more than merely pursuing pecuniary goals. Employees' associational activity is of a nature that deserves constitutional protection, according to Dickson C.J.

Collective bargaining is also about more than economic issues and job security. Collective bargaining has, in Paul Weiler's words, a "civilizing impact on the working life and environment of employees."[77] The collective bargaining process is able to modify the exercise of social power within the organization. The reduction of managerial discretion and the subjection of decision-making to external scrutiny limits, in Weiler's view, the abuse of managerial power. The workplace is subjected to the rule of law. This clearly places collective bargaining in a different category than other economic institutional arrangements.

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[74]J.G. Pope, "Labor and the Constitution: From Abolition to Deindustrialization" (1987) 65 Tex. L. Rev. 1071 at 1078, argues that American courts, in the course of avoiding judicial enforcement of economic rights, incorrectly have embraced a theory which reduces labour liberty to the status of an individual's right to sell labour power. This seems to be much the same position as that adopted by our Supreme Court in the context of the right to strike.

[75]*The Alberta Reference, supra,* note 8 at 367.

[76]D. Beatty,"Labour is Not a Commodity" in B.J. Reiter & J. Swan, eds, *Studies in Contract Law* (Toronto: Butterworth's, 1980) 313 at 324.

[77]P. Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 30.

The associational activities of unions can also be seen as a form of political expression that justifies a greater degree of constitutional protection than other forms of economic activity. There are three aspects to this view. First, the pursuit of economic security is primarily a political activity. The importance of security to workers is evident from the diverse array of measures sought to promote this goal. This array includes public pension schemes, unemployment insurance, fiscal policies to promote economic stability, limitations in employment standards legislation on unilateral management decisions, etc. Resort to collective bargaining and the use of strikes is merely another means of promoting the economic security of workers. However, by characterizing this latter route to promoting workers' interests as the exercise of economic power in a labour market, there is a denigration of its political aspect. It then becomes easy to claim that there should be no constitutional protection for such activity. The conclusion, however, rests on a false characterization of the interests and the associational activities in issue.

Strikes are political in a second sense. The right to engage in strikes is a measure of the right of workers to challenge the government as well as employers on a wide range of policies, including governmental limitations on the collective bargaining process. It is evident from the opinions in the right-to-strike trilogy that the Supreme Court justices were not willing to categorize all strikes as having a political component. However, their decision does not rule out the possibility that strikes whose immediate purpose is to challenge the legislative policy of governments must be considered as an aspect of freedom of expression or within the protection of freedom of association for political rather than economic purposes.[78]

Finally, strikes may be considered to be political in the sense that they are a challenge to the existing distribution of wealth and power in society. The solidarity exhibited in the act of striking demonstrates a rejection of the atomistic market as the legitimate means of regulating the sale of labour power. It is a statement that workers share a class consciousness and recognize the ultimate incompatibility of their interests with the unilateral exercise of control by the owners of property. Such an analysis based on class interests does not fit well within any liberal ideology. It is not surprising that the Supreme Court did not venture to consider these political aspects of strikes.

[78]See L. J. MacFarlane, *supra*, note 64 at 196, who argues that the political case for treating the right to strike as a fundamental human right is overriding.

D. State Neutrality

The duty of the state to be neutral as between competing visions of the good life has already been identified as one of the important elements of liberal theory.[79] In giving meaning to the concept of freedom of association, two possible and contradictory definitions have been recognized. The first conceives freedom of association as a right of persons to associate with others of their choice in a non-coercive way. However, no specific protection is given to the actions of the group that is not already given to the individual. In other words, there is no promotion of or protection for specific purposes. This can be labelled the liberal-political conception of freedom of association. The second approach is functional, wherein freedom of association is protected to secure a clearly defined social purpose, which, in the industrial relations context, means the attainment of an equilibrium in bargaining power between employers and workers.[80]

Clearly, it is the former view that informs the approach of the majority of the Supreme Court in the right-to-strike trilogy. Freedom of association is characterized by LeDain J. as particularly important for the exercise of other fundamental freedoms. He states that the freedom to work for the establishment of an association and to participate in its lawful activity is not to be taken for granted.[81]

The rejection of the second approach is consistent with the individualist ideology within which the courts have traditionally framed their approach to rights. It is also consistent with a belief in the duality of political and economic spheres of activity. However, it raises serious problems with respect to the commitment to equality. Indeed, one can see that there is often a fundamental contradiction between the perceived need to control industrial strife and the impetus towards equalization of bargaining power. It is the latter which is subordinated to the former by limitations on the right to strike. The irony is that this is said to be done from a concern for the general public interest. This ultimately leads the state to prefer certain types of activities (productive ones) over others (limiting production as a means of obtaining more preferable terms and conditions of work)—a clear violation of the neutrality norm that it has set for itself.

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[79]See Dworkin, *supra*, note 15 and accompanying text.

[80]F. von Prondzynski, *Freedom of Association and Industrial Relations*, (London: Mansell Publishing, 1987).

[81]*The Alberta Reference*, *supra*, note 8 at 391.

IV. Right to Picket

The ability of unions to exert effective pressure on employers depends to a great extent on the effectiveness of picketing. Picketing is a means of signalling workers that a strike is taking place and of communicating the views of the strikers to the general public. It is a call to solidarity and a request for co-operation by those who are sympathetic to the specific demands of the strikers. The picketers hope that fellow workers will respect the picket line and refuse to work, and that customers of the picketed employer will refuse to do business.

Canadian labour law has extensively regulated the use of picketing. Originally the subject of criminal sanctions as well as civil liability, it is now the subject of extensive statutory regulations. The common law developed a wide variety of actions such as trespass, defamation, nuisance, civil conspiracy and inducing breach of contract in order to control the extent of permissible picketing. The latter tort, in particular, has been used to restrict the scope of picketing to the struck employer, thereby protecting non-struck employers from economic disruption that may be caused by a strike.

These limitations may have a substantial impact on the effectiveness of strikes. An objecting employer can apply to obtain an injunction to prohibit or limit picketing through a very summary procedure in which the courts do not consider the underlying substantive issues in dispute, and in which there is rarely a full-scale trial on the merits. Injunctions can be granted very quickly, diffusing any momentum the union and striking workers might have been able to build up. It is not surprising that the court's response to union picketing is one of the major factors that has fostered the general distrust and disrespect that unionized workers feel for the judicial system.

In a recent decision, the Supreme Court of Canada declared that common law restraints on secondary picketing are not susceptible to *Charter* scrutiny. In *R.W.D.S.U., Local 580* v. *Dolphin Delivery Ltd*[82] the union was on strike against Purolator Courier Limited ["Purolator"]. In the belief that Dolphin Delivery Ltd ["Dolphin"] was allied to Purolator, the union threatened to picket Dolphin. Dolphin immediately applied for a *quia timet* injunction to restrain the threatened picketing. By the time the matter reached the Supreme Court of Canada, the only argument that the union submitted for consideration was that the granting of an injunction infringed its freedom of expression, contrary to section 2(b) of the *Charter*, and that this infringe-

[82][1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, [1987] 1 W.W.R. 577 [hereinafter *Dolphin Delivery* cited to S.C.R.].

ment could not be justified as a reasonable limit imposed by law under section 1.

The Supreme Court decision, written by McIntyre J. and partially or wholly concurred in by the six other justices who heard the case, held that peaceful picketing involves the exercise of freedom of expression.[83] Furthermore, the *Charter* could apply to the common law,[84] albeit in rather narrow circumstances. In particular, it was held that the *Charter* would not apply to private litigation that is completely divorced from any connection with government.[85] Section 32(1) of the *Charter* states that the *Charter* applies to the Parliament and government of Canada and to the legislature and government of each province. "Government" in this context was held to mean the executive branch of government, and not the courts. Since the prohibition of secondary picketing in this case did not, in the Court's view, involve any government action, the *Charter* could not provide any protection.

The *Charter* could apply, however, in those jurisdictions where picketing is controlled by statutory regulation.[86] Nevertheless, the successful invocation of *Charter* rights by trade unions to protect secondary picketing is still unlikely as McIntyre J. indicated in *obiter* that a prohibition on secondary picketing is a reasonable limit on freedom of expression because the social cost of picketing justifies limiting it to the actual parties to the dispute.[87]

There are a number of strands of liberal ideology that can be discerned from an examination of this opinion. First, the importance attached to freedom of expression as a protected value and its link with democratic freedoms is emphasized. Second, the crucial distinction between the private rights of individuals and the world of government action is consistent with the public/private distinction described earlier. There are two aspects to the public/private distinction that are relevant here. The first aspect is whether there are certain types of activities that are private in the sense that the constitution is considered irrelevant in delimiting the scope of permissible action. In other words, there is no constitutional duty imposed on a private actor to refrain from conduct which interferes with the basic liberties of another individual. The second aspect is whether there is a sphere of private activity which the constitution protects from state interference.

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[83] *Ibid.* at 588.
[84] *Ibid.* at 593.
[85] *Ibid.* at 597-603.
[86] *Ibid.* at 603.
[87] *Ibid.* at 590-91.

An extensive commentary has already been produced on the scope of the *Charter* and its applicability to private litigation.[88] This commentary has concentrated on the ambiguities in the *Charter* and there has been considerable diversity of opinion about the appropriate reach of *Charter* guarantees. McIntyre J. purports to engage in an interpretive exercise without providing an extensive theoretical justification for his conclusion that the application of common law rules to purely private litigation need not comply with *Charter* guarantees. He states the liberal view that the courts act as neutral arbiters in disputes between private litigants. Yet he claims that the judicial enforcement of orders which violate freedom of expression or other constitutionally guaranteed liberties does not amount to governmental intervention in private affairs of the type which the *Charter* is intended to limit. The result is that the coercive power of the state is made available to protect the economic well-being of employers as a class, while simultaneously limiting the economic power of trade unions as well as their freedom of expression. One would have expected a neutral arbiter to hold itself bound by extraneously imposed principles found in the *Charter*.

The *obiter* holding that judicial prohibition of secondary picketing is a reasonable limit on the freedom of expression was based on limited evidence about the impact of the picketing. Indeed, given that the picketing had not yet occurred, the Court was authorizing a prior restraint on the freedom of expression. The Court was willing to hold that there was no need for concrete evidence to demonstrate the reasonableness of the restraint, stating that in this case it was self-evident.[89] The economic interests of a business are pitted against the economic interests of the unionized workers, and in this battle the Court holds that the workers' right to freely express their views through picketing must defer to the rights of the business.

This conclusion is reached on the basis of a contractual view of collective bargaining which sees industrial action as justified only to the extent

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[88]*E.g.*, K. Swinton, "Application of the Canadian Charter of Rights and Freedoms" in W. Tarnopolsky & G.A. Beaudoin, eds, *The Canadian Charter of Rights and Freedoms — Commentary* (Toronto: Carswell, 1982) 41; D. Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L. J. 213; Y. de Montigny, "Section 32 and Equality Rights" in A. Bayefski & M. Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 565; J.D. Whyte, "Is the Private Sector Affected by the Charter?" in L. Smith *et al.*, eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 145; G. Otis, "The Charter, Private Action and the Supreme Court" (1987) 19 Ottawa L. Rev. 71; D. Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183; and J. Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of Dolphin Delivery Ltd." (1987) 19 Ottawa L. Rev. 413.

[89]*Dolphin Delivery, supra*, note 82 at 592.

that it is directly exerting pressure on the party with which the union will enter a collective agreement.[90] The contractual nature of relations between employers and unions is a key component of liberal ideology, emphasizing the appropriateness of parties determining for themselves the workplace rules by which they will be bound. Intervention in secondary picketing is justified because it is claimed that the target of the picketing is not in any position to make the concessions that will settle the new contract.[91] Unions are considered to be unjustified in their attempt to put pressure indirectly on the primary employer by forcing others to stop doing business with it.

Although McIntyre J. claims that it is the general social interest which requires the curtailment of secondary picketing, this general social interest is equated with an interest in uninterrupted productivity. When an interruption occurs, it is identified as a social harm that justifies judicial intervention without deference to constitutional guarantees of liberty. There is no attempt by McIntyre J. to engage in the balancing that one would expect under a section 1 analysis. There is no investigation of the adverse effects on trade unions of limiting their exercise of freedom of expression. Rather, there is an assumption that the economic power of unions is already adequate for their needs without allowing them to extend the scope of their picketing. This corresponds with the assumptions made about the balance of power between unions and employers in the right-to-strike trilogy.

V. Political Expenditure of Union Funds

In a historic arbitration award made in 1946, Justice Rand balanced union demands for a union shop against employer opposition to such an arrangement and ordered that the employer deduct union dues from all employees covered by the collective agreement, whether or not they were union members.[92] The Rand Formula was justified on the basis that those who directly received the benefit of trade union representation should be required to pay for it. The formula has been the subject of agreement in many collective agreements since then, and it has been taken beyond the pale of bargaining and instituted as a minimum union right in some jurisdictions.[93] The willingness of the state to extend this protection to trade unions is partly based on the political power of trade unions, on the extent

[90]A limited exception to this principle arises when another employer or business is so closely associated with the struck employer that it can be treated as an ally. Here, it was found in the initial hearing on the application for injunction that Dolphin was not an ally of Purolator, the struck employer.

[91]*Dolphin Delivery*, *supra*, note 82 at 591-92, citing P. Weiler, *supra*, note 77 at 64-65.

[92]*Re an arbitration between Ford Motor Company of Canada Ltd and the U.A.W.* (1946), 46 Lab. Gaz. 123.

[93]See, *e.g.*, *Labour Relations Act*, R.S.O. 1980, c. 228, s.43.

to which the prospects for industrial peace are thereby increased and on the recognition that trade unions play an important public function which requires funding to ensure its effectiveness.

However, the precise role of the trade union comes under close scrutiny when one considers the purposes for which the union spends funds that are collected from individuals who do not choose to become members of the organization. There is a clear conflict between the concept of individual and group rights. That conflict arises when the individual's money is taken away in circumstances amounting to coercion, and then used for purposes with which she or he does not agree. The use of the word coercion here is guarded. There is coercion in the sense that the only alternative that the individual has to paying the required sums is forfeiting his or her job. While in classic contractual theory this may not be sufficient coercion to render a contract void, it is certainly accurate to describe it as a form of economic duress. Nevertheless, there are many things that the citizens of a state are required to do against their wishes. One could argue that the role of industrial citizenship is analogous to political citizenship such that this coercion or duress can be treated as legitimate.

In addressing this issue it is particularly important to delve behind the justification for forced union payments. As already indicated, the role of trade unions in Canadian industrial relations has been the subject of extensive regulation. This regulation crystallized in the late 1940's in the form of legal bargaining rights, controlled strikes and unfair labour practices. The legalization of the industrial relations system was in part an attempt to provide for greater industrial stability, workplace democracy and equality of bargaining power. For unions to be effective in their role, it was seen as important to grant them exclusive bargaining rights. However, this can be regarded as a fair system by the requirement that the union be able to demonstrate that it has the support of a majority of the workers that it represents, and because of the duty imposed on it to fairly represent all those for whom it has bargaining rights. A system of majority rule replicates in the workplace the commitment to representative democracy which is present in wider political forums.

For the union to be effective as the exclusive bargaining agent, it needed financial resources that would allow it to stand up to the employer. Furthermore, any gains made through bargaining are of such a nature that the union could not restrict them merely to those that voluntarily paid for the representational services of the trade union. The terms and conditions of work that were negotiated took on the quality of public goods.[94] Hence, to

[94]M. Olsen, *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1965).

prevent some workers from obtaining a free ride and to increase the bargaining power of trade unions, the compulsory exaction of union dues was seen as justified.

The preceding paragraphs emphasize the collective bargaining role of trade unions. Unions in Canada have long recognized that it is not only through collective bargaining that they can act effectively on behalf of their members. Governments have long conceded that they must play a central role in economic regulation and in determining many aspects of workplace life. Unions have therefore seen it as an inevitable part of their task to influence the governmental process so as to ensure the best possible deal for their members. The methods by which a union might seek to directly influence legislation include testifying before legislative committees, meeting with elected and non-elected governmental officials, influencing public opinion, mobilizing its membership to engage in political activity and providing financial support of political parties or candidates.

Other roles played by trade unions that may be quite important include the promotion of social relations among workers and the establishment of a sense of solidarity among workers generally and with other groups that share many of the same interests as workers in challenging the status quo of political, social and economic inequality. These other goals require the expenditure of funds. Several recent cases have considered the extent to which trade unions can spend compulsorily collected union dues for purposes other than collective bargaining.

In *Re Baldwin and B.C. Government Employees Union*[95] a correctional officer employed by the provincial government challenged the right of the union in which he was not a member (but which represented him and to which he was statutorily required to pay fees) to spend those fees on certain purposes not directly related to collective bargaining. In making the challenge, the petitioner's counsel argued not that the statutory provision requiring the payment of union dues was unconstitutional, but that certain uses of the funds by the union violated the petitioner's *Charter*-guaranteed freedoms. The Court decided that the uses to which the union put funds that it was lawfully entitled to was a purely private matter, not involving governmental action. This distinction between governmental and private action is an important one, particularly in light of the Supreme Court's subsequent holding in *Dolphin Delivery*[96] that *Charter* rights are only applicable to governmental action. By holding that there was no nexus between the government compulsion of the collection of the dues and the ways in

[95](1986), 28 D.L.R. (4th) 301, [1986] 4 W.W.R. 679, 86 C.L.L.C. 14,059 (B.C.S.C.) [hereinafter *Baldwin*].

[96]*Supra*, note 82.

which the union spent those dues, the Court in *Baldwin* was able to avoid dealing with the question of whether individual rights must predominate over the rights of the organization as a whole to engage in political and other types of activities.

In *Lavigne* v. *Ontario Public Service Employees' Union*[97] the Ontario Supreme Court was called to decide a case very similar to *Baldwin*. Mr. Lavigne, a community college teacher, was not a member of the respondent union which represented him in collective bargaining. He was, however, required by the collective agreement between the union and the employer's representative, the Ontario Council of Regents of Applied Arts and Technology, to pay union dues. The governing statute did not require the payment of union dues by non-members, but it did authorize such terms in collective agreements. Mr. Lavigne objected to a variety of expenditures made by the union and by the federated union bodies of which the union was a member and which it financially supported out of its normal funds. The Court held that there was sufficient governmental action to invite *Charter* scrutiny both from the fact that the Council of Regents was a statutorily created body that, by entering into the collective agreement, affected individual rights, and from the statutory authorization for the collective agreement provision.[98] The *Charter* violation was the forced payment of dues, and not merely the union expenditure of these dues. It was on this basis that the *Baldwin* case was distinguished.

In determining that there was a violation of Mr. Lavigne's freedom of association, the Court demonstrated its reliance on many of the liberal tenets described above. Justice White held that, while there had been no violation of Mr. Lavigne's freedom of speech or conscience, his freedom of association had been violated to the extent that he was forced to associate with causes against his wishes.[99] The right not to associate arises from the concept of individual liberty. Even when one is not identified with the cause or the group, there can be a violation of one's freedom of association. The mere fact of financial support is a form of forced association. It harms the individual in a sufficiently serious way that the government should be required to achieve its goal of preventing free riders by a means less intrusive on the individual's freedom. The less intrusive means held to be applicable was the granting of a right to objectors to opt out of paying any portion of the fee that was used for non-collective bargaining purposes.[100]

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[97](1986), 29 D.L.R. (4th) 321, 55 O.R. (2d) 449, 86 C.L.L.C. 14,039 (Ont. S.C.) [hereinafter *Lavigne* cited to D.L.R.]. The decision is on appeal in the Ontario Court of Appeal.

[98]*Ibid.* at 360.

[99]*Ibid.* at 379-80.

[100]*Lavigne* v. *Ontario Public Service Employees' Union (No. 2)* (1987), 41 D.L.R. (4th) 86, 87 C.L.L.C. 14,044 (Ont. S.C.) [hereinafter *Lavigne (No. 2)* cited to D.L.R.]. In this decision, White J. fashioned an appropriate remedy in light of his finding in *Lavigne, supra*, note 97.

The petitioner did not challenge the right of the union to collect dues for collective bargaining purposes. Justice White concluded that the use of compulsory dues for non-collective bargaining purposes violated a basic tenet of Canadian political culture. It is claimed that Canada's political tradition is based on a free and democratic political system which requires the individual exercise of judgement and decision-making. Unions are characterized, in one sense, as being synonymous with certain political and ideological perspectives.[101] The assumption is that the individual exercise of judgement is unacceptably interfered with when a trade union collectively acts to promote the political interests of those it represents. No attempt is made to analyze the role of groups in a democratic system. There is a claim made that unions are different from other service organizations because of the compulsory aspect that arises from the concept of exclusive bargaining agency.

Another important assumption that is made yet not explored in great detail is the divisibility of the collective bargaining and political roles of the trade union. White J. proposed the following test to determine which expenditures are permitted without interfering with the individual's right not to associate: "Is the purpose reasonably related to collective bargaining or is the purpose reasonably related to the administration of the collective agreement?"[102] In applying the test he concluded that union sponsorship of participants (by paying for their lunch) at a conference dealing with social assistance and public expenditures on a domed sports stadium was a political expenditure, as were contributions to disarmament campaigns, contributions to support the amending of laws to permit free choice in abortions, charitable and humanitarian aid to Nicaragua and contributions to political parties. However, the promotion of union solidarity by financially supporting striking British miners and by paying the expenses of Nicaraguan unionists on a tour of Canada were sufficiently related to collective bargaining purposes to withstand constitutional attack.

The idea that one can neatly sever collective bargaining and non-collective bargaining activities into distinct and non-overlapping categories is sustainable only with certain assumptions. These assumptions are that collective bargaining is unaffected by the actions of the government in setting economic and social policies, that any particular institutional configuration in which collective bargaining takes place has no effect on the substantive outcome of bargaining and that the process of collective bargaining itself

[101]It is not clearly indicated what this political or ideological perspective is, although reference is made to the unions' close links with the New Democratic Party [*Lavigne, supra*, note 97 at 379]. It is disputable whether there is such a unitary ideological perspective within the Canadian labour movement.

[102]*Lavigne (No. 2), supra*, note 100 at 109.

does not have any particular political significance. All of these assumptions are questionable.

There is obviously a wide range of governmental policies that are crucial to the substantive outcomes of collective bargaining. These are not limited to regulations which directly control terms and conditions of work such as minimum labour standards or occupational health and safety legislation. General government policy on issues such as the availability of unemployment insurance, daycare, interest levels, money supply and trade policy are of crucial concern to the conduct of collective bargaining. In other words, unions do not necessarily have to take the collective bargaining environment as a given, but may legitimately be interested in helping to create as favourable an environment as possible.

Although political action is extensively connected with collective bargaining, it is not the only issue that presents difficulty of application. The idea that there is a political world that is in some real sense distinct from a non-political world of private affairs itself presents difficulties. The danger is that by dividing the world up in this way we fail to see the essential interrelatedness of public and private-social and political. In fact, the attempt to concretize such distinctions may serve as a smokescreen for the essential role played by the courts in maintaining the conditions necessary for the continuing accumulation of capital in our liberal, democratic and capitalist society. By characterizing certain functions, such as the control of picketing,[103] as a matter of private law, and others, such as the regulation of union expenditures, as essentially a public matter, the courts are able to effectively limit the power of trade unions to challenge the status quo when necessary. By emphasizing individual rights, whether of employers to be free from the effects of a strike to which they are not a party, or of workers' refusal to make financial contributions to causes with which they disagree, unions are fettered in their ability to effectively represent the collective interests of their members.

An approach to the expenditure of union funds which recognized communal values would differ considerably from the liberal approach. Rather than reducing union activity to its instrumental ability to facilitate individual betterment, emphasis would be placed on the workplace as one of the communities within which the individual is situated. The choice to favour unions is seen as the expression of already assumed responsibilities and obligations, responsibilities assumed when one becomes a worker at that particular workplace.[104]

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[103]See *Dolphin Delivery*, *supra*, note 82.

[104]See Cornell, *supra*, note 13 at 1102-03.

VI. Conclusion

The idea that each person is and can be in complete control of his or her individual destiny is a fabrication that does not correlate with the realities of complex relationships in a modern society. Only by developing a theory that gives greater recognition to the role of communal values, the existence of duties, obligations and rights at an organizational level which is smaller than the overwhelming structure of the state, is there the possibility of fully translating into law the reality of the modern condition.

The inclusion of a guarantee of freedom of association in the *Charter* places before the courts the task of interpreting what is clearly an ambiguous concept. In hard constitutional cases such as these, judges will have to justify their decisions with arguments "drawn from the most philosophical reaches of political theory."[105] Judges must "look to the actual political history of [their] community as a check on the answer that seems right to [them] from the point of view of justice."[106] The decisions on the right to strike, the right to picket and the right of unions to spend their funds on non-collective bargaining purposes demonstrate the extent to which judges are wedded to a particular political philosophy. However, they fail to demonstrate either the depth of argument or a sensitivity to the political history of the Canadian community that such decision-making requires.

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[105]R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 380.

[106]J. Abramson, "Ronald Dworkin and the Convergence of Law and Political Philosophy" (1987) 65 Tex. L. Rev. 1201 at 1221.