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**Abstract**
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# LABOURING OUTSIDE THE CHARTER©

BY DAVID M. BEATTY*

In this essay, Professor Beatty reviews the leading *Charter* cases decided by the Supreme Court of Canada which consider the constitutionality of a variety of different labour laws. In reasoning and result, he finds that by and large these cases provide strong support for those legal scholars who are generally sceptical of the law and critical of the courts and who predicted that, even with the *Charter*, it was unlikely the Court would change the antipathy judges have historically displayed to the interests of workers and their associations. However, while these legal theorists may draw some comfort from these decisions in confirming their powers of prognostication, Professor Beatty concludes that the workers who were adversely affected by them can take little solace in being left out in the cold.

Even before the *Charter of Rights*[1] was entrenched in the Canadian Constitution in April of 1982, a vigorous debate had begun, among both lawyers and politicians, about the desirability of inserting a process of constitutional review into our system of government. Especially among those on the political and legal left, there was an acute awareness that, however alluring the idea of human rights, constitutionalizing their protection in a written bill of rights would necessarily and unavoidably enhance the power of the judiciary relative to the other two, elected branches of government and that caused them considerable concern.

Nowhere was this disquiet more deeply felt than among those individuals familiar with how judges and the courts had treated disadvantaged members of society and, in particular, members of the working class. In a word, the courts' treatment of the interests of

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

workers since the Industrial Revolution and, indeed, even before is deplorable.[2] The history of Anglo-Canadian common law of employment (of "masters" and their "servants" as it was once called) is one of crude design and overt manipulation of legal doctrine – of property, tort, contract, and crime – to disempower workers as individuals and as a group. Vague and arbitrary legal categories, like conspiracy, intimidation, inducing breach of contractual relations, and secondary action, were manufactured by judges out of whole cloth to render unlawful the most important tools workers had – unions, strikes, boycotts, picketing, *et cetera* – to make their voices heard. Other judicial creations, such as the fellow-servant rule or rules of termination and employment security, made workers materially even more vulnerable.

On the basis of their knowledge of the history of the rules of labour law that had been developed and applied by the courts, highly respected legal scholars argued that workers and trade unions in Canada should not put their faith in the *Charter* and the process of constitutional review.[3] In their view, nothing in the nature of the

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[2] Descriptions of how the courts have developed the common law rules of employment over the course of the past century and a half abound and are uniform in their depiction of how this body of law has consistently favoured the interests of the employer and commercial classes. See, for example, H.W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can. Bar Rev. 786; H.W. Arthurs, D.D. Carter & H.J. Glasbeek, *Labour Law and Industrial Relations in Canada* (Toronto: Butterworths, 1984); D.M. Beatty, "Labour is Not a Commodity" in B. Reiter & J. Swan, eds, *Studies in Contract Law* (Toronto: Butterworths, 1980) 313; I. Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980); I. Christie, *The Liability of Strikers in the Law of Torts: A Comparative Study of the Law in England and Canada* (Kingston: Industrial Relations Centre, Queen's University, 1967); and H.J. Glasbeek, "Voluntarism, Liberalism and Grievance Arbitration: Holy Grail, Romance, and Real Life" and E. Tucker, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" in G. England, ed., *Essays in Labour Relations Law* (Toronto: CCH Canadian, 1986) 57 and 219. And see, generally, K. Wedderburn, *The Worker and the Law* (Middlesex: Penguin, 1965) and O. Kahn-Freund, *Labour and the Law* (London: Stevens & Sons, 1972).

[3] See, for example, H.W. Arthurs, "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter" and J.A. Fudge, "Labour, The New Constitution and Old Style Liberalism" in *Labour Law Under the Charter* (Kingston: Queen's Law Journal & Industrial Relations Centre, 1988) 17 and 61; J.C. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1990) 445; H.J. Glasbeek, "Contempt for Workers" (1990) 28 Osgoode Hall L.J. 1 and "Workers of the World Avoid the *Charter of Rights*" (April 1987) 21 Can. Dimensions 12; R.A. Hasson, "What's Your Favourite Right? The *Charter* and Income Maintenance

*Charter* was likely to alter the behaviour or class bias of the courts. Their recommendation was that workers and their unions should deliberately refrain from using the *Charter* whenever it was possible to do so and concentrate their energies on urging reform in the legislative and political arenas. Their preferred legal strategy was to suffocate the *Charter* with silence and neglect.

The suggested course of action of ignoring and marginalizing the impact of the *Charter* was not, however, to come to pass. At least not overnight. Rather, in several cases, individual workers, their dependants, and their unions rejected the caution which these pundits had preached and mounted challenges against the constitutionality of a number of laws which, in their view, offended their constitutional guarantees. Complaints were filed against laws restricting the freedom of different groups of workers to strike, picket, engage in various forms of political activity, and work beyond arbitrarily imposed mandatory retirement dates. As well, unions and their supporters were drawn into constitutional discourse defending laws which protected their interests against attacks by individuals and groups who were generally cool if not hostile to the organized labour movement.[4]

Although it has turned out that those who were generally suspicious of judges and procedures like constitutional review have not been able to witness the immediate decline, let alone the demise, in the involvement of judges in our system of government which they had hoped would transpire, there are certain features of the courts' record from which sceptics and critics can draw a certain amount of satisfaction. For one thing, the judgments concerning the application of the *Charter* to the rules of labour and employment law vindicate their claims about the tendency of the courts to

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Legislation" (1989) 5 J. L. & Soc. Pol'y 1; M. MacNeil, "Courts and Liberal Ideology: An Analysis of the Application of the *Charter* to Some Labour Law Issues" (1989) 34 McGill L.J. 87; T.G. Ison, "The Sovereignty of the Judiciary" (1986) 27 C. de D. 501; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); A. Petter, "Immaculate Deception: The *Charter's* Hidden Agenda" (1987) 45 Advocate 857; A. Petter & A.C. Hutchinson, "Rights in Conflict: The Dilemma of *Charter* Legitimacy" (1989) 23 U.B.C. L. Rev. 531; and P.C. Weiler, "The *Charter* at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117.

[4] Most, if not all, of the early labour cases involving the *Charter* are catalogued in Weiler, *ibid.* at 191-212.

manipulate legal doctrine and cases to the detriment of workers and their dependants. Just as the sceptics predicted, the Supreme Court of Canada's *Charter* decisions on labour and employment law read as the latest chapter in an uninterrupted tale, whose beginnings reach back to the Industrial Revolution and even earlier times. A close reading of the *Charter* decisions which the Supreme Court has authored shows precisely the same bias against the interests of workers and their unions that plagued the common law rules of tort and crime employed by the judges to control the behaviour of the working class throughout most of the nineteenth and first half of the twentieth centuries.

Analytically, the quality of the reasoning used by the members of the Supreme Court of Canada to support their *Charter* judgments is just as flawed as that which impugned their earlier common law rulings, or perhaps even worse. In each case in which it dismissed a complaint that some part of our labour law was constitutionally impaired, the Supreme Court committed errors of logic, interpretation, and doctrinal analysis of the most basic and crudest form. Similar to the mistakes infecting the earlier common law rules governing dismissal, accidents, strikes, picketing, *et cetera*, the Court's *Charter* decisions on employment law provide an equally legitimate basis on which critics can continue to challenge the objectivity of the law and the integrity of the courts.

The first case the Court heard challenging the constitutionality of a rule of labour law was *Dolphin Delivery*,[5] a case almost certainly destined to become as infamous as the much maligned decision of the U.S. Supreme Court in *Lochner* v. *N.Y.*[6] *Dolphin Delivery* has been condemned in virtually all quarters and stands, without question, as the most criticized judgment the Supreme Court has issued on the *Charter*.[7] At issue was a common

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[5] *R.W.D.S.U.* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*].

[6] 198 U.S. 45 (1905).

[7] Many of these critiques are collected in D.M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990) c. 4, n. 60 [hereinafter *Talking Heads and the Supremes*]. See Weiler's discussion of the case, *supra*, note 3. Incredibly, in their judgment in the mandatory retirement cases, the majority reaffirmed the Court's decision in *Dolphin Delivery* without even referring to the deluge of criticism which *Dolphin Delivery* has attracted. Although recognizing and attempting to respond to some of

law rule restricting the freedom of workers to engage in picketing activity. Although everyone on the Court, except Jean Beetz, was prepared to accept the idea that picketing was a protected form of expression within section 2(b) of the *Charter*, the judges unanimously dismissed the picketers' claim on the ground that the common law rules which governed their relations with the company did not fall within the reach of the *Charter* or their own powers of review.

Even without reading a word of the judgment the Court wrote to justify this sweeping restriction on the scope of the *Charter*, a moment's reflection should make clear the central defect on which it is based. Logically, (or structurally)[8] the decision in *Dolphin Delivery* cannot stand because it turns the entire organization of our system of government, and the place of the Constitution, on its head. In putting the judge-made rules of contracts, property, tort, *et cetera*, beyond the reach of the *Charter* whenever they regulate the behaviour of two or more individuals or groups, the Court disregarded the principle of constitutional supremacy enshrined in section 52 of the *Charter*. It elevated its own rules to a position above and beyond the Constitution itself. It reversed the hierarchy that logically exists between constitutions and ordinary, subordinate law and, in so doing, licensed the judges and the third branch of government to exercise their legal authority free of any constitutional constraints.

Legally, the judgment is grounded on an equally egregious mistake. As Brian Slattery was quick to point out, the distinction which the Court tried to draw between its own rules of common law and the law (statutes, regulations) initiated by the other two branches of government, cannot withstand the most basic legal analysis.[9] The legal authority the courts exercise whenever they

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these critiques in her dissent, Bertha Wilson avoided responding to the structural, logical argument described in the paragraph. See *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

[8] The characterization of "logical" arguments as "structural" in nature is made by P. Bobbitt in "Methods of Constitutional Argument" (1989) 23 U.B.C. L. Rev. 449 [hereinafter *Constitutional Argument*]. See P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982).

[9] B. Slattery, "The *Charter's* Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L.J. 905.

apply principles of common law to resolve a dispute between different individuals or interests in the community has exactly the same grounding as that which is exercised by any agent or arm of the state. Like any administrative agency or government official, the power of the courts to effect legal relations by common law principles is itself grounded in statutes. As Slattery explained, the federal Parliament and every provincial legislature has, either at the time of confederation or subsequently upon its joining Canada, adopted acts of incorporation, making authoritative the common law rules which were then in existence. Common law principles, in short, are no different from the rules applied by any arm or branch of the state. They are grounded in statutes, draw their legitimacy from the legislative branch and are, therefore, equally within and subordinate to the principle of constitutional supremacy.[10]

Nothing in *Dolphin Delivery* (or in its more recent ruling on the constitutionality of rules of mandatory retirement)[11] can repair these fundamental logical and legal failings. Reduced to its essentials, the Court put forward two different arguments to support its position, neither of which can withstand scrutiny. First, the judges made a textual argument based on section 32. According to William McIntyre, who wrote this judgment for the Court (and Gerard La Forest who repeated the argument in *McKinney*), the words of section 32 make it clear that it was the intention of those who entrenched the *Charter* that it was only to apply to the

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[10] The glaring inconsistency in drawing a line between statutory and common law rules of any kind is manifested in the Court's decisions in *Dolphin Delivery* and *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*]. As a result of the decisions the Court handed down in these two cases, people whose dismissal is governed by the common law rules of termination will receive no protection from the *Charter*, while those whose termination must conform to standards of just cause will be able to insist those standards themselves met the principles of review which the *Charter* contains.

Both the majority and dissenting judgments in the mandatory retirement cases clearly recognized the relevance of their decision in *Slaight Communications* to their ruling in *McKinney, supra,* note 7 and both discussed it at length. Neither, however, addressed the inconsistency in treatment between judicial and administrative tribunals, although Bertha Wilson's discussion of the academic comment on *Dolphin Delivery* indicates she was aware of it. Nor did any of the judges recognize the inconsistency of grounding their right to review arbitral rulings on the basis that arbitrators derive all their powers from statutes, while ignoring the legislative base of their own legal authority.

[11] In *McKinney, supra,* note 7, the Court reaffirmed its ruling in *Dolphin Delivery* that the *Charter* has no application to "private" law.

executive and legislative branches of government and not to the courts. In effect, McIntyre argued, the reach of the *Charter* was dependent upon and varied with the person or persons seeking to have any given law enforced.

Now, we have already seen how this argument ignores or avoids the historical fact that all common law in Canada is itself grounded in acts of all of the legislatures and so, on that ground alone, falls within the *Charter*'s reach. In addition, however, in reading the Court's judgment, it can also be seen that, in advancing this proposition, the Court abandoned the interpretive method it had consistently endorsed in all of its most important decisions leading up to its judgment in this case. Essentially, rather than read the word "government" in section 32 liberally, in accordance with its conventional meaning[12] and in light of the larger objectives of the *Charter*, the Court chose the definition which it claimed was held by those who were legally responsible for the actual entrenchment of the *Charter* in 1982.

Although, at first blush, it might seem that giving effect to the intention of those who were most involved with adding the process of constitutional review to our system of government is the most natural and appropriate approach to take, nothing could be further from the truth. Both empirically and theoretically, there are enormous problems in relying on the intention of the "framers" of a constitution to give meaning to the words in its text.[13] To all of these difficulties, the Court was completely oblivious. For example, there was no evidence as to what the intention of those provincial and federal legislators who adopted the *Charter* actually was with

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[12] Both lawyers and political scientists recognize that when it is written in the lower case, "government" in modern, liberal-democratic states embraces the judiciary as the third branch. See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 1 and D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 195. Even read literally, the text of section 32 supports the interpretation of the word government to include the judicial as well as the executive branch of government. As Dale Gibson has stressed, the use of the lower case, rather than capitalizing the "G" in governments, is strong support for the wider definition.

[13] See *Talking Heads and the Supremes*, *supra*, note 7 at 19-22.

respect to its application to the rules of common law.[14] Nor was there any reference to the theoretical difficulties of using intention as a dictionary, so to speak, for constitutional texts. The Court simply asserted that the *Charter* was not intended to apply to private disputes based on common law rules developed by the courts and so could be of no assistance to the picketers in the instant case.

The second reason McIntyre (and again La Forest for the majority in *McKinney*) gave to justify his decision in *Dolphin Delivery* that the *Charter* had no application to private litigation based on principles of common law was essentially a prudential one.[15] In his opinion, the Court and the process of constitutional review was not well-suited to resolve cases of this kind. According to McIntyre, these kinds of disputes are better handled by human rights tribunals and other agencies dealing with similar sorts of complaints. In support of this position, McIntyre was able to call on the writings of several academic commentators who seemed to have endorsed a similar line of argument.[16]

Regardless of the pragmatic appeal and academic pedigree such a line of analysis may enjoy, it remains fundamentally flawed. In reasoning this way, the Court embraced an analytical method I like to call the technique of "avoidance."[17] Essentially, the method involves the Court focusing on a set of ideas or facts which simply are not relevant to a challenger's claim.

The mistake the Court made in referring to human rights codes as an alternative source of relief in cases of this kind was in thinking that the two processes are, to some extent, substitutes for each other. The reality, of course, is that human rights codes and

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[14] Incredibly, in his judgment in *McKinney*, *supra*, note 7, Gerard La Forest explicitly acknowledged that there is no evidence available which would suggest what reason the framers of the Constitution would have had for excluding the judicial branch from the *Charter*. For her part, the only evidence Bertha Wilson was able to elicit about the framers' intent was a reference to the testimony given by one bureaucrat, a Mr. J. Jordan, at the time, senior counsel, Public Law, Department of Justice.

[15] Again, the terminology is borrowed from Bobbitt. See *Constitutional Argument*, *supra*, note 8.

[16] *Dolphin Delivery*, *supra*, note 5 at 191-93.

[17] *Talking Heads and the Supremes*, *supra*, note 7 at 88*ff*.

the *Charter* operate at two very different levels in our legal system.[18] Human rights codes regulate the physical behaviour of individuals towards their fellow citizens, in their homes, at work, and at play. The *Charter*, by contrast, regulates the content and quality of the law used by the state to co-ordinate those affairs including, as the Court itself recognized, the human rights codes themselves.

The fact that human rights codes have been enacted to regulate certain aspects of private relations in a community provides no reason why other laws and rules that govern how each of us must interact with others in the community (including the common law rules of contract, property, and, in the case of *Dolphin Delivery*, tort) should be immune from the process of judicial review and elevated to a status beyond or above the principle of constitutional supremacy. There simply is no logical connection between the idea that we already have human rights codes to control how each of us must treat others in various situations in our daily affairs and a ruling that other aspects of the *law* we use to co-ordinate personal relations in the community do not have to conform to the principle of constitutional supremacy. To press the connection, as the Court does, is to commit a logical error — known to logicians and lawyers as a *non sequitur* — of the most basic and glaring kind. It simply does not follow from the assumption that the *Charter* is not meant to control the behaviour of individuals in their private lives that there is a body of rules devised by the third branch of government that stands above, or at least alongside, the Constitution. Paralleling its impact on foreign governments and the laws they enact, the *Charter* will also affect the private affairs of individuals and groups whenever they rely on a body of rules that limits the entitlements the Constitution guarantees.[19]

Although *Dolphin Delivery* certainly is the most notorious judgment the Court has issued to date, it is not so qualitatively

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[18] This eventually was recognized in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

[19] Because of the Court's confusion of the different roles that are played by constitutions and human rights laws, there is a belief that applying the *Charter* to the common law will overwhelm the courts and strangle freedom in the country. The reality is that the *Charter* only governs the rules of tort, contracts, *et cetera*, devised by the courts and not the behaviour of private individuals themselves.

different from its other labour decisions. In all three cases in the *Labour Trilogy*[20] and more recently again in *P.I.P.S.*,[21] the Court can be shown to be guilty of precisely the same kinds of logical, interpretive, doctrinal, and analytical mistakes which plague its decision in *Dolphin Delivery*. These decisions manifest the same kind of structural or logical failing as the one which undermines the legitimacy of its decision in *Dolphin Delivery*. In the *Labour Trilogy* and in *P.I.P.S.*, the Court narrowed the reach of the *Charter* even further than the restrictions established in *Dolphin Delivery* by excluding any law bearing on the freedom of workers to strike and bargain collectively from the protection of section 2(d) of the *Charter* and the process of constitutional review. Like the common law rules governing picketing by and of private individuals, this body of law – regulating the most fundamental activities engaged in by workers to maintain some control over the most basic aspects of their daily lives – was put beyond the reach of the *Charter* and the requirement of judicial review. In the same way *Dolphin Delivery* reversed the hierarchy that exists between a constitution and ordinary common law, in these cases, the Court elevated the most important parts of the legal regime we use to regulate relations in the workplace to a position above, or at least, alongside the Constitution itself. In these cases, as in *Dolphin Delivery*, the Court once again ignored and, in the end, contravened the principle of constitutional supremacy in section 52.

In fact, in these cases, the Court compounded its mistake because, in "reasoning" this way, it held constitutional a set of laws which, as the dissenting opinions clearly caution, needlessly and gratuitously restricted the freedom of a large number of workers to act in ways (selecting a union, engaging in a strike) most likely to give them some influence in the decision-making processes in the enterprises in which they toil. In the *Labour Trilogy*, the Court affirmed the constitutional validity of half a dozen labour laws

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[20] *Reference Re Alberta Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *P.S.A.C.* v. *Canada*, [1987] 1 S.C.R. 424 [hereinafter *P.S.A.C.*]; *R.W.D.S.U.* v. *Saskatchewan*, [1987] 1 S.C.R. 460.

[21] *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 [hereinafter *P.I.P.S.*].

prohibiting, to varying degrees, different groups of workers from being able to strike and to engage in collective bargaining, even though it could be shown that the proscriptions were drawn more broadly than was required to accomplish the purposes of the acts. For example, in *Reference Re Alberta Public Service Employee Relations Act*,[22] the majority ruled that a law passed by the Alberta Legislature, prohibiting strikes by *all* public servants in order to ensure uninterrupted provision of essential services affecting lives, health, and safety in the community, was constitutional even though it applied to many people who did not perform emergency services of that kind. Similarly, in the *P.S.A.C.*[23] case, a law limiting the freedom of federal public servants to strike and to engage in collective bargaining, passed as part of that government's attempt to bring an inflationary economy under control, was judged to be constitutional even though it restricted the freedom of these workers to strike and to bargain collectively with respect to important matters (like arbitration, seniority, or management rights) which had nothing to do with wages or compensation of any kind. In both decisions, the freedom of large numbers of workers was needlessly compromised.[24] Laws drafted much too broadly, with restrictions much wider than required to accomplish the Government's objectives, were allowed to stand. If the laws had been more carefully drawn, the freedom of non-essential workers in Alberta and all federal public servants could have been shown greater respect without doing any violence to the objectives each of those governments was pursuing.

In *P.I.P.S.*, the Court ruled that the labour relations statute governing the working lives of public servants in the Northwest Territories was constitutional, even though it imposed unprecedented

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[22] *Supra*, note 20.

[23] *Supra*, note 20.

[24] Note that this was also the effect of the Court's decision in *McKinney*, *supra*, note 7 and the related mandatory retirement cases. Here, the Court upheld rules of termination which were blatantly discriminatory – both to the elderly and women – even though there was evidence before it to suggest that, in other jurisdictions in Canada and throughout the United States, the objectives which underlie these rules (faculty renewal, academic excellence, protection of pension plans) could be accomplished with alternate rules and procedures which were not as discriminatory.

restrictions on the freedom of workers to bargain through unions of their own choosing. Despite the fact that this piece of legislation limited the freedom that other public servants and private employees enjoy all across the country, the Court ruled that it was constitutionally valid. Without requiring the Government of the Northwest Territories to show why it did not adopt or adapt one of the standard certification procedures prevailing in all other collective bargaining statutes which allow workers much more freedom in choosing and changing their unions, the Court ruled it was perfectly constitutional for the government to design a system in which it retained final authority over which bargaining agent any group of employees could use.

Like its decision in *Dolphin Delivery*, the Court offered nothing in any of these judgments which addresses, let alone responds to, the structural and logical failings which impugn their legitimacy. Instead, it invoked the same kind of interpretive, analytical, and doctrinal arguments which proved to be so wanting in *Dolphin Delivery*. Thus, in the *Labour Trilogy*, the majority of the Court opted for a minimalist construction of section 2(d) which is the antithesis of the conventional (purposeful) approach used in the interpretation of constitutional texts. It simply assumed that the narrowest range of activities related to the organization and objectives of an association was the exhaustive definition of the text. No explanation was offered as to why the words "freedom of association" should not be defined in terms of the larger purposes which the *Charter* was meant to serve, like any other constitutional guarantee, even though this was precisely the approach followed by the two dissenting judges, Brian Dickson and Bertha Wilson.

In addition to grounding its decision in the *Labour Trilogy* on an interpretation of the language of the *Charter*, which is quite out of keeping with the constitutional stature of its text, the interpretive approach relied on by the majority was quite inconsistent with the analytical structure which the Court has repeatedly stressed is implicit in the *Charter* itself. As described in the landmark case of *R.* v. *Oakes*,[25] the process of constitutional review can be divided into two phases which, as the Court has emphasized, are completely

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[25] [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

separate and analytically quite distinct. In the first stage, the person challenging a law tries to persuade the court that one of their rights and freedoms guaranteed by the *Charter* (religion, association, equality, *et cetera*) has been infringed in some way. To accomplish this, the challengers have to establish two separate things. First, they have to show that the interest or activity which they have asked the court to protect is one which falls within one of the rights and freedoms guaranteed by the *Charter.* It is at this point in the proceedings that interpretive questions about what interests and activities are protected by the *Charter* would be answered. Second, assuming they have successfully surmounted the interpretive hurdle, the challengers would also have to prove that the law they were challenging really did constrain people in the ways that they claimed. They would have to prove, as a matter of fact, that their constitutional freedom had been burdened by the law they attacked.

In contrast with the rules governing ordinary debates, the second stage of the review process is not automatic. It is only undertaken where the person complaining about a law is able to satisfy the court of the validity of both the legal (interpretive) and factual bases of their claims. If the complainants fail in either of these tasks, their case will be dismissed and there would be no occasion for the court to proceed to the second stage. Where, however, it can be shown that the challenged law does limit an interest or activity which falls within one of the guaranteed rights or freedoms, the court embarks on the second, "justificatory" stage of the review process. In this phase of the debate, it is the government's turn to talk. Using the principles the Court summarized in *Oakes*, those defending the constitutionality of a law endeavour to show that it is the kind of rule or regulation that can be demonstrably justified in a free and democratic society, even though it limits the rights and freedoms of some of its members. Like the burden which challengers must bear, there are two distinct issues a government must address if it is successfully to defend the constitutionality of a challenged law. Not only must it establish the importance of the public interest which a challenged law was expected to promote, but it must also justify the integrity of its particular approach – its means – as well. A government has to explain both the advantages of the social policies it has chosen to enact into law and why there were no other alternative means

available which would have impinged less on people's constitutional freedom.

In the *Labour Trilogy*, the Court paid no heed to this structure or framework of analysis. Essentially, it collapsed the two phases of the review process by considering, and ultimately being very deferential to, the public interest promoted by the laws under review in the first interpretive stage of its analysis. Contrary to its own admonitions that the two phases of the review process are analytically distinct and must be kept separate and apart, the Court adopted a very deferential posture in the first phase of the review process in defining what interests and activities were protected by the *Charter's* guarantee of freedom of association. The Court's explanation for why none of the challengers' constitutional rights had been violated was short and to the point. Strikes and collective bargaining were said to be activities that were notoriously subject to balancing and compromise and on which the elected branches of government had a good deal more expertise than the Court. Labour relations, said Gerald Le Dain, was a subject on which the judges were not comparatively well equipped to review the merits of social policy and they should therefore defer on these issues to the legislature. Based on this assessment of its own relative lack of expertise, the Court interpreted the words "freedom of association" in a way to provide no protection to one of the most fundamental activities by which individuals can maintain some measure of control over their working lives.

Defining which interests and activities are protected by the *Charter* by examining and weighing the public interest that is promoted by challenged law is not a legitimate method of approaching the *Charter* for a variety of different reasons.[26] As an interpretive device it again turns on its head the hierarchical relationship which exists between constitutional and statutory instruments. Rather than using the *Charter* to evaluate the content of ordinary law, the latter is used to give meaning to the Constitution. As well, reasoning in this way reverses how the burden of proof in *Charter* cases must be assigned. It results in the complainant, rather than the government, having to establish how

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[26] The full argument is set out in *Talking Heads and the Supremes*, *supra*, note 7 at *99ff.*

the competing interests affected by the challenged law should be weighted. Indeed, it was precisely by failing to see the fundamental difference in the purpose of the two stages of the review process that the Court was led, in the *Labour Trilogy,* to hold constitutional laws which restricted people's freedom quite unnecessarily.

In the *P.I.P.S.* decision, those forming the majority of the Court relied on very similar lines of argument. For the most part, these members of the Court felt the challenge they had been asked to adjudicate could be resolved by a simple doctrinal argument.[27] In their view, the challenge to section 42(1)(b) of the Northwest Territories' *Public Service Act*[28] was governed by its earlier decision in the *Labour Trilogy.* According to the majority in *P.I.P.S.*, in the *Labour Trilogy*, the Court had ruled that not only did strike activity not fall within the protection of section 2(d), neither did any other aspect of collective bargaining. Although, as the dissenting judgment of Peter Cory makes clear, this is a fair reading of the judgment Gerald Le Dain wrote for himself and two other judges in the *Labour Trilogy.* It is equally clear that such a reading cannot be given to the concurring reasons of William McIntyre which were crucial to the outcome of those cases. As Cory correctly points out, in the *P.S.A.C.* case, which formed part of the *Labour Trilogy*, William McIntyre expressly disassociated himself from this view and said explicitly that he was leaving open the possibility that other aspects of collective bargaining — in addition to strikes — might receive *Charter* protection under the guarantee in section 2(d).

As well as misusing a doctrinal argument by citing a case as authority for a proposition for which it cannot stand, each of the opinions authored by the judges who formed the majority on the Court relied on one or other of the methods of reasoning that were invoked in *Dolphin Delivery* and the *Labour Trilogy* and, as we have already seen, are flawed in some very basic way. The central opinion written by John Sopinka is a classic example of the strategy of avoidance which we saw was so central to the Court's decision in *Dolphin Delivery.* Here, while repeating again and again that the law in question had no impact on the existence of P.I.P.S. as an

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[27] See *Constitutional Argument, supra,* note 8.

[28] R.S.N.W.T. 1974, c. P-13.

association and that no person had actually been prohibited from joining that organization, Sopinka simply ignored the essence of the challenger's claim which, as noted by the minority, was that the law made it virtually impossible for P.I.P.S. to maintain the membership of those individuals whose employment had been transferred from the federal government to that of the Northwest Territories.[29] As the dissent pointed out, whatever the law still permitted individual workers to do, it put tremendous pressure on them to belong to one particular union and made it practically impossible for them to ever change their situation.

In addition to failing to address the central complaint that the challengers had with the way in which the Northwest Territories' law interfered with their association, the judgments of John Sopinka and Brian Dickson suffered from a logical and structural failure. Both of these judges, as well as La Forest and L'Heureux-Dubé who concurred, thought persuasive the argument that, because it was conceded that the Government of the Northwest Territories was under no duty to enact any scheme of collective bargaining for its own employees, it "logically" followed that whatever limitations the law contained could not attract review under section 2(d). As Dickson wrote, "If s. 2(d) does not guarantee the right to bargain collectively, I fail to understand how it can guarantee a right to any particular bargaining agent."[30]

The answer, of course, is that, on the model of review envisaged in *Oakes*, the central focus of the judicial process is on the means which a government employs when it chooses to act, not on what any government's agenda ought to be. As the entire record of the Supreme Court's performance makes abundantly clear, means, not ends, are what the *Charter* and the process of review are all about. Other than one early and isolated exception,[31] the Court has never imposed any restrictions on what objectives a government may,

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[29] Although Sopinka makes reference to the fact that there is no evidence that any of the employees who were affected by the transfer of their employment from the federal to the Northwest Territories government still wished to be represented by P.I.P.S., he fails to see, in this fact, the very powerful (and coercive) influence the challenged law exerted on their freedom to associate in organizations of their own choosing.

[30] *P.I.P.S., supra,* note 21 at 5.

[31] *A.G. Quebec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66.

let alone must, pursue. Conversely, on *every* occasion the Court struck down a law as violating a constitutional guarantee, it was because it was satisfied that alternative policies – alternative means – existed which would have allowed a government to accomplish its objectives, but would have limited human freedom and the rights in the *Charter* even less.[32]

On this very clear orientation of all of the Court's decisions over the first six years it has worked with the *Charter*, the logic should have been clear that it is precisely when government decides to take action that the Court's powers of review can be invoked. Rather than being illogical, it is the very essence of a process of constitutional review that the Court must be scrupulously vigilant in guaranteeing "the unremitting protection of human rights"[33] in every case in which lawmakers have decided to exercise their legal authority and to infuse one particular social policy with the coercive authority of law. Although there is still some controversy over whether the Court has the power to tell a government when it must act, there should be no doubt that whenever a government does exercise the legal powers of the state, the process of review may be engaged.

The Supreme Court's general antipathy to the interests of workers in the two other cases in which it rejected *Charter* challenges they have initiated is manifested slightly differently, but no less dramatically than in the cases we have just reviewed. In contrast with its treatment of strikes, picketing, and collective bargaining in general, the Court's judgments in *Reference Re Workers' Compensation Act, 1983 (Nfld.)*[34] and *B.C.G.E.U.* v. *A.G. British Columbia*[35] are not, for the most part, marked by or predicated on the analytical errors and leaps of logic which make so clear the Court's true allegiances. However, in both decisions, all of the judges make very plain, quite openly and directly, that they rank

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[32] See *Talking Heads and the Supremes, supra*, note 7 at 112-19.

[33] *Hunter* v. *Southam*, [1984] 2 S.C.R. 145 at 155.

[34] [1989] 1 S.C.R. 922 [hereinafter *Workers' Compensation Reference*].

[35] [1988] 2 S.C.R. 214 [hereinafter *B.C.G.E.U.*].

the property, contracts, and related interests of various members of the community far ahead of the interests of the working class.

In the *Workers' Compensation Reference*, at stake was a section, common to all workers' compensation legislation across the country, denying workers and their dependants the opportunity to sue their employers for injuries they suffered as a result of the negligence of the employer, no matter how grievous the injury nor deficient the behaviour. In two sentences, the Court dismissed the challenge on the ground that workers could not fit within the protected grounds of discrimination set out in section 15 as that section had been interpreted in its earlier decision in *Andrews*.[36]

By basing its judgment on its earlier ruling in *Andrews*, the Court made it as clear as it possibly could how little it thought the interests of workers are worth. Leaving aside the very serious interpretive error committed by the Court in *Andrews* in rejecting the "similarly situated" test,[37] the contrast between the results of the two cases provides critics with extraordinarily strong evidence supporting their claim of a consistent, anti-worker bias in the courts. In *Andrews*, the successful challengers were non-Canadians who were otherwise qualified to practise law in Canada. According to the Court, a law which discriminated against lawyers because of their citizenship status was the kind of legal classification or stereotyping which the *Charter* was meant to prohibit. By contrast, in the *Workers' Compensation Reference*, the Court asserted that of all accident victims it was perfectly proper to deny workers any access to the courts.[38] Only immigrant lawyers, not indigenous workers, were able to claim the protection of the equality guarantees of the *Charter*, unquestionably one of the most important entitlements which any constitution can provide.

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[36] *Supra*, note 18.

[37] See M. Gold, Case Comment on *Andrews* v. *Law Society of British Columbia* (1989) 34 McGill L.J. 1063; W. Black & L. Smith, Case Comment on *Andrews* v. *Law Society of British Columbia* (1989) 68 Can. Bar Rev. 591 at 600; and *Talking Heads and the Supremes*, *supra*, note 7 at 73.

[38] The discriminatory treatment endured by workers in the area of accident compensation has been compounded in recent years by the enactment of no fault, automobile insurance schemes which preserve some opportunity for accident victims to sue in tort. See, for example, *Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2.

Although it is possible to identify both doctrinal and analytical errors in *B.C.G.E.U.* similar to those which mar its other decisions dealing with strikes and picketing,[39] the Court's decision is unique and most striking for how openly and blatantly it discounted the importance of the workers' interests in publicizing their labour dispute with the Social Credit government of the day. The Court's decision in *B.C.G.E.U.* is exceptional because, of all of the cases so far examined, it was the only one in which the Court felt obliged to evaluate the competing interests involved in the case against the proportionality principles embedded in section 1.

In *B.C.G.E.U.*, the Court was asked to rule on the constitutionality of an *ex parte* injunction issued by the Chief Justice of British Columbia restraining an otherwise lawful picket line that had been set up around various courthouses in the province in conjunction with a legal strike of provincial employees. Although the Court agreed with the challengers that the injunction had restricted their freedom of expression, it ruled that the limitation was justified under section 1 because it constituted only a "minimal interference" with their rights compared to the "massive disruption" of the courts and with the legal rights of all citizens in British Columbia.

To appreciate fully just how little the Court thought the interests of workers weighed in the balance, it is necessary to read a full account of the case. Suffice it to say that at no point in the judgment was the Court able to refer to any actual prejudice which the picketing caused. On the evidence before the Court, it was uncontested that the union had set up a pass system to allow duty counsel and others associated with cases which involved individuals in custody to pass through the picket line without violating its ethic of solidarity. In addition, there was sworn evidence that, at least outside the courthouse in Vancouver, people did pass freely in and out of the building without being impeded in any way by the pickets. Apart from the delay that might be caused by people respecting the picket line, all of the injuries the Court foresaw were entirely speculative. Witnesses, said the Court, "could well" have been

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[39] See *Talking Heads and the Supremes*, *supra*, note 7 at 97 and P. Macklem "Developments in Employment Law: The 1988-89 Term" (1990) 1 Sup. Ct L. Rev. 405.

deterred. Criminal cases "would undoubtedly" not have been processed with dispatch. At no point, however, did the Court endeavour to evaluate whether, with the pass system in place, the most pressing cases could be processed in the usual way. Rather than make a serious and informed inquiry about precisely what interests would be prejudiced by the presence of the picket line, the Court simply assumed that, whatever they were, they counted more than the workers' interest in being able to communicate with others in the community about their labour dispute and ultimately about the conditions under which they were obliged to work.

In the result, the *Charter* decisions related to labour and employment law issued by the Supreme Court of Canada have, with one exception, all been of one kind.[40] The reasons advanced by the Court to justify dismissing virtually all of the *Charter* challenges mounted by workers, their dependants, and their unions provide additional grist for the critics' and sceptics' mill. The analytical errors, logical gaps, and doctrinal distortions distinguish the Court's review of laws which, on a standard application of the proportionality principles in section 1, seem unduly Draconian and heavy-handed. These decisions follow precisely the pattern of judicial law-making that has been reflected in the common law of employment and labour relations over the past century and a half. The sceptics can claim fairly that, as a matter of positive law, their prognostication about what course *Charter* jurisprudence was likely to take in the area of labour law has proven to be exactly right.

In addition to claiming some facility in predicting how the Court was likely to behave with the *Charter* in its hands, sceptics of law and critics of courts can also take some solace from the fact that, even though various unions and individual workers did not listen to their advice from the start, it is almost certain that their

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[40] The one exception to this unbroken refrain, denying workers any *Charter* relief, is the Court's decision in *Slaight Communications*, *supra*, note 10 where it was recognized that the reasoning and rulings of adjudicators under statutory regimes must conform to the *Charter*. What impact the Court's decision in *Slaight Communications* will eventually have is uncertain. Clearly, the Court did not see its ruling in *Slaight Communications* overturning its judgment in *Dolphin Delivery*, *supra*, note 5. On the other hand, if generally recognized arbitral principles, like "management rights," will now be subject to review against the proportionality principles embedded in section 1, the *Charter* may still be able to inject a measure of social justice in the workplace which it currently lacks.

initial call for the marginalization of the *Charter* in the area of labour and employment law will now be heard. Future litigants now have clear evidence that the *Charter* has not changed how the Court weighs the interests of workers, nor has it discouraged the Court from manipulating and distorting traditional sources of reasoning to reach a desired result. In addition, almost paradoxically, the results which the Court has come to in each of the cases we have reviewed has meant that virtually all of the most important parts of labour law have now been put beyond the scope of the *Charter* and the reach of judicial review.[41] In concrete terms, the Court has now ruled that all laws regulating strikes, picketing, and, indeed, all

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[41] Indeed, in their decisions in the mandatory retirement cases, all of the judges took as settled the idea that, in addition to the basic rules of employment law, all or most social and economic policies enacted by governments should be shielded from the full rigors of the model of review in *Oakes*, *supra*, note 25. Drawing a distinction between social and economic policies which seek to balance conflicting interests in the community from matters of criminal law, both La Forest and Wilson suggest that only in the latter cases should the proportionality principles in *Oakes* be applied to their full effect. In other cases, it is claimed, the Court should mitigate the strictures of the proportionality principles and, in particular, the principle of least drastic means by only requiring a government to establish it had a "reasonable basis" for its belief that the policy or means it chose to enact into law was the least intrusive available to it. It is not pertinent to the purposes of this essay to explore the soundness of the distinction which the Court has drawn between social and economic policies on the one hand and criminal matters on the other. As examples like abortion, pornography, hate propaganda, or impaired driving make abundantly clear, criminal law, no less than social and economic policy, involves balancing competing interests in a community. For my purposes, the more important point is to note that the consequence of limiting the second proportionality principle in *Oakes* in this way is to substantially attenuate the burden of proof governments must bear in justifying laws which impinge on constitutional guarantees and to allow for the validation of laws which needlessly restrict constitutional guarantees. In the mandatory retirement cases, it permitted the Governments (and universities) of Ontario and B.C. to avoid having to explain why they did not follow the lead of other provinces, the federal government, and many institutions in the U.S.A. in outlawing rules of mandatory retirement. The fact that mandatory retirement has been abolished in these jurisdictions provided strong evidence that all of the benefits for which mandatory retirement rules were acclaimed could be realized with alternative policies and procedures which would be free of the discriminatory elements of the traditional mandatory retirement rules.

It should be stressed that, in addition to discriminating on the basis of age, conventional mandatory retirement rules also discriminate on the basis of sex. What is perhaps most defective about our current approach to mandatory retirement is that it uses years of age, rather than years of service, to realize its purposes. Given that many women take time out of their careers to raise families, the current rules are very prejudicial to women. Even though they will routinely have fewer years of employment than their male counterparts, they will be made to leave work at the same age. Given the kinds of professional and academic jobs that were at stake in these cases, the financial loss individual women will be required to endure will be considerable.

aspects of collective bargaining lie beyond the scope of the *Charter* and the process of constitutional review. As well, it has held that workers cannot invoke the equality guarantees whenever a law discriminates against them as members of the working class. Even if their advice was slow to take hold, critics of the courts and sceptics of written bills of rights can take some satisfaction in knowing that, in the future, the *Charter* is not likely to distract the energies and drain the resources of workers and their associations from what for them is the more fundamental and productive work of political and policy reform.

In the final analysis, then, the instincts and original predictions of those who were sceptical and critical of modifying our system of government by the addition of a process of constitutional review has proven to be correct. The position they took against those who were more sanguine about the *Charter*'s prospects essentially has prevailed. The debate largely has gone their way. And yet, the victory that sceptics and critics can rightly claim against "believers" in constitutional review must remain a very hollow and pyrrhic one. Whatever taste of success they may savour must be very bittersweet indeed.

Even if the cases the Supreme Court has decided so far largely bear our their thesis that judges know no shame in using legal, doctrinal, and analytical ploys to frustrate legitimate grievances from members and associations of the working class, the substantive results of these cases have left the workers involved and those in similar situations unambiguously worse off. All workers are, in fact and in law, now vulnerable to having their rights to strike and to bargain through unions of their own choosing denied in the name of the legislative will. Their right to picket and to express themselves freely can be extinguished by any judge. Their claims to equality of treatment with other individuals and groups can be blatantly ignored by any government which does not regard them as a natural or important part of its constituency.

In terms of lost opportunities, the costs are all too clear. Had the dissenting judgments in the *Labour Trilogy* and the *P.I.P.S.* decisions carried the day, workers would know that they would be protected against extremist governments bent on passing Draconian laws limiting their right to strike and to bargain collectively. Had the Court not made the same interpretive, analytical, doctrinal, and

logical mistakes in case after case, workers would be finally freed from the legacy of discrimination they have endured for far too long from both the judicial and legislative branches of government. At a minimum, they would not be vulnerable to rules of tort and accident compensation which were aimed specifically at them. Had the *Charter* been applied in the proper way, workers would get the same protection and be entitled to the same guarantees as everyone else.

Whether workers will ever enjoy the kind of protection which the *Charter* can provide is something no one can predict with any confidence today. Although the Court has been clear that the law of grievance arbitration – the so-called common law of the shop – does fall within the scope of the *Charter*,[42] the reasoning and results of all of its other labour cases makes it impossible to be optimistic that the Court will suddenly change its views and approach. Even though, in an extra-judicial pronouncement, Beverley McLachlin has encouraged members of the judiciary to be open to the opportunity of admitting and correcting past mistakes, as a practical matter, the Court as a whole has resisted such openness and honesty.[43] On at least four different occasions, the Court has failed to take advantage of an opportunity to overturn its decision in *Dolphin Delivery*,[44] and, in its judgment in *P.I.P.S.*, it missed a chance to correct its mistake in the *Labour Trilogy*.[45] Unless and until the members of the current Court face up to just how arbitrarily their predecessors have treated workers in the past,

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[42] *Slaight Communications*, *supra*, note 10.

[43] Madam Justice McLachlin, "The *Charter of Rights and Freedoms*: A Judicial Perspective" (1989) 23 U.B.C. L. Rev. 579.

[44] *Supra*, note 5. See *B.C.G.E.U.*, *supra*, note 35; *Slaight Communications*, *supra*, note 10; *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530; and *McKinney*, *supra*, note 7. For comments on the first three of these cases, see *Talking Heads and the Supremes*, *supra*, note 7 at 97 and D.M. Beatty, "A Conservative's Court: The Politicization of Law" (1991) 41 U.T.L.J. 147. Except for Bertha Wilson's dissenting opinion in *McKinney*, none of the judges even addressed the criticisms that have been levelled at the Court's decision in *Dolphin Delivery*. Although Wilson did acknowledge and make reference to many of the critiques of *Dolphin Delivery*, for the most part, she avoided the most telling criticisms that have been written about that case.

[45] Note also that, in its decision in *Workers' Compensation Reference*, *supra*, note 34, the Court missed an opportunity to correct the very serious interpretative error it made in *Andrews*, *supra*, note 18.

the latter will be destined to toil in a world which gives no credence either to the most basic principles of constitutional order and/or to the rule of law.