Contempt for Workers

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Contempt for Workers

Abstract
Charter proponents have been hopeful that the courts will use the constitutional entrenchment of rights to enlarge the political freedom of Canadians. Charter opponents have been doubtful of the court's ability to do so and, more importantly, of their willingness to do so where the enhancement of rights would undermine existing power relations. While many cases which come before the courts do not raise this issue squarely, the contradictory propositions are tested where capital labour conflicts are the subject of litigation. The argument is that it is the courts' historic mission to safeguard capital from working class challenges. Two recent contempt of court cases are used to demonstrate the judiciary's continued protection of private property and contract rights at the expense of the working classes political ambitions.

Keywords
Contempt of court; Strikes and lockouts; Picketing; Constitutional law; Canada

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Charter proponents have been hopeful that the courts will use the constitutional entrenchment of rights to enlarge the political freedom of Canadians. Charter opponents have been doubtful of the court's ability to do so and, more importantly, of their willingness to do so where the enhancement of rights would undermine existing power relations. While many cases which come before the courts do not raise this issue squarely, the contradictory propositions are tested where capital labour conflicts are the subject of litigation. The argument is that it is the courts' historic mission to safeguard capital from working class challenges. Two recent contempt of court cases are used to demonstrate the judiciary's continued protection of private property and contract rights at the expense of the working classes political ambitions.

I. OUR BELIEF THAT WE ARE FREE

When does an ideal become a barrier to the realization of what it supposedly promotes? When people are encouraged to treat the ideal as a description, however imperfect, of the real, as in the claim that ours is a society ruled by law, where whatever actually exists that goes counter to this claim is relegated to the role of a passing qualification. Viewed in this way, the dynamics of who is doing what to whom and why, together with the structural reforms needed to change things, can never be understood.

In public discussions about the comparative merits of living capitalism and socialism – especially in the last decade; during which time it has become increasingly problematic as to whether the advanced capitalist nations will be capable of sustaining economic well-being for the mass of their citizenry – liberal democrats are likely to point to the fact that, in a country such as Canada, all citizens...
have the fundamental right to adhere to their beliefs and convictions and to speak about them freely. It is this, it is argued, which makes our system superior; it is this which makes a country like Canada democratic. Further, these advocates are likely to claim, it is the lack of equivalent rights in centrally planned, would-be socialist countries such as the USSR or Cuba which makes them undemocratic.\(^2\)

The recent reinstatement of Polish Solidarity as a lawful organization serves as a reminder of the events which had led to its demise. The attitude we displayed towards Polish Solidarity in 1980 provides a good illustration of our certainty that we have democracy and states like Poland do not. At that time there was an outpouring of sympathy and support for the oppressed Polish workers, and of outrage at the repression with which they were meeting when they made their demands. This attitude was, on its face, not easy to comprehend. After all, Polish workers involved in Solidarity were engaged in a general strike. We, in Canada, have never permitted that to take place. Such uprisings, or even attempts at them, have been met with forceful and direct repression, from the 1919 Winnipeg General Strike, to the Quebec public sector strike in 1972, to the pathetic One Day of Protest mounted by the Canadian Labour Congress in 1976, to the threats posed by Operation Solidarity in British Columbia in 1983.\(^3\) Yet when Polish Solidarity was outlawed

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\(^2\) The welcoming of Perestroika and Glasnost by our media seems to be premised on the basis that, finally, the USSR will be more like us and, therefore, will be a better nation because it will accord individuals the kinds of civil liberties which our citizens already enjoy.

\(^3\) For a good account of the vigour with which the Winnipeg General Strike was put down, see D. Bercusson, "The Winnipeg General Strike" in I.M. Abella, ed., On Strike: Six Key Labour Struggles in Canada 1919-1949 (Toronto: J. Lorimer, 1975) c. 1. The 1972 Common Front strike in Quebec is described in D. Ethier, J.-M. Piotte & J. Reynolds, Les travailleurs contre l'etat bourgeois (Montreal: L'Aurore, 1975); see also Black Rose Books Editorial Collective eds, Quebec Labour: The Confederation of National Trade Unions Yesterday and Today (Montreal: Black Rose Books, 1975). That strike, in addition to the concerted cessation of work it involved, replicated some of the other Polish workers' tactics, including the capture of a radio station to broadcast news. The workers were forced back to work and union leaders who refused to co-operate were jailed, just like their Polish equivalents. For an indication that the political change the Quebec labour movement was seeking was of the same sweeping kind as that which the Polish Solidarity movement sought, see its manifesto "Ne Comptons Que Sur Nos Propres Moyens, 1971" reproduced in Quebec Labour, cited above. The One Day of Protest was called that because the calling of a general strike of workers by their leaders against the repressive income restraint legislation of the time would clearly have been illegal and would have been considered to be a long way beyond the political pale. It
and workers were restricted to bargaining with their particular employer (as are ours), to have their strikes regulated by legal overseers, including the total denial of the right to strike for some workers (as is the case here), there was an audible sigh of disapproving regret throughout our nation.

The widespread sympathy for Polish Solidarity in Canada can be explained only on the basis that we understood that that movement was a political movement, a way for the mass of Polish workers to attain democratic rights. Their general union was perceived to be the means whereby workers were trying to assert themselves politically, even though they were using what we, in Canada, characterize as the unacceptable use of collective power. We feel justified in not permitting our workers to use their economic power for political purposes because we believe that workers, qua citizens, have adequate participatory political rights. They can vote, form political parties of their choice, and raise funds to pursue their beliefs and convictions. Unlike in Poland, then, it is legitimate to separate the political sphere from the economic sphere in Canada. This reasoning is justified on the basis that we, in Canada, do have a great measure of individual political freedom. In this paper, I will look at that assumption from the perspective of how much scope our law, enriched as it is by the *Charter of Rights and Freedoms*,\(^4\) gives to workers who want to act and to speak politically.

would have been imprudent for unionists to call a spade a spade, a general strike a general strike. Despite this caution by the labour movement, the law exacted its price; for an elaboration, see H. Glasbeek, "Labour Relations' Policy and Law as Mechanisms of Adjustment" (1987) 25 Osgoode Hall L.J. 179. For a good discussion of how British Columbia's Operation Solidarity nearly became a general strike and how political and legal pressures were combined to defeat this, see B. Palmer, "The Rise and Fall of British Columbia's Solidarity" in B. Palmer, ed., *The Character of Class Struggle: Essays in Canadian Working Class History, 1850-1985* (Toronto: McLelland & Stewart, 1986). For a recent indication of how intolerant many of us in Canada are to the use of concerted economic activity by workers who want to influence the political process, note the Attorney-General of British Columbia's (failed) attempt to obtain a blanket injunction to restrain future labour protests against the Social Credit government; see "A-G's sledgehammer is a thing abhorrent to the law of the land" *The Vancouver Sun* (4 June 1987) B4.

II. OUR FREEDOM ENHANCED – THE CHARTER AND THE JUDICIARY AS LIBERATORS

In 1980, the time of Polish Solidarity’s formation and uprising, Canada did not have the benefit of the Charter. We did believe, however, that we had freely exercisable rights of speech, assembly, and association, as well as real choices in respect of political and religious beliefs, freedom from arbitrary incarceration, and so forth. If we had any doubt about our political freedoms, it was as to the scope of those freedoms. They were not unlimited in range and could always be denied or constrained by legislative and/or executive action. Moreover, there was always the problem, endemic to a private property-based polity, that it is one thing to have the right to act freely but quite another to have the means to do so. For instance, in respect of the right to free speech, even if left alone by governmental actors, individuals still have to find a place in which to exercise their right. One commentator has argued that the grave lack of public space in which to exercise the right of free speech in the U.S.A. has led to a lack of a public sphere, that is, to the absence of a positive environment which encourages people to develop their political rights. Whatever the merits of that argument, the conventional wisdom before the enshrinement of the Charter was that the political rights of Canadians were more liberal in scope, both in theory and in practice, than the analogous rights in a planned society such as Poland. This conviction has grown stronger with the entrenchment of these political rights in our constitution. We now have a way of making sure that they will not be undermined by frivolous, capricious, or malevolent actions of an executive or legislature. An independent, impartial judiciary will safeguard our political freedom. The Charter gives credence to our claim to be a free and democratic society, one in which the use of economic power to assert political rights is unnecessary.

This line of reasoning is posited on certain assumptions. First, there has to be a belief that judges have the tools and the ability to meet the demands which will be made upon them in giving meaning and life to the rights and freedoms enshrined in the constitution, the scope of which is, after all, contentious. The methodology of common law adjudication is the major tool; it purports to rely on established decisions which are to be manipulated and moulded in a constrained manner, leading to the development of a coherent jurisprudence which renders the law certain, predictable, and easily applicable. The use of this methodology requires great skill. Proponents of the constitutional entrenchment of rights assume that judges have always had these skills and will continue to exhibit them or, alternatively, that they will develop them as they respond to the great and new responsibilities imposed on them. In addition, underlying the reasoning of the protagonists of the Charter is the assumption that judges will have the vision to interpret the rights and freedoms enshrined in the constitution in such a way as to achieve (i) the lofty aims denoted by constitutionalizing them, and (ii) the perfection of democracy. It is hoped that, somehow, judges will be informed that this is their role and that they will understand that they are to fulfill it by reflecting the fundamental consensus which is the essence of the Canadian polity. The perception is that judges will be helped to do all these things by the fact that they are above the fray. They are not prone to be influenced by electoral and interest-politics, political factors which all too often obscure the view of other policymakers and politicians.

III. DOUBTS ABOUT THE FREEDOM-ENHANCING POSSIBILITIES OF A JUDICIARY ARMED WITH THE CHARTER

Many people think that these assumptions about the judiciary’s ability and vision are ill-founded. They argue that the adjudicative methodology is necessarily incoherent because it is always political in nature. That is, these critics believe that judges have predilections and biases which inform their decisions more than do the dictates of a scheme of internal logic imbued with the spirit of a politically independent profession’s mores and that, all too often,
these preferences (often unconsciously held) favour the status quo. And, if this is true, the argument goes, judges should not be entrusted with such important political decisions as the Charter mandates them to make, precisely because they are not accountable to the people in any substantive way. They are not as accountable as our elected politicians are, or even as accountable as our responsible public servants are. This lack of accountability is made all the worse, these critics argue, because judges come from the elite of our society, from the most conservative segments of the population, giving those segments an undue advantage in disputations arising over what are, by definition, fundamental rights. Some critics go further, contending that it is the very nature of law itself, and of the Charter in particular, which prevents the judiciary, no matter what its stripe, from undermining the essential elements of the status quo which disadvantages so many Canadians.

IV. THE ACID TEST FOR THE JUDICIARY'S POTENTIAL, EVEN WHEN ARMED WITH THE \textit{CHARTER}, TO ACT AS A LIBERATOR: CAPITAL-LABOUR CONFLICTS

Many of the cases which arise for decision by courts under the Charter do not answer the question as to which of these two divergent views is the more persuasive one. This is so because many of the decisions rendered by the courts can be justified on the basis that they have been made by judges who are according internally generated professional principles their proper respect. That is, judges can decide a great number of cases by reference to criteria which do not require choosing between sharply clashing policies. The reason for this is that these cases do not bring into focus the deep divisions in our society. For example, when courts deal with legal rights (those found in sections 8 to 13 of the Charter) – which they do more often than they deal with any of the other provisions found in the Charter\footnote{B.L. Strayer, "Life Under the Canadian Charter: Adjusting the Balance Between Legislatures and Courts" [1988] Public Law 347 at 356 cites empirical studies which indicate that some 90 percent of Charter cases have involved the legal rights' provisions.} – they are interpreting rules of their own making which occasionally have been tampered with by the legislatures or, more often, by law
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enforcement agencies or officers. These cases are characterized as raising procedural, sometimes very important procedural, issues. There is a large measure of consensus on how to deal with these issues. Hence, there is no need for the courts to take a principled, potentially controversial, stand on fundamental values, one which might be seen as extremely harmful by significant groups in society.

But, the courts do purport to take principled stances in these cases. A perceptual mirage has been created as in many of the decisions dealing with legal rights the judicial rhetoric is replete with references to the sacred nature of Canadians' freedom and liberty, suggesting that vital concerns of our polity are being dealt with by the courts. The courts are holding out that they are dealing, and more importantly, are capable of dealing, with serious political issues. But, while the lives of particular individuals are affected by the decisions in these cases, the impact of these decisions on political freedoms and participatory rights in our society is marginal.7 Yet, even in this politically non-controversial setting there is room for the argument that class biases colour judicial decision-making, throwing doubt on the proposition that courts decide cases on the basis of neutrally-derived principles they find in the Charter and which they apply to all Canadians in an evenhanded way. Thus, in Hunter v. Southam,8 the Supreme Court of Canada decided, without discussion, that a corporation should be entitled to the same kind of protection which is to be given to a human being to safeguard the essence of her or his self, namely, a constitutional right to privacy. While the actual holding was, in practice, just an example of procedural rule-making which hardly affected anything of significance in the justice system (causing some sympathetic Charter analysts to defend it in precisely

7 Strayer, ibid. argues that in these kinds of cases the legislatures and the executive tend to agree with the courts' approach. They have no conscious desire or intent to coerce Canadians suspected or accused of criminal behaviour, or to deal with those who are subject to the decisions and policies of administrative agencies in an inappropriate manner. Rather, the denial of proper process by governments, their agents and functionaries for which redress is sought by reference to the Charter is, more often than not, the result of neglect and failure to oversee zealous prosecutors and bureaucrats. Thus, Strayer writes that "with respect to many of the provisions which have been struck down in this area, Charter rights were being denied not through a contemporary and meaningful will of legislatures but through legislative indifference.... Provisions of this nature rarely attract the interest of legislators." Ibid. at 358.

this way,\(^9\) the unthinking attribution of feelings uniquely possessed
by human beings to that ultimate manifestation of capitalism, a
corporation, stuck in the gorge of those who see the judiciary as an
agent of the ruling class.

To return: many of the Charter cases which come before the
courts, then, support another of the Charter proponents' assumptions
which is very important to them, but one which they seldom articulate
with any sophistication. This is that our society is based on
consensus, one which is not plagued by irreconcilable conflicts. But,
this is not so: this is a class-divided society, one in which the conflict
between capital and labour persists, even though many mediating
structures tend to hide this truth from plain view. The conflict arises
from the fact that a very few people, employers, own the bulk of the
resources, whereas the many, workers, only own their labour power.\(^{10}\)

In the past, courts have sided with capital when it clashed with
labour. This well-established fact is central to the argument of those
who oppose the Charter as an instrument to achieve a better society.
They reason that both the bias of the judiciary and the nature of the
law they have fashioned over time in a class-based society demand
that courts should be given less power to resolve capital-labour
clashes, rather than more. The power of this line of argument is well
recognized. One not unsympathetic Charter commentator has
written: "It is also true that organized labour has not fared well in

Public Law 385 at 387 noted:

>This decision has no real effect on government's capacity to enforce the existing
law, nor on its willingness to introduce tougher anti-combines legislation. I would
add that a ruling making it more difficult for officers of government to research the
files of a newspaper is very much in the interests of the left, right and the middle
in a liberal democracy."

Note that characterizing the holding as giving protection to a "newspaper," a repository of
democratic participatory rights, sounds much better than arguing that protection was given to
a profit-grabbing "corporation." Unfortunately for this clever ploy, the Supreme Court of
Canada, unlike Professor Russell, did not stress the fact that it was a newspaper, rather than
a corporation, which was being safeguarded.

\(^{10}\) L. Osberg, Economic Inequality in Canada (Toronto: Butterworths, 1981) has shown
that the richest 10 percent of Canadians own 57 percent of Canada's total personal assets,
while the bottom 40 percent own 1 percent of those assets.
He goes on to refer to the right to strike cases (which are discussed below), and to Edwards Books and Arts Ltd v. The Queen, which he seems to see as a pro-labour decision. He continues:

As a political science court-watcher, I have the impression that many members of the judiciary - above all those who serve on the Supreme Court of Canada - are sensitive to the left's concerns and are struggling to avoid an approach to the Charter which will give credence to them.13

That is, it is when there is a dispute before the courts between workers who seek to use their collective power against capital's interests that we will be able to confront, most directly, such questions as:

(1) What side are the courts on?
(2) Will they be able to overcome their ancient biases against labour collectivities and thereby fulfill what Charter proponents see as the judiciary's mission, the enhancement of freedom of individuals and the perfection of democracy?
(3) Or, at the very least, can we expect this much from the more progressive judges who grace our benches and are sympathetic to the visions supposedly embedded in the Charter, leading them to give workers a respect not accorded them by courts in an earlier epoch when there was no clear enunciation of the significance of the political rights of all Canadian citizens, no matter in what circumstance they wanted to exercise them?

11 Russell, supra, note 9 at 387.
13 Russell, supra, note 9 at 387-88.
V. RATIONALIZATION OF APPARENT SET-BACKS TO THOSE WHO ARGUE THAT THE JUDICIARY ARMED WITH THE \textit{CHARTER} ENHANCES CANADIANS' FREEDOMS

The answers to some of these questions began to emerge with the Supreme Court of Canada's decisions in two sets of cases dealing with the collective rights of labour: the right to strike cases\footnote{14} and \textit{Dolphin Delivery}.\footnote{15}

In the right to strike cases, the Supreme Court of Canada held that the freedom to associate, enshrined in the \textit{Charter}, means just that: it permits people to associate with whomever they like, no more, no less. It does not give workers who decide to associate together for the purpose of winning better working and social conditions an inviolable right to use any power their association might afford them to such ends. Indeed, if it is likely that the power derived from such an association might yield them gains unacceptable to the legislature, the judiciary is to hold that the legislature can forbid the members of the association from withholding their labour in concert, that is, from using the only tool which gives them power, even though it is well understood that the potential of the use of this power was the principal reason why these people decided to associate with each other in the first place. Despite the \textit{Charter} and its specific guarantee of the freedom of association, then, the right to strike in Canada, as in Poland, can only exist insofar as the state, in its legislative guise, is willing to permit it to exist. It is not for the courts to fashion new rights on the basis of the \textit{Charter}. It is to be noted that the strike activity constrained by legislation in each of the right to strike cases was aimed at particular employers, not at the state as a whole. That is, the judicially upheld statutory fetters were not ones prohibiting dangerous general strikes of the kind which the government in Poland was lambasted for repressing.


\footnote{15}{Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd (1986), [1986] 2 S.C.R. 573.}
In Dolphin, the Supreme Court of Canada was confronted with another kind of issue. Workers who seek to make gains by means of a permitted strike have two major recurring difficulties to overcome. One is the fact that, in a capitalistic society, there are many people who need to work and who might be able to replace them, making a strike ineffective. The second is that some employers' businesses are integrated with that of others, or may be sympathetically supported by other businesses when they are struck. Thus, a strike may be less painful to the primary target of the strike than it otherwise might be because that employer knows that production can be continued, or that contracts will be honoured somehow, and/or that its existing share of the market is not seriously threatened. Workers on strike, therefore, ask would-be replacement workers not to do struck work; they ask the same of workers employed by businesses who do business with, or on behalf of, the struck employer during the strike, and/or ask would-be customers, purchasers, and suppliers of the struck employer not to continue to do business with it during the strike. These tactics are calculated to make the cessation of production, which the striking workers are attempting to bring about, bite. They are the natural concomitant of a strike. In practice, workers implement these strategies by publicizing the strike and the reasons for it. Leaflets are published, speeches are made, and strikers parade outside target employers' premises, and those of associated businesses, with placards, asking for support. They often get angry when people ignore their requests, particularly if replacement workers are brought in. Their jobs and livelihoods are on the line. Violence may break out. But, until it does, it is clear to liberal theorists that, whatever else such striking workers are doing, they are expressing their beliefs and views and communicating information. Before the Charter became the law of the land, such activity was protected to some extent by specific legislation. Inasmuch as it was not specifically protected, courts took a dim view of it because it tended to interfere with existing contractual and commercial relations.16

16 The list of critical writings on the courts' uses of torts law and on their hostility to secondary boycotts and picketing, because this conduct interfered with contractual and commercial relations, is a long one. The following are representative only: J. Finkelman, "The Law of Picketing in Canada" (1937-38) 2 U.T.L.J. 67; B. Laskin, "Picketing: A Comparison of Certain Canadian and American Doctrines" (1937) 15 Can. Bar Rev. 10; A.W.R. Carrothers, "Recent Developments in Tort Law Picketing" (1957) 35 Can. Bar Rev.
In *Dolphin*, workers were engaged in a lawful strike against employer A. They set up communication posts – pickets – outside employer B's business. The workers believed that employer B was doing struck work. Employer B sought to have the court enjoin the workers from picketing its place of business. Given the entrenchment of the freedom of expression in section 2(b) of the *Charter* and the fact that, when strikers communicate information and seek to persuade other citizens to help them, it is commonly acknowledged that they are exercising their right of free speech, should employer B have been given its injunctive relief? The Supreme Court of Canada upheld the trial court's granting of an injunction to employer B. Its reasoning was that the *Charter* does not apply to disputes which are fought in the private realm. The injunction in issue was being sought by one private economic actor to inhibit the conduct of a number of other private economic actors. The holding means that, if a legislature or the executive seeks to inhibit freedom of expression, the courts might restrain it because its action takes away a precious fundamental right. It also means that that same precious right can be crushed by a private actor. Indeed, the court is to help such a denial of freedom of expression at the behest of a private repressor of free speech. After all, employer B in *Dolphin* had to ask the court for positive action to get the relief it sought; a judge had to make an order on its behalf. The Supreme Court of Canada did not find this too problematic. It characterized courts as helpless actors: if the state of the private law justified the granting of an injunction, a court had no option but to give it. It was not for judges to make or unmake law; they were not state actors, merely interpreters and appliers of law within a confined setting regulated by internally generated principles of reasoning.

The cat was threatening to crawl out of the bag. The Supreme Court of Canada's decisions in these cases seemed to indicate that judges have not changed their stripes despite the advent of the *Charter*. They still do not believe workers ought to have a

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right to strike and still characterize the right to trade as more important than the right to speak. Indeed, in the right to strike cases, the greater plurality of judges, led by LeDain J., argued that the right to strike was not a fundamental right and, therefore, not worthy of protection from legislative manipulation, precisely because the courts had not created it. It was a recent invention of the legislatures and, therefore, not a fundamental right in our society. The lesson is obvious. Courts are not willing to protect now what they have always fought against with all their vigour. The same lesson can be taken from *Dolphin*. There the Court’s upholding of the grant of the injunction depended on the total respect it accorded the pro-capitalist and anti-working class rights carved out by the judges over time. The Charter’s broad language had not in any way diminished the Supreme Court of Canada’s admiration for the judiciary’s century-old handiwork.

To those who see the Charter as an obstacle to democratic politics, these decisions were grist for the mill. Fudge\(^{17}\) has argued persuasively how these results were predictable because the courts were fulfilling their institutional role as defenders of private property and contract rights. Arthurs\(^{18}\), in less class-based terms, argued that nothing else could have been expected from an anti-collectivist judiciary. Others\(^{19}\) have castigated these decisions for their internally conflicting reasoning, suggesting that it was the Supreme Court of Canada’s intuitive antipathy to collective action by workers which led it to reach out for arguments which do not stand up to analysis. An argument similar in nature, in that it decries the analytical incompetence of the courts, is made by the more extreme defenders of the Charter and the judiciary. Beatty has angrily denounced the Supreme Court of Canada’s position in *Dolphin* because of its failure to subject judges to the strictures of the Charter. He sees this as an unacceptable evisceration of the Charter’s potential, giving unnecessary ammunition to those critics who already had argued that

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\(^{17}\) J. Fudge, "Labour, The New Constitution and Old Style Liberalism" in *Labour Law under the Charter* (Kingston: Queen’s Law Journal and Industrial Relations Centre, Queen’s University, 1988) at 61.


judges should not be given too much power. 20 In respect of the right to strike cases, Beatty and Kennett 21 have argued that it is not too late for the judiciary to change its mind at the Supreme Court of Canada level. They believe it should. They have taken issue with MacIntyre J.'s understanding of the law, but not with the principles which they believe to underpin his approach. 22 Having found MacIntyre J. to be wrong in law, Beatty and Kennett pointed to the two dissents, those by Dickson C.J. and Wilson J., both of whom had found that "freedom of association" meant that the legality of union formation for the purpose of collective bargaining implied that union members had a right to strike. While it is true that Dickson C.J. thought that the curtailment of such a right might well be justified – indeed, was justified in two out of the three cases before him – the recognition of the constitutional protection given to that right by two Supreme Court of Canada justices left the way open, in Beatty and Kennett's view, for a newly constituted Supreme Court to reach a different result. 23 The fact that there was equivocal language and


21 D.M. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protests and Political Participation in Free and Democratic Societies" in Labour Law Under the Charter, supra, note 17 at 214. These writers felt so strongly about their argument that they had this article republished, presumably so that more lawyers and judges would be likely to read it; see "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 Can. Bar Rev. 573. This tells us something of the angst raised amongst Charter proponents by these labour rights' decisions.

22 Maclntyre J. had reasoned that Charter rights were only meant to enhance rights which individuals could exercise lawfully by themselves and, as an individual could not strike, there could be no Charter-based right to strike. Beatty and Kennett simply said that individuals could strike at common law. This is an imaginative, if untenable, argument. Whatever the plausibility of the Beatty/Kennett argument in law (and it is slight), it is unreal. The claim to the right to strike arises because collectivities of people without property were formed to render a cessation of work, which would otherwise be pointless, effective. A single individual's cessation of work has no economic or political importance, unless he is a Gretzky. I pause here to make a debating point. The nature of legal argument is that reaching out for any plausible argument to buttress a decision is a permissible tactic. Thus, well-intentioned people seeking to set aside conclusions reached by, what they perceive to be, ignorant or badly-motivated judges, are content to use the same kinds of poorly-founded arguments which the judges they criticize employed. This illustrates nicely the malleability of the judicial methodology and the futility of relying on the constraints of an internally binding set of principles as a means to keep a well-instructed judiciary within acceptable bounds.

23 Should a union ever be foolish enough to gamble its scarce resources and political legitimacy on such tendentious reasoning!
two strong dissents in the right to strike cases, then, suggests, to whomsoever wants to believe it, that there is a potential for progressive labour decisions by the judiciary under the Charter: a more liberal-minded set of appointees to the benches could do the trick.

This optimism about the Charter's potential, despite the actual results in the labour rights cases, was supported by another line of reasoning. Those who wanted to do so could, and did, treat these decisions not as examples of a reactionary judiciary's adherence to its anti-working class bias but, rather, as encouraging exercises of judicial deference. This argument posits that the Supreme Court of Canada, understanding its proper role, had given the democratic arm of the state, the legislature, as much room as possible. The Court had not succumbed to the temptation, held out by the Charter, to act arrogantly and anti-democratically. While this line of reasoning is unconvincing because it presumes that not to strike down legislation is a form of inaction, the kind of reasoning which is reminiscent of the empty distinction drawn in other spheres between omissions and commissions, it put another argument on the table which diminished the force of the challenge mounted by critics in light of the results in the right to strike cases and in Dolphin. Given the conventional wisdom which likes to portray our legal world as a consensual, albeit pluralistic, one rather than a conflictual one, and given the accompanying low interest in labour relations and social economic rights' struggles, the cat was, somewhat awkwardly, stuffed back into

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25 Charter proponents are vociferous in their opposition to censorship and agonize about the limits on free speech which, they acknowledge, must be imposed. Thus it is that questions, such as whether or not the state should be allowed to control pornography or nazi publications, are treated by them as if they dealt with the very fabric of democracy. Yet, when workers are told that they are not to read anything but employer and industry literature during their coffee and lunch break, lest their own choice of reading pollutes their minds and they become distracted or recalcitrant (as was the case at a papermill in Northern Ontario in 1987) the issue is not seen as one raising civil liberty issues. To Charter proponents, conditions of employment and political freedom seem to be unconnected. In a similar way, Charter advocates seldom, if ever, refer to the labour law cases which have been brought under the Charter when they trumpet its virtues. For instance, when listing the achievements of the Charter, in what now seems to be the routine birthday celebration of the Charter, Harold Levy listed 10 significant cases; see The Toronto Star (16 April 1989). While the list contained such important decisions as the one which guaranteed corporations the freedom to practice whatever religion their non-existing souls desired, no mention was made of any of the Supreme
the bag. Inasmuch as there were some nagging doubts amongst advocates of the judiciary as an institution capable of reflecting the best elements of societal values when armed with the Charter, they were soon dispelled by the decision in Morgentaler. Whatever the import of that decision, it was like a warm bath of words and soothing sounds for those who put their faith in the Charter as a valuable means by which to create a better society.26 The possibility that courts would favour the ruling class when applying the Charter, just as they did before the Charter, receded from view. Two recent decisions of the Supreme Court of Canada, however, have brought it back in sight. The cat is crawling out of that bag again.

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26 Morgentaler, Smoling and Scott v. The Queen (1988), 44 D.L.R. (4th) 385 (S.C.C.). The question of what the empirical impact of the decision has been or could be, as opposed to what was said by the judges in reaching it, is much neglected by Charter supporters. A recent report shows that it is questionable whether many more women now have ready access to abortions than before; see "Abortion access depends on where you live" The Toronto Star (28 January 1989) A4. This is not to say that the Morgentaler decision was not important, particularly symbolically. But, even this symbolic advance may be lost if Parliament acts to criminalize some abortions, as seems quite possible at this stage. The possibility of such recriminalization was left open deliberately by the Supreme Court of Canada.
VI. THE JUDICIARY COMES CLEAN: CHARTER OR NOT, THERE ARE TO BE REAL LIMITATIONS ON WORKERS' FREEDOM IN CANADA

In *Newfoundland Association of Public Employees v. Attorney-General for Newfoundland and Chafe*, a union of governmental employees was engaged in a lawful strike. Some of these employees were court workers. The union picketed a court house. Chafe, one of the union's members, who was a bailiff, decided to go to work. He crossed his union's picket line. The union, an association formed by the voluntary agreement of its members, had a set of agreed-upon by-laws, one of which provided that the union was entitled to discipline any member who crossed a picket line during a lawful strike. In accordance with this by-law, the union set a trial date for Chafe. Chafe was joined by the Attorney-General of Newfoundland in an application for an injunction which would restrain the union from holding a trial which might lead to the discipline of Chafe. They succeeded on the basis that, regardless of the motivation of the picketers, an attempt to stop judicial officers from carrying out their duties is an interference with the administration of justice. This, said the courts, is always a matter of serious public concern. Hence, Newfoundland's Attorney-General had standing to seek the injunction. It was granted to him because such an interference with the administration of justice threatens the supremacy of law and, therefore, constitutes a contempt of court. It followed that the union's intent to discipline a court worker for carrying out his responsibility to the legal system was restrainable. The Supreme Court of Canada was unanimous in upholding the grant of the injunction and the reasoning which underlay it.

In the companion British Columbia case, the legal issue raised was the same, although the basic facts differed. Again, a union of public servants which included court workers was engaged in a legal strike. Court houses were picketed. McEachern C.J.S.C., a trial judge, coming to work early, saw the picket line outside his court house, went to his chambers and wrote out an interim restraining

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order which he issued in court, without anyone having asked for such an order. It forbade picketing. The union removed the picketers and, two days later, as permitted, returned to show why the interim injunction should not be made permanent. The trial judge upheld his own restraining order. His arguments stood the test of appeals. Indeed, his arguments were relied on in the Newfoundland case. They were that, whether intended or not, the picket line interfered with the administration of justice and that this constituted a criminal contempt of court, one which could not be tolerated, even if this meant the curtailing of the freedom of speech of workers. Again, the Supreme Court of Canada agreed with this reasoning.

The bottom line of these decisions, then, was the denial of yet another entrenched right (this time freedom of speech) to workers. The Supreme Court of Canada, once again, had not seen fit to enhance the imperfect political rights of Canadians. Moreover, in coming to its conclusions, it paid but scant attention to the factual situations before it and appears to have been insouciant of the need to make its arguments internally coherent. The decisions provide little comfort for the proponents of the judiciary as an institution comprised of capable crafts' people imbued with the spirit to create a better world as envisaged by the Charter. Indeed, it is hard to see these decisions as anything but untrammeled expressions of the courts' sense of self-importance, inflated by their new role under the Charter, and as evidence of their continued anti-working class biases. A brief discussion of the Supreme Court of Canada's ability to handle legal logic and of the vision with which the Charter has imbued it, as revealed by the arguments and holdings in these two cases, follows.

A. Contempt of Court

The Supreme Court in Canada found that, since ancient times, courts have used contempt of court as a means by which to preserve the supremacy of law. Case law and learned authors were

Cited. There were no directly analogous cases to the ones before it. But, one of the texts on which the Supreme Court of Canada relied treated both the obstruction of persons officially connected with the court and the prevention of public access to the courts as residual categories of criminal contempt.\textsuperscript{30} The Court did note that the author’s inclusion of these residual categories had relied on an Australian case which had no factual similarity to the picketing cases before the Supreme Court of Canada. It was not concerned, however, by this lack of judicial authority for the text-writer’s assertions. It held that the particular activities before it – which fell in the text-writer’s residual categories – to be contumacious. It must be acknowledged, however, that despite the lack of persuasive judicial precedent, this finding is not very surprising because there is no question but that the courts always have used the criminal contempt power to stamp out interferences with the administration of justice, as defined by them.\textsuperscript{31} On the other hand, there is also no doubt that there is a danger that the contempt of court power could easily be used by courts to suppress what ought to be tolerable dissent. Indeed, some commentators have argued that courts have not used the contempt power to protect the maintenance of an independent administration of justice, available to all, but rather to aggrandize themselves, to still criticism or to achieve political goals which favour


\textsuperscript{31} The Court was not worried about the fact that courts have been the creators of the criteria for the definition of contempt, as well as the interpreters of these criteria, nor by the fact that the criteria, as set out in the British Columbia decision, are rather vague. In other circumstances, however, courts have been known to be wary of coercive powers granted to agencies such as censorship boards. The courts feel that these agencies should be kept under control by being subjugated to relatively explicit guidelines; see \textit{Re Ontario Film & Video Appreciation Society and Ontario Board of Censors} (1983), 5 D.L.R. (4th) 766 (Ont. C.A.). The fact that judges trust themselves, while they view other decision-making bodies with distrust, is also reflected by another aspect of the McEachern C.J.S.C. judgment. In deciding how much evidence was required to prove that the interference with the administration of justice amounted to a contempt of court, the learned judge noted that the jurisprudence showed that there had to be a cognizable danger and that what amounted to a cognizable danger lay in the eye of the beholder, namely, the judge; see (1988), 2 D.L.R. (4th) 705 at 720-22. This was not perceived as creating a problem, one which raised the possibility of abuse of power by an unaccountable agency.
one group over another. There is no reference to this literature in these Supreme Court of Canada decisions. Apparently, the Court was sanguine that its use of the coercive contempt power in the cases before it did not give rise to the perception of abuse, even though it did fetter newly constitutionally enshrined political rights, the freedoms to assemble and to speak.

B. The Restraining Order

To lay the foundation for the restraining order, it was necessary for the trial judges to find that what would otherwise have been treated as legal picketing by workers did in fact constitute an interference with the administration of justice. On the face of it, but only on the face of it, this was relatively easy to do in the Newfoundland case because there had been an attempt by the union to punish a court official for doing his job. In the British Columbia case, however, it had to be argued that the picket line would cause people — whether this was intended or not — not to do business in the courts. The Supreme Court of Canada agreed with the trial judge and the Court of Appeal that a picket line would have this effect, even though the supporting evidence for this conclusion had been scant at the trial. In particular, the only evidence touching on this was an affidavit by a Crown official who had asserted that the

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32 On the chilling effect of the use of the contempt power, see R. Martin, "Criticizing the Judges" (1982) 28 McGill L.J. 1. For an account which shows how courts developed and enhanced the contempt power to achieve certain political goals, see D. Hay, "Contempt by Scandalizing the Court: A Political History of the First Hundred Years" (1987) 25 Osgoode Hall L.J. 431. For an insight into how judges may well abuse their power to restrict free speech in order to safeguard their legitimacy, even when it means fettering other judges, see J. Webber, "The Limit to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984) 29 McGill L.J. 369.

33 Unsurprisingly the Newfoundland Court of Appeal spent some effort on deciding whether Chafe was a court official, as well as a government employee. Presumably, classifying him as a court official made it easier to believe that the exertion of pressure on him not to cross a picket line constituted an interference with the administration of justice than it would have been if he had been characterized as an ordinary employee in conflict with his employer, in this instance, the government of the day.
picket line was orderly and peaceful. Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers.\footnote{This affidavit was referred to specifically by the Supreme Court of Canada in \textit{BCGEU}, \textit{supra}, note 28 at 220-21.}

Thus, the Supreme Court of Canada's conclusion that the picket line had constituted "a deliberate course of conduct which could only result in massive disruption of the court process of British Columbia,"\footnote{Ibid. at 248.} was based on a very frail foundation. This cavalier attitude towards facts, plus the transparently poor legal reasoning used by the Supreme Court of Canada and the lower courts in these cases, suggests something about the judges' agenda: they were determined to reach the result they did. The way the judges made their arguments made it crystal clear that they were not going to be bound by the rules of formal legal logic.

The courts accepted it to be an incontrovertible fact that a picket line is a solid barrier which will not be crossed by anyone. The Supreme Court of Canada put it bluntly:

\begin{quote}
A picket line \textit{ipso facto} impedes proper access to justice. It interferes with such access and is intended to do so. A picket line has great powers of influence as a form of coercion.\footnote{Ibid. at 231. The same statement is also found in the Supreme Court of Canada's decision in the Newfoundland case where it is offered as a quotation from the trial judge's decision in \textit{NAPE}, \textit{supra}, note 27 at 212.}
\end{quote}

In support, the Court cited a well-known passage from \textit{Heather Hill Appliances Ltd. v. McCormack}:

\begin{quote}
The picket line has become the sign and symbol of trade union solidarity and gradually became a barrier - intangible but none the less real. It has now become a matter of faith and morals and an obligation of conscience not to breach the picket line and this commandment is obeyed not only by fellow employees of the picketers but by all true believers who belong to other trade unions which may have no quarrel at all with the employer who is picketed.\footnote{(1966), [1966] 1 O.R. 12 (Ont. H.C.) at 13. Cited by the Supreme Court of Canada in the \textit{NAPE} case, \textit{supra}, note 27 at 212, and in the \textit{BCGEU} case, \textit{supra}, note 28 at 231.}
\end{quote}

First, note that this case was decided in 1966 and that the quoted passage contained the kind of assumption which gave credibility to the argument, so often made by labour law commentators of the
period, that courts had remained anti-worker, anti-trade union, and anti-collective bargaining, despite the clear legislative intention found in collective bargaining law to the effect that collective bargaining and picketing should be tolerated as a matter of public policy. In those bad old days critics frequently lamented the fact that courts would take judicial notice of the fact that picket lines would not be crossed by anyone and that these failures to cross would lead to breaches of contract or interferences with commercial relations. This allowed them to grant injunctions which fettered union activities, even though there was no evidence that there was a contract which might be affected by the picketing activity. Yet, as can be seen, none of these vehement arguments seem to have penetrated the consciousness of the judges who sat in the contempt cases, even though the logic of these arguments was bolstered by the Charter's guarantees of freedom of speech, association, and assembly. Remarkably, none of the courts in the contempt cases hesitated for even a fleeting moment before accepting the validity of the doctrines developed by common law courts over the centuries, doctrines which had given rise to so much heated criticism by academics and policymakers.

As well as referring to what ought to have been discredited jurisprudence, the judges also relied on a paragraph written by the well-known commentator and former British Columbia Labour Relations Board chairman, P. Weiler, to buttress their stance. Weiler had written that a picket line induced a Pavlovian response, namely, an automatic refusal to cross picket lines by unionists as soon as they...
saw one. In the contempt cases the judges took this *ex catedra* statement to be gospel. This is peculiar since there is much evidence that judges hold the belief that many people would cross picket lines if they deemed it safe to do so. It is, after all, this belief which justifies the many orders they issue which permit the maintenance of picket lines provided the union limits the number of people on the picket lines. A line which merely communicates information, and which can be seen to do just that, will be permitted to continue its activities by the courts because, while *some* people may not cross it, others are likely to feel free to do so if they are not physically intimidated. Moreover, there is ample evidence that this is a sensible assumption: people do cross picket lines. Indeed, note that in one of the contempt cases before the Supreme Court of Canada, the one which arose in Newfoundland, there was a legal problem to be solved precisely because an employee *who was a member of the union had crossed the picket line*.

Even if it is believed that, on balance, the Supreme Court of Canada was justified in accepting Weiler's assessment that unionists do not like crossing picket lines and that they rarely do this, it might have read Weiler's edict with more care. After all, Weiler began his statement, as cited by the Supreme Court of Canada, as follows:

"The crucial variable determining the impact of power of peaceful picketing is whether it is addressed to unionized workers. That kind of picket line operates as a signal, telling union members not to cross."

Weiler went on to say that not to cross a picket line was a symbol of a political commitment to solidarity, an essential component of a bargaining strategy aimed at enhancing all workers' rights. From this perspective it is easy to understand why unions have by-laws which require their members to respect picket lines and which they want to

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41 Collective agreements frequently contain clauses which permit employees to honour lawful picket lines at the place where they are employed. Such clauses, on their face, violate the statutory peace obligation and their validity is, therefore, a contentious matter; see D.J.M. Brown & D.M. Beatty, *Canadian Labour Arbitration*, 2d ed. (Aurora: Canada Law Book, 1984) at 7:3640. Presumably, then, in the absence of such clauses, people are expected to honour the picket lines, and unions know that employers may punish workers who abide by the unions' requests not to do so, making it difficult to enforce trade union discipline.

42 BCGEU, supra, note 28 at 232 (emphasis added).
enforce strictly.\textsuperscript{43} The reliance on Weiler's statement as warranting
the factual finding the Supreme Court of Canada needed to come to
to reach the decision it did in the British Columbia case, was flawed
by reading it out of context and without reference to the facts before
the Court. After all, the Supreme Court of Canada did not conclude
that access to the courts by fellow unionists would be impeded by the
union's picket line and that, therefore, a restraining order was
warranted. Rather it held that people such as litigants, lawyers,
witnesses, jurors, and sureties, as well as members of the general
public, \textit{might} not cross the picket line. This is a long step away from
the only inference which could be drawn from the Weiler statement,
viz., that unionists who desire to develop solidarity amongst
themselves will rarely cross a picket line. Note further that the
passage from the \textit{Heather Hill Appliances Ltd} case, relied on by the
Supreme Court of Canada, also was restricted to the situation where
unionists were faced by a picket line. Just as Weiler did not, the
court in the \textit{Heather Hill Appliances} case did not purport to hold that
non-unionists would honour a picket line automatically.

As if all of this is not enough to cast doubt on the courts' reasoning abilities and motives, let it be noted that there was no
evidence of any kind that litigants, lawyers, witnesses, sureties or
members of the public were not going to cross the picket lines outside the court houses in St. Johns and Vancouver. Indeed, in the
Newfoundland case, the court house was picketed for the duration of
the public servants' strike. It ended on 26 September 1978, having
lasted three weeks. The factum of \textit{NAPE} (the union) set out the
following facts, none of which were contradicted by evidence offered,

\textsuperscript{43} The Supreme Court of Canada also should have noted that Weiler was talking about
British Columbia, a province with a distinct history of union solidarity. It might have been
prudent for the Court to consider whether or not Weiler's appraisal could be applied, without
qualification, to the Newfoundland situation where unions have had a much tougher road to
hoe over time. It is also pertinent to note that the judges, at all levels in these two cases,
seemed only too keen to accept Professor Weiler's notion of a Pavlovian response. This fitted
in with their intuitions about workers, that is, that workers react like unthinking mobs and
masses. It bolstered their view that collective activity should be regulated strictly. It is easier
to issue restraining orders if one believes that all that is being restrained is unthinking activity.
This is a good lesson as to why academics, reaching for dramatic impact, should not use
words lightly. Would even the strongest critics of judicial behaviour write, in those terms,
about the Pavlovian response of judges when faced with a picket line? Is this kind of criticism
not likely to be cast in less pejorative and derogatory language?
either by the Attorney-General of Newfoundland or by Mr. Chafe, the successful applicants for an injunction:

(i) there was no evidence of any person having been denied access to the court while the picket lines were up;

(ii) Mr. Chafe, the trade union member crossed the picket line to do his work as a bailiff on 18 September 1978;

(iii) the trade union resolved to proceed against Mr. Chafe on 17 October 1978, that is, three weeks after the picket lines had been removed;

(iv) the date set for the trade union disciplinary hearing was 12 December 1978, on which date the applicants were granted an ex parte injunction which was made permanent on 10 January 1979.44

There was no evidence of any kind that the administration of justice had been impeded in any way by the picket lines. Indeed, uncontroverted facts before the courts indicated the very opposite had been true.45 In these circumstances, the bald acceptance by all the members of the judiciary involved in the Newfoundland case of the assertion that picket lines ipso facto interfered with access to businesses, workplaces, governmental services, and courts, is very troublesome. How, then, in light of the frail factual evidence before it in both cases, did the Supreme Court of Canada satisfy itself that the picket lines in Newfoundland and British Columbia were contumacious?

When dealing with the British Columbia case, the Supreme Court of Canada made the same assumptions as did the trial judge, McEachern C.J.S.C., when he dismissed the British Columbia Government Employees' Union's case to have the interim restraining order set aside. McEachern C.J.S.C. had held that his wisdom in granting the interim order had been proved by the fact that a number of trials had been successfully conducted after the picket lines had been dissolved. He listed the following triumphs:

In New Westminster Toy J. was able to continue a most difficult case and McKenzie J. was able to commence and complete the tragic case of R. v. Blackman where a young man was found not guilty by reason of insanity on a charge of murdering six members of his family; Trainor J. continued a difficult murder trial in Cranbrook; Davies J. held a criminal assize at Prince Rupert; Callaghan J. held a civil assize at

44 Mr. Randell J. Earle, counsel for NAPE, provided me with the contents of the factum and other data. His kind co-operation is deeply appreciated.

45 Mr. Earle indicated to me that the purpose of the strike was not to stop citizens from crossing the picket lines, but to let them cross and find that the government or courts were not able to deliver services. The hope was that they would become angry with the employers because of their refusal to deal fairly with the workers, just as the picketers were claiming.
Nanaimo; Lander, Finch and Wood J.J. were able to commence or continue jury trials in Vancouver; and all the other busy work of this court at Vancouver was carried on. The County Court of Vancouver was able to carry on its usual work as well as complete jury selections in criminal cases involving the attendance of upwards of 460 jurors; and, so far as I know, most of the work of all courts in most locations of the province was carried on.\footnote{Supra, note 29 at 713-14. The Supreme Court of Canada reproduced this passage in full in BCGEU, supra, note 28 at 226.}

McEachern C.J.S.C. and the Supreme Court of Canada seemed to assume that the picket lines might have prevented the hearing of such cases. Clearly the judges felt that the fact that some people might not have crossed the picket lines was enough to warrant this conclusion. In the end, it was this possibility of harm, as opposed to tangible evidence of harm, which was balanced against the rights of the picketers. The finding against the picketing in these circumstances raises some interesting questions.

One such question is why it is that the judges, who were so worried lest witnesses, jurors, litigants, lawyers, and sureties might be intimidated, did not consider the possibility that some people might have liked the option of not crossing a picket line which espoused a cause they wanted to support? That is, such people might have relished an opportunity to exercise their political rights as Canadian citizens, even if this meant that they might not be able to fulfil any obligations they owed the judicial system. Enjoining all picketing outside the court house and thereby denying people the opportunity to exercise their rights as full citizens was not calculated to advance the integrity of the administration of justice, a system supposedly dedicated to the liberty of the individual.

Another question arises. Forcing the union to remove all its pickets was a bit like using a power-driven pulverizer to crush an ant. After all, if some people whose attendance in court was deemed essential for the conduct of a fair trial in fact had decided not to cross a picket line because they thought it more important to honour such a request than to attend at court, or because they had been susceptible to Pavlovian training which induced them not to cross picket lines, or because they really were intimidated, would a court not have had ample power to command the presence of such individuals? Given the lack of tangible evidence of interference with the administration of justice, was there anything which prevented
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McEachern C.J.S.C. from adopting a "wait and see" approach, and to act promptly only when it was truly necessary? This would have ensured that both access to the courts would be unimpeded and that union members would have been granted an opportunity to exercise their freedoms of speech and assembly. This possible way of handling the problem deserved consideration because the evidence before McEachern C.J.S.C. was that the union was going to do everything in its power to make sure that people who felt that they had to go to court were not to be harassed unduly by the picket line. The union had agreed to accommodate people who felt badly about crossing a picket line, such as, say, Law Union lawyers, by giving them a pass. This pass would be a declaration that the union appreciated that they were supporters rather than scabs. In the absence of evidence of intimidation and harassment, and knowing that union supporters would find it easy to cross the picket line, the complete prohibition issued by the court seems to have been an over-reaction.

In view of these and like arguments, it is not surprising that the courts sought to give added strength to their decisions by relying on a motherhood-like argument. In the British Columbia case, the Supreme Court of Canada reasoned that, should any witness, juror, surety, lawyer, or litigant have been dissuaded from coming to court by picketers, adjournments might have been necessitated and "justice delayed is justice denied." As noted, the union was doing its best to ensure that there would be no serious delay by giving out passes to anyone troubled by having to cross a picket line. But, presumably, it was the principle of the matter which concerned the Court, not the facts: the possibility of any delay was perceived as an unacceptable evil. Yet, given the nature of the cases before it, there is something ironic about the Supreme Court of Canada stressing that any delay at all amounted to a denial of justice.

In the British Columbia case the initial restraining order had been issued in the fall of 1983. It was not until five years later, on 20 October 1988, that the Supreme Court of Canada handed down its decision in the case. In this respect, the Newfoundland case is even more remarkable. The initial restraining order was issued on 12 December 1978. The Supreme Court of Canada decision came almost ten years later, again on 20 October 1988. While the initial

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47 Supra, note 28 at 232.
decisions to issue injunctions were made without any delay at all, the
final determination came so long after the events that the unions
would have lost even if they had obtained favourable decisions. No
sensible remedy could have been fashioned to redress the harm done.
Thus, speed, not delay, might well have led to a denial of justice in
these cases. This is typical of labour injunction cases, a fact which
must have been well understood by the Supreme Court of Canada.
In the past, courts were much criticized for the ease with which they
granted ex parte injunctions in labour disputes. Timing is of the
essence during a strike and once a picket line has been dissolved, the
employer gains an immediate advantage in the bargaining
situation.48

While it is somewhat ironical that courts rely on the argument
that justice delayed is justice denied to support a result where justice
might have been denied because one of the protagonists' access to
the courts was facilitated too much, it is true that, as a general
principle, delay is a bad thing and that courts should discourage it.
Indeed, since 1982, the Charter has made the failure to bring an
accused to trial without delay a violation of the accused's
constitutional rights. But, in interpreting this provision, the courts
have had to balance a variety of factors. Thus, an explicit or implied
waiver of time periods by the accused or the time requirements
inherent in the nature of the case, or limitations on institutional
resources, all might be acceptable justifications for delay.49 Thus,
while courts generally frown upon delay, they acknowledge that some
delays which cause some hardship are acceptable. It is not easy to
believe that potential delays caused by court house picketing would
lead to a quantum leap in the scope of denial of access to the courts,
one likely to bring the judicial system into more disrepute than other
kinds of delay already have done. Rather, what was manifestly
intolerable to the courts in the contempt of court cases was the cause
of the delay. This shone through the judgments and reveals a great
deal about the judges' sense of self-importance and the persistence of
their anti-collective working-class feelings.

48 The courts' willingness to use their injunctive power to aid employers, especially in the
1960s, is well-documented; see A.W.R. Carrothers & E.E. Palmer, Report of a Study on the

S.C.R. 588.
It is clear that if the potential absence of people who ought to be in court, such as lawyers, litigants, witnesses, jurors, or sureties, amounts to an interference with the administration of justice, then the actual absence of court workers would have this effect in spades. In the contempt of court cases, the court workers were on lawful strike. That is, they were legally absent from work, intending to impede the work of the courts. The Supreme Court of Canada acknowledged that these workers could not be faulted for any delays arising out of their lawful strike activity. The courts were stymied: the legislature had deliberately chosen to give these workers the right to strike, that is, to interfere with the administration of justice. It would thus have been an overtly political act for the court to hold that these court workers were in contempt by staying away from work, one going to the root of the question as to who wielded political power in the land. It was this which inhibited the Supreme Court of Canada. So inhibited, the Court set about showing that, inasmuch as it had not been clearly forbidden from saying how a lawful strike should be conducted, it was going to be "maitre chez-nous."

The Supreme Court of Canada argued that, even if to cause delay was not the intent of the union when it picketed, any resulting delay was to be treated as an unacceptable interference with the administration of justice. As we know that, to the judicial mindset, a picket line is bound to lead to delay, even though it requires other people than the picketers to make an independent decision to honour the picket line before it can have this effect and even though the union in British Columbia had made serious efforts to ensure that every person who needed to attend court would feel free to do so, we cannot be too surprised by the fact that the Supreme Court of Canada found that delay would be caused by the picket lines and that it was the kind of delay which could not be tolerated. Yet, the

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50 McEachern C.J.C.S. was not so clear on this point. He noted that, fortunately, the issue was not before him and that he did not have to resolve it. But, both in the Newfoundland case and in the British Columbia case, the Supreme Court of Canada pointed out that it did not want to comment adversely on the conduct of workers who were exercising their lawful right not to work.

51 The legislatures could easily have said that these workers were essential workers. They have done so in respect of many government workers who, therefore, are not entitled to strike. Indeed, in the strikes which gave rise to the contempt cases, supervisors were legislatively prohibited from striking and they continued to work in the courts at all relevant times.
The reasoning the Court used was strained. The extremist nature of the argument can be gauged from the fact that there are many other things which cause delay and poor access to the courts:

(1) the unpreparedness of lawyers, leading to adjournments;
(2) the difficulty of getting witnesses to court;
(3) the accommodation of expert witnesses who have busy schedules which do not always fit in with the judicial ones;
(4) judges who work short hours and weeks;
(5) the lack of money for court rooms provided by the government;
(6) the lack of funds to attract an adequate number of court workers and judges; and
(7) the lack of money of litigants.

The last two impediments to access to the courts are the most intriguing for our purposes.

Recently, Ontario's provincial court judges have expressed extreme frustration because their courts are dreadfully overcrowded, and they believe that they cannot discharge their duties properly. Their dissatisfaction has been aggravated by the fact that they feel their salaries have neither kept pace with those of superior court judges nor with the cost of living increases, in large part because the government-paymaster had refused to implement an independent commission's recommendation for substantial increases. In short, the judges were venting their unhappiness with their conditions of work. Like all workers who have come to feel that their pleas for relief are falling on deaf ears, they have become more militant: they are threatening "job action." Apparently, this would include a refusal to adjourn cases. This would mean that the "counsel, police and witnesses lined up in the hallways would have to wait until the cases in front of them were completed." This could increase the existing chaos and delays considerably. And Mr. Paul French, a lawyer representing the judges in their negotiations, has stated that "[a]nother option is the complete shutting down of courts to draw the attention of the public to a situation that cannot go on any longer." As far as I know, no government official representing the

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public, nor any judge acting on her/his own motion, has come forward to enjoin these potentially drastic interferences with access to the justice system.

In a similar vein, the impecuniosity of litigants is not treated as an interference with the administration of justice. The underlying reasoning is that it is not the result of the intent of anyone that it should be so. The lack of access to the administration of justice because of people's poverty is the result of massive inequality in our society. This is of no concern to the courts. Indeed, it is seen as so natural by them — because it is economic in origin, the product of the invisible hand — that it is not identified as something which interferes with the administration of justice. It is not the result of a positive act, although it is regrettable. On the other hand, when workers attempt to change this status quo by getting more of the economic pie for themselves, their attempts, especially when they involve conduct which is aimed at the courts, are characterized as non-natural, that is, as political. This is presumably so because they act as a collectivity. Therefore it becomes a proper subject for regulation, for restraint. Both the judiciary's understanding of the world and its desire to maintain it as so understood are coming into clearer focus.

In sum, the Supreme Court of Canada's finding that there had been an interference with the administration of justice was far from convincing. It rested on the assumption that lawyers, sureties, litigants, and witnesses would not cross the picket lines, even though both the legal and factual bases for this assumption were embedded in quicksand. These threadbare decisions are best explained by the Supreme Court of Canada's sense of self-esteem and anti-labour bias. It is of some interest that this bias was displayed by a bench of the Supreme Court of Canada, the majority of whose members would be characterized as progressive by most observers.53 One could seek to explain these decisions without reference to anti-worker bias by arguing that, leaving aside the sloppy reasoning, they were consistent with the Court's natural and instinctive protection of its authority and legitimacy. But, this will not do. These decisions were made after

53 The only judges with conservative credentials were Estey J. (who took no part in the decision-making) and McIntyre J. The others — Dickson C.J., Lamer, Wilson, LaForest, and L'Heureux-Dubé J.J. — are generally accepted as "progressive judges" whatever that term and the term "conservative judges" mean in this context.
the Charter. Courts are supposed to pay more respect to individual liberty now than they did in the past. They should be expected to subjugate their institutional interests more than they used to do. After all, the proponents of the judiciary as an agency, and of the Charter as an instrument for good, tell us that things have changed, that courts will seek to perfect the personal and political rights of Canadians. A better explanation must be offered. Perhaps it is to be found in the last set of arguments made by the Supreme Court of Canada in the contempt cases.

C. Freedom of Speech

The union in the British Columbia case had raised a number of Charter issues. I will deal in detail only with the one involving section 2(b) (freedom of speech).\textsuperscript{54}

The courts could not question the argument that the picketing involved speech, given their previous holdings. In the British Columbia case, the Supreme Court of Canada wrote that picketing represents a highly important and now constitutionally recognized

\textsuperscript{54} Reliance on section 7 (denial of liberty) underpinned a union argument to the effect that the injunction had denied liberty to it and to its members. The Supreme Court of Canada held that, even if an injunction might have that effect, the order issued in the British Columbia case only denied the unionists' constitutional right to liberty in a minimal way because the union was permitted to come to court within twenty-four hours to dispute the restraining order. The inhibition on liberty - if any - was \textit{de minimis}, given the other rights sought to be protected by the trial judge. The contentious issue as to how any violation of a person's right to liberty could be \textit{de minimis} is not taken up here. The union also relied on section 11(a) (right to be informed without reasonable delay of a specific offence) and section 11(d) (right to be presumed innocent, to have a fair trial by an independent tribunal). The Supreme Court of Canada characterized the finding that the unionists were in contempt as an exercise of an inherent judicial power. It did not involve a charge, nor an accusation that the union had committed an offence. Hence, there had been no need for notice. As the union had obeyed the order instantaneously - so much for its blatant attempt to interfere with justice! - no charges were ever laid to punish the union for disobedience. Hence, the Supreme Court of Canada argued there had been no violation of the presumption of innocence. As for the lack of a fair trial by an independent tribunal, the Supreme Court of Canada pointed out that McEachern C.J.S.C. had acted to guarantee that the people inside the court house be given a fair trial by an independent tribunal by preventing interference with access to the courts and that, therefore, it did not lie in the mouth of those who were seeking to interfere with such fair trials by an independent tribunal to make a claim on this basis. If this is not a classic bootstrap argument, then nothing is. The union also raised section 2(c) (freedom of assembly) and section 11(c) (not to be compelled to be a witness) but made no submissions in respect of section 2(c) to the Supreme Court of Canada and dropped its argument based on section 11(c).
form of expression in all contemporary labour disputes." It cited Harrison v. Carswell for this proposition, although in that case the Supreme Court of Canada had denied the union's right to picket because it interfered with an owner's enjoyment of his private property. But, of course, that denial of speech to protect private property rights had occurred before the Charter. The important point was that in Harrison v. Carswell the Supreme Court of Canada had characterized picketing as involving speech. In the contempt cases, a different approach to the extent of its protection might have been expected, given the entrenched guarantee in section 2(b). But, we know that the result was the same as that reached in Harrison v. Carswell. Given the rather frail case made to substantiate the argument that, inevitably, the picketing would impede access to the courts and/or cause delays which would seriously interfere with the administration of justice unless enjoined, the Supreme Court of Canada had to find a legally acceptable formulation to hold that the restraint on these picketers' exercise of free speech was at least as justifiable as the reasoning which had justified the restraint in Harrison v. Carswell in the bad old pre-Charter days.

The Court found the answer to the problem raised by the constitutional guarantee of free speech in the Charter itself. The argument was simple. The Charter asserts in its preamble that "Canada is founded upon principles that recognize the supremacy of ... the rule of law." As section 52 of the Constitution makes the Constitution, which includes the Charter, the supreme law of the land, the Supreme Court held that a violation of any of the rights and freedoms found in the Charter constitutes the essence of the denial of the rule of law. Hence, access to the independent institutions to which citizens must go to enforce these rights and freedoms is central to the maintenance of the rule of law and, therefore, to the very fabric of Canadian society. Access to the courts, while not mentioned as a fundamental right and freedom in the Charter, becomes a constitutional right, one to which other rights may have to give way. As the Supreme Court of Canada put it:

Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate

55 BCGEU, supra, note 28 at 230.
them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined.\footnote{BCGEU, supra, note 28 at 229. A skeptic who believes that the Charter, if it does anything at all, renders surplus value to the legal profession as well as enhance its prestige, could take comfort from this approach by the Supreme Court of Canada. Elevating the unimpeded right of access to the courts to the status of a constitutional right fits in nicely with the interpretations the Supreme Court of Canada has given to section 10(b) of the Charter. While the Supreme Court of Canada has not yet clearly specified what it is that will offend the administration of justice and bring it into such disrepute that otherwise reliable evidence should be excluded (section 24), it has categorically stated that the denial of access to counsel will mean that a fair trial is not possible, bringing the administration of justice into disrepute should evidence obtained as a result of such a violation be admitted; \textit{R. v. Collins} (1987), 33 C.C.C. (3d) 1 (S.C.C.); \textit{R. v. Baig} (1987), 37 C.C.C. (3d) 181 (S.C.C.). This elevates the right to counsel above all the other legal rights found in the Charter.}

Thus, while the picketers were exercising their constitutionally protected right to free speech and the restraining order violated their right, this was a justifiable denial of an otherwise guaranteed freedom. If it were otherwise, the Supreme Court of Canada reasoned, Canada would no longer be governed by the rule of law, but by a rule of men and women who could determine who should have access to the courts and, thus, to Charter rights.

It is now clear how important the characterization of the picket line as a threatening barrier to movement was to the holding of the courts in these cases. The lack of evidence that there was any actual impediment was not such an obstacle to the holding in the British Columbia case once it was decided that access to the courts was the equivalent of an entrenched constitutional right.\footnote{One to which the \textit{non obstante} clause might very well not apply. Note, however, that in the Newfoundland case there were some suggestions that the legislature might reduce access to courts by allocating less resources to the judicial system. The Court indicated that this would not be considered objectionable by it. This brings one back to the argument that it is \textit{who} denies access to the courts which is what angered the Supreme Court of Canada rather than whether or not access, as such, was denied; see text accompanying notes 50-52.} Even the slightest interference, or possibility of interference, with access to the courts would amount to a serious constitutional violation. Thus, when it came to balancing the violation of the picketers' constitutional right of free speech against the justification for the limitation imposed upon it by the injunctions granted in these cases, Dickson C.J. had no trouble with the problem:
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It follows ... that the s. 2(b) claim falls to be decided under s. 1. Freedom of expression protected by s. 2(b) of the Charter is obviously a highly valued right as is the individual liberty reflected in modern democratic society by the right to strike and the right to picket. A balance must be sought to be attained between the individual values and the public or societal values. In the instant case, the task of striking a balance is not difficult because without the public right to have absolute, free and unrestricted access to the courts the individual and private right to freedom of expression would be lost. The greater public interest must be considered when determining the degree of protection to be accorded to individual interests.  

Apparently, the question as to whether or not the proportionality tests propounded in Oakes were satisfied did not present itself as a problem to Dickson C.J. That holding was much heralded because the proponents of the Charter were able to say that it made clear that the courts were not going to be capricious; they would respect democratic decisions but also be zealously watchful of Canadians' precious rights and freedoms.  

In Oakes the Supreme Court of Canada had held that section 1 imposed a stringent standard of justification upon those who wanted to have the courts treat a violation of Charter rights and freedoms as justified. In the absence of any analysis in the contempt cases, it is to be presumed that the Supreme Court of Canada thought that the potential interference with access to the courts and the resulting restraining order was one of the circumstances in which the answer to the questions posed by certain elements of the section 1 analysis "are obvious and self-evident" and that no further examination was required before allowing a finding that, as far as these elements went, the constitutional violation was justified. But, that way of dealing with section 1 is only available in respect of some of the elements of the tests propounded in Oakes. Another requirement is that the violator of constitutional rights should make

61 One of the times that Dickson C.J. thought it to be self-evident that a curtailment of a Charter right was warranted was in the Dairy Workers' case, supra, note 14, where he decided that the adverse effect of the strike on innocent third parties justified the prohibition of the strike by the legislature. In that case, however, the innocent third parties were very closely associated with the struck employers. Wilson J., the other progressive justice on the bench which considered this case and who, like Dickson C.J. found a right to strike to be constitutionally entrenched, took her Chief Justice to task for his factual finding. Unlike him, she was willing to pierce a corporate veil. This disputation tells us something about the room for manoeuvre there always is when courts are given the task of applying largely undefined rights to concrete situations.
clear to the court the consequences of imposing limitations on the constitutional right in question and demonstrate that there was no alternative way of achieving the legislative or executive objective, one which did not require the violation of a guaranteed constitutional right. As outlined earlier, there was a good argument that, on the evidence before the courts in the British Columbia case, there well might have been sensible, alternative ways of dealing with what was, at worst, a potential problem. But, the difficulty raised by this argument arising out of its own careful formulation in Oakes did not trouble the Supreme Court of Canada. Dickson C.J. did not deem it necessary to consider the Oakes test; nor did McIntyre J. The latter finessed the section 1 issue by holding that the picketing in question was conduct calculated to interfere with access to the courts, that is, with the constitutional rights of others and that, therefore, it could not possibly attract Charter protection. Charter proponents should take note of this when they make the argument that some of the difficulties which critics envisage will disappear should, one fine day, a progressive judiciary dominate the scene. To the workers who lost, it can but matter little that their Charter right was found to exist by a progressive judge and its abrogation was upheld by that same progressive judge, or that a conservative judge flatly denied that they had a constitutional right to exercise in the first place. In either case, they were not allowed to express themselves freely.62

To return: thus far, the legal reasoning underpinning the Supreme Court of Canada's holding that the restraining orders were

62 In the right to strike cases, supra, note 14, the argument of Dickson C.J. was that the right to strike was constitutionally protected and that any limitations put on it by governments were subject to judicial review. This approach should be of little comfort to workers. After all, in those very cases, the progressive Dickson C.J. held that the government's denial of the right to strike was justified in two of the cases before him. This cannot have looked all that different to workers to the holding by the "conservative" wing that, in all three cases, the government legislation was constitutionally unimpeachable. Note also that, in Dolphin Delivery, the "progressive" and the "conservative" wings of the Supreme Court of Canada agreed that picketing involved freedom of speech but that it was perfectly justifiable to curtail it at the behest of a private sector applicant. The spectrum from "progressive" to "conservative" must look very short to workers. And, finally, note that in the British Columbia contempt case, it is McIntyre J. characterized as the "conservative" in the right to strike cases because he rejected the claim that the guarantee of freedom to association included a constitutionally guaranteed right to strike, who takes the Charter rights so seriously that he cannot tolerate anyone impeding access to citizens seeking to enforce them in court, no matter what the reason is for such interference. All of this can be rationalized legally, but from a realpolitik perspective it is difficult to give credence to the idea that there is much of a difference between progressive and conservative judges when class conflict issues are before them.
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easily justifiable violations of guaranteed rights and freedom is not very persuasive when viewed through the lens of an adherent to traditional judicial methodology. Perhaps this is why the Supreme Court of Canada sought to bolster its argument by reference to the Charter's preamble. This was an unusual thing to do, but it presumably was warranted by the fact that the Charter is not to be read as a common statute. It ought to be expected, however, that the most superior level of the judiciary, supposedly disciplined by an internal logic which mandates reading all texts with integrity, would treat the preamble as a whole, or not use it at all. Now, the very phrase which says that Canada is a country subject to the rule of law, the key to the Court's holding, contains other words. In full, as cited by the Court itself, the preamble reads:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

Now, if all the words in that phrase, including the emphasized ones, are taken as having great and equal significance for the interpretation of the Charter, the implications might be quite earth-shaking for the guarantee of freedom of religion in this country. It is unlikely, however, that the words "the supremacy of God" will ever be given the weight the words "the rule of law" were in the contempt cases. If this speculation has merit, once again we can point to the plastic nature of judicial reasoning in general and to its unpersuasive nature in the cases being examined.

There are, then, considerable difficulties with the way in which the Supreme Court of Canada dealt with the Charter argument in contempt cases. But, these difficulties were overlooked or given short shrift because the Court was driving towards a conclusion which it treated as a holy grail: a sweeping proclamation that workers, acting collectively, could not be permitted to attempt to persuade people not to do their business in court, no matter how justified they thought they were, or how much they believed they were exercising their constitutionally protected rights. So much was this the case that the Supreme Court of Canada dealt with another serious legal problem in a single, rather off-handed, paragraph. Indeed, it referred to it as "a preliminary matter." It was much more than that.
In Dolphin Delivery⁶³ the Supreme Court of Canada had held that, while the Charter, by its own prescription applied to governmental action, it was also applicable to the common law. But, in that case it also was decided that when a common law rule was invoked to deal with a dispute between litigants in the purely private sphere, Charter protections could not be invoked.⁶⁴ The fact that it is a state-appointed judge who applies the common law rule does not trigger the application of the Charter. Thus, when a judge issues an injunction in such a case at the behest of a private actor whose interests are allegedly infringed, as was the case in Dolphin, the judge is acting as a mere conduit pipe. The fact that the restraining order is to be enforced with the full force of the state behind it does not alter this characterization of the judge as a non-governmental actor. As McIntyre J. wrote in Dolphin Delivery:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action.⁶⁵

Further, the fact that a successful application to this non-governmental agent, the judge, for an injunction would result in the abrogation of a constitutional right of the other party – workers involved in an exercise of free speech while picketing – was not seen as affecting the characterization of the judge’s disposition as non-governmental conduct.

In the British Columbia contempt of court case the Supreme Court of Canada was at pains to point out that the restraining order was not issued to protect the judge’s personal dignity. If that is all the judge had sought to do, it would have been difficult to hold that the picketing was justifiably prohibited. There would have been no private party on whose behalf a neutral, non-governmental judge would have been acting, and the denial of constitutional rights – given the lack of evidence that any disrespect was meant to that judge – would have seemed capricious. At all levels in the British

⁶³ Supra, note 15.

⁶⁴ This leaves very little room for the application of the Charter to the common law as, by definition, the common law deals primarily with private disputations.

⁶⁵ Supra, note 15 at 600.
Columbia case the courts were, therefore, eager to point out that the order had not been issued to establish a perfect existence for judges, free from the vicissitudes of every day life. Rather, the inherent contempt powers were said to have been used to protect the public's interest. Hence, when McEachern C.J.S.C. rushed to his chambers to write out his interim order without anyone having asked for it, he was acting, in the view of the Supreme Court of Canada, in much the same way as the intervening Attorney-General in the Newfoundland case had, that is, as a public official. For this reason, the order's legitimacy had to be subjected to the rigours of the Charter, unlike the order made by the trial judge at the behest of the picketed business in Dolphin Delivery. This acknowledgment that judicial personality is inherently schizophrenic in that a judge may be a governmental actor at some time, and at other times not, created a legal problem which should have raised a question about the essence of law. Neither the legal problem nor the inherent political question was addressed by the Court because it dealt with the issue as a "preliminary matter," one only raising the question as to whether or not the Charter applied to the order of McEachern C.J.S.C. Once the Court had characterized the conduct as a public official's act subject to the Charter, it lost interest in the issue. It did not look for trouble. Yet, it was there.

The legal problem was easy enough to discern. What is special about the Charter is that it gives the judiciary a totally new power. Until it was entrenched, courts could only review legislative and executive action — that is; political conduct — to determine whether or not it was within the jurisdiction of the legislature or the executive to act as it did, and as to whether or not procedural and fair process rules had been followed. In theory, the content of the legislative or executive decision was not subject to judicial scrutiny. Since the Charter, it is. This can be defended as long as the reviewing judiciary is a politically neutral institution, unlike the legislature or the executive. If that is the case, the court's curtailment of political power can be justified on the basis that it is an exercise in a rationality related to acceptable social norms, not the crass exercise of a will by a supposedly neutral body which is improperly competing for primacy in the political sphere with the
explicit political arms of the state. But, if the judiciary is also entitled to engage in overt political decision-making, who is to review its decisions? Thus, if the court’s issuance of a restraining order, which violated the constitutional rights of picketers, were a political act - even though it was done for the common good - who could judge whether this was acceptable political behaviour? Is a court, alone amongst our state political institutions, not to be subjected to the strictures of the sacrosanct Charter? Is it sufficient if another court, albeit a superior court, reviews such governmental acts of judges by reference to the Charter? Is there not something counter-intuitive about the propriety of this solution to the problem? Should, therefore, courts be subjected to legislative review in such cases? Apart from the logistical problem this solution would create (it smacks of the arcane renvoi doctrine in the private international law sphere), was there not in the contempt cases before the Court a factual difficulty which made this solution a troublesome one? After all, it was known that the danger which the Supreme Court of Canada thought had to be averted - impeding access to the courts - no matter what the cost, had not been seen as a very serious problem by the legislatures. They had been willing to let court workers strike. By treating the issue as a "preliminary matter" in the way it did, the Supreme Court of Canada avoided these interesting, and truly difficult, legal questions. In so doing, it also ignored the deeper implication of this line of argument.

Once the British Columbia trial judge’s issuance of the restraining order was characterized as a public act, it not only lost

66 It is this argument which, together with s. 33, is used to rebut those who say that political power has been transferred to the judiciary, an unelected, unaccountable body. For a more detailed discussion of the competing views of what the Charter has done to our polity, see H. Glasbeek, "A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality" [1987] Access to Justice (forthcoming; available on request).

67 Which has not stopped some commentators from offering this kind of a way out of the dilemma; see B. Slattery, "A Theory of the Charter" (1987) 25 Osgoode Hall L.J. 701, who argues for a complicated co-ordinated review system and acceptance by courts and legislatures of a very demanding kind of self-discipline. Note that the use of section 33 is a different way of dealing with the problem, one which does not address the issue raised in the text directly. The fact that the judges themselves have held that some of their work should not be subjected to the Charter, even though there is no other logical way to review it, has been seen as a flagrant abandonment of the tenets of the Charter by one of its ideologues; see D. Beatty, "Constitutional Conceits: The Coercive Authority of the Courts," supra, note 20.
the precarious position of a mere personal act which violated the workers' entrenched constitutional rights, but it also became differentiated from the judicial restraining order in *Dolphin Delivery*. In *Dolphin Delivery* the restraining order was not held to be subject to *Charter* review because it was not the result of a governmental act. In the British Columbia contempt case, the Supreme Court of Canada did not bother to review this analysis of the activity of a judge when applying a common law doctrine. Yet, the question as to why that kind of judicial act is non-governmental and the judicial activity in the British Columbia case is a public official's act, is a very difficult one to answer.

To be able to treat the judicial granting of the injunction in *Dolphin* as a non-state act, the Supreme Court of Canada had to view the tort of inducing breach of contract, the common law doctrine on which the *Dolphin* injunction was based, as one which had somehow come onto earth like manna from heaven, without any help from anyone. This is a little far-fetched. The tort of inducing breach of contract is a judicially created remedy where none existed before the judiciary said that it should. Its purpose was, and is, to protect private property and contract rights. While the tort can be applied in many contractual and commercial situations, it has been most significant as a weapon for employers who have used it with telling effect against trade unions whose very purpose it is to interfere with private property and contract rights. The doctrine was not developed fortuitously or with ill-will. The courts adopted it because they saw it as a justifiable means by which to perpetuate and maintain what they perceived to be the highest public interest, namely, the furtherance of capitalist acts between consenting adults. In a most extreme statement of the centrality of this policy, but one which accurately reflected the century-old dominant judicial approach, Aylesworth J.A. wrote:

> Even assuming that the picketing carried on by the respondent was lawful in the sense that it was merely peaceful picketing for the purpose only of communicating information, I think it should be restrained. Appellant [a secondary target] had a right lawfully to engage in its business of retailing merchandise to the public.... Where that business is being carried on, the picketing for the reasons already stated has caused or is likely to cause damage to the appellant. Therefore, the right,

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if there be such a right of the respondents [union and its members] to engage in secondary picketing of appellant's premises must give way to appellant's right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large. If the law is to serve its purpose then in civil matters just as in matters within the realm of the criminal law, the interests of the community at large must be held to transcend those of the individual or a particular group of individuals.69

In short, in the tort of inducing breach of contract, a positive rule had been fashioned by the courts and, if it had to be defended, the defence would have been that it was justified as being in the public interest. This is, of course, how both the interventions of the Attorney-General in the Newfoundland contempt case and of McEachern C.J.S.C. in the British Columbia case were justified. If McEachern C.J.S.C.'s intervention was a judicial act to which the Charter applied, then why was the judicial application of the doctrine of inducing a breach of contract in Dolphin Delivery immune from Charter scrutiny? The answer lies in the fact that the courts wanted to ensure that the rights of private property and contract, exercised by wealth owners, remain as free from fundamental challenge as they can possibly make them. Much of the common law has been devoted, successfully, to this objective. The primary way this goal has been achieved is by courts rendering common law decisions which treat existing property rights as natural phenomena, not ones which have been politically/judicially crafted.70

69 Hersees of Woodstock Ltd v. Goldstein (1963), 38 D.L.R. (2d) 454 (Ont. C.A.) (emphasis added). This decision was a culmination of many which had given progressive critics of the judiciary great concern. It caused them to say that the judiciary was unable to deal with a contemporary society in which collective bargaining and trade unionism, as well as strikes and picketing, were to be accorded total respect. The legislature had so indicated and should be heeded. For a particularly trenchant comment on the Hersees case, see H.W. Arthurs, "Picketing, Public Policy and Per Se Illegality" (1963) 41 Can. Bar. Rev. 580. It is somewhat ironic to note that what the courts were doing (and what upset progressive people and liberal pluralists so much) before the advent of the Charter, was inspired by the attitude which still dominates the thinking of the Supreme Court of Canada after the Charter.

70 In Dolphin Delivery, McIntyre J. made it clear that he understood the implications of this argument. Having said that it was odd to say that judges were not governmental actors, he went on to say that if it were otherwise it would "widen the scope of Charter application to virtually all private litigation." Supra, note 15 at 600. Such a review of the conduct of private actors by reference to such criteria as freedom of assembly, speech, equality and fundamental justice would bring the existing relations of production into question. Unsurprisingly, this is not a path which a thinking Court, charged with the maintenance of the status quo, would like to blaze.
The courts have succeeded in convincing themselves that the allocation of private property rights to individuals, with the economic and political power this accords, is not the result of state action and protection. It is assumed to have happened, somehow. The attempts by non-propertied workers to redress the imbalance of power so naturally created, by the use of collective activity, is seen as an interference with the state of nature. It can, therefore, be prevented by resort to private law fashioned by the courts to protect the natural order. This protection of the public good requires no, or very little, justification. It is not seen as a political act. Inasmuch as collective activity by workers is permitted as a result of a deliberate political alteration of the state of nature by the legislature, it may be limited in its impact by the courts. In so doing, the courts may be able to act positively as non-governmental actors (as in Dolphin Delivery), positively as governmental actors (as in the British Columbia contempt case), or passively as non-governmental actors (as in the right to strike cases, where they assisted a reversal in legislative policy by reference to common law doctrines developed to preserve the state of nature; and as in the Newfoundland contempt case, where the judge was acting as a mere technocrat applying the law as a public official had requested). To the non-propertied people, this must seem bleak: any way they look at it, they lose. Courts will assist private actors to inhibit their freedom to speak and to assemble. Courts will help governments who want to do the same. To them, it must seem that the courts, even after the proclamation of the Charter, from which they were told they could expect so much, respect their political freedoms no more than they ever did.

VII. WHERE WE STAND

(i) The concerted withdrawal of labour to make both political and economic gains is no more tolerated in Canada than it is in Poland. We are just not as blunt about our policy. Indeed, the British Columbia contempt case arose out of a strike which might well have become a general strike with very serious political impact. It was the British Columbia Government Employees’ Union which was on strike against the government and which was picketing the court houses as part of its fight against its governmental employers. But, in the event, it was joined by other unions and popular sector
groups, leading to the formation of Operation Solidarity. Operation Solidarity was declaring its aspiration to change the political and economic climate of British Columbia. Many people felt aggrieved by what they saw as unacceptable economic restraints and a political turning-back of the clock by the incumbent government. In this context, the British Columbia Government Employees Union's picketers at the court houses (and elsewhere) were seen as being more than a bunch of isolated workers looking after themselves. The restraining order can be justified much more easily from this perspective. The court, as part of the state apparatus, might well have felt the urge to stop the potential snow-balling effect of the strike, one threatening to emulate Polish Solidarity's efforts. But, of course, in a judicial forum it is often impossible to discuss the real issues underlying the dispute before the court. The only reference one finds in McEachern J.'s judgment to the drama of the events in British Columbia is his grateful acknowledgement of the fact that the picketers obeyed his order instantly:

The court cannot overstate how pleased it is that the good citizens of this province, particularly the officers and members of the B.C.G.E.U., and more particularly the regular staff of the various courts of the province, have obeyed the court's order. In these difficult times the B.C.G.E.U. and its members have demonstrated the incalculable value of the legal truism that everyone must obey court orders if the rule of law is to be preserved.

If the fact that Operation Solidarity had to be thwarted had been the basis for the decision, the lack of logical coherence would not have been such a problem: there would have been a straightforward, sensible and politically understandable reason for the findings by the Supreme Court of Canada. But, the decision on this basis would also have revealed the stark political nature of what the judiciary had done. Hence, the argument could not be made in that way. It would have brought into question the assumption which preserves the legitimacy of the judiciary, namely, that it is an independent institution. Further, it would have brought into focus something which is conveniently ignored in most discussions about the institutional distinctiveness of courts. This is the fact that, when push

71 The name was no coincidence.

72 Supra, note 29 at 708-09. No other reference to this issue is to be found in any of the other judgments which dealt with the British Columbia case.
comes to shove, the state in its guise as legislature and the state in its guise as judiciary are not all that different. Hence, for these basic, as well as traditional professional reasons, the argument offered by the courts was a narrowly legal one. Ignoring the real basis for the decision inevitably leads to incoherent reasoning. But, even if the actual decision is sought to be justified on the basis that it made good political, if not legal, sense, a stark fact remains. At the end of the day, the unequivocal result of the Supreme Court of Canada's decisions in all of the cases involving collective action by workers is that the concerted withdrawal of labour for combined political and economic action which is not restricted to particular employment situations, is forbidden in Canada, just as it is in states which we find it so easy to characterize as totalitarian.

(ii) Canadian workers may only use the right to withdraw their labour for narrow economic purposes, that is, when their particular employer (and some very closely integrated allies) refuse to grant them their economic demands. Even this right is not available to all workers. Only one-third of all Canadian workers are members of trade unions. In addition, of those people who are unionized many have not been given strike rights. In Ontario and Alberta, the public servants may not use this right at all and all governments reserve the right to designate some employees as "essential," thereby denying them the right to strike.

(iii) Not only are relatively few people entitled to strike, they may only do so in limited circumstances – after negotiations, conciliation, and waiting periods, and not during the life of a collective agreement. Moreover, legislatures can remove even these

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73 Corporations and Labour Union Reporting Act, Annual Report for 1985 (Ottawa: Statistics Canada, 1985). But, note that as trade unions are collective bargaining agents for non-union members of the bargaining unit they represent, the number of people who participate in collective bargaining may be as high as 50 percent of the workforce. But, as the following text shows, this does not mean that 50 percent of Canada's workforce has been granted the right to strike.


75 As was the case, for example, in the circumstances which gave rise to the Newfoundland case, supra, note 51.
embryonic strike rights. They do so increasingly often. They have been helped by the courts. As the right to strike cases show, the courts are supportive of such curtailments, even after the enactment of the Charter.

(iv) Collective attempts to persuade people not to do business with someone other than the primary target of a lawful strike are also forbidden, even if the persuasive tactics used are not intimidatory, are not accompanied by violence, nor by any other unlawful act. The courts fashioned means to prevent the dislocation of secondary results of worker militance a long time ago. They provided remedies at the behest of private economic actors. They have shown that the Charter will not stand in the way of their efforts to protect private property owners from the effects of secondary picketing.

(v) When unions attempt to win support for lawful strike action by appealing to the public by means of mass picketing, their members’ rights of free speech and assembly may be subjugated to some other form of public interest, not identified as directly with a particular business’ right to trade. This is what happened in the contempt cases. The courts proved themselves willing, perhaps even eager, to justify the violation of the workers’ right to speak freely about issues of vital concern to them on the basis of some rather ill-defined notion of public interest.

(vi) In the upshot, workers, qua workers, are only allowed to picket (that is, to exercise their freedom of speech as a collective) for narrow economic purposes. Thus, given the circumstances of their lack of access to means of public communication, the most efficient means by which to exercise their right to free speech is seriously limited. Indeed, their claim to be allowed to exercise their political rights in the most effective way possible is strongest when they are seeking to use that political right for aims which are the least likely to affect the political processes and institutions in Canada. That is, they are most free to picket and communicate as organized workers

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76 L. Panitch & D. Swartz, *The Assault on Trade Union Freedoms: From Consent to Coercion Revisited* (Toronto: Garamond Press, 1988) have shown that, in the last ten years, every government in Canada has passed laws restricting the right to strike of some of their workers. In addition, they have collected data which show that the number of times that people who are lawfully on strike have had that right taken away from them in mid-strike by ad-hoc back-to-work legislation, has also increased dramatically.
when their target is one employer and their objective is a few cents per hour. A paradox has been created.

It took close to two hundred years for workers to obtain a measure of legitimacy for trade unionism and for collective bargaining with an associated right to strike. To get this far, they withheld their labour in concert and sought influence in legislatures. Indeed, they used economic weapons to get the franchise enlarged to help them get more economic and political rights. They were jailed, deported, and killed. Unquestionably, they helped obtain such rights as they (and all of us) have today by engaging in political action in the broadest sense of that term. Now, collective rights are under attack by people who are able to use the Charter to assert their individualistic political rights. Unions and their members must prove that their hard-fought-for measure of collective power is only used for narrow economic purposes if they are to be allowed to retain it. It is this which underlies decisions like Lavigne where the union's right to levy dues from its members was limited to those dues which, in the court's opinion, were directly enough connected to economic collective bargaining activities. This serves to remind the memberships that their unions are not meant to be agents for the enrichment of their political participation in Canadian society. Again, the recent attack on the closed shop by an employer who wanted to employ her grandson, despite a statutorily permitted agreement with the union which sought to prohibit the hiring of non-union labour, was made under the aegis of the employer's claim to the rights and freedoms which she asserted the Charter had bestowed on her. In particular, her claim was that her right to contract and to associate

77 See G.S. Jones, Languages of Class: Studies in English Working Class History 1832-1982 (Cambridge: Cambridge University Press, 1983) c. 3; Hobsbawm, "Labour and Human Rights" in Hobsbawm, Worlds of Labour (London: Weidenfeld & Nicolson, 1984) has argued that "by far the most powerful mobilizations of labour on the continent, e.g., general strikes, were for electoral reforms, as in Belgium and Sweden." He argues that it is not until near the end of the century that labour begins to give economic matters priority when it uses its strike power and that this happens first in Britain. That is, there is a long history of labour militance to achieve greater political freedom.

78 Re Lavigne and Ontario Public Service Employees Union (1986), 29 D.L.R. (4th) 321; the ruling was applied to the facts in Re Lavigne and Ontario Public Service Employees Union (No. 2) (1987), 41 D.L.R. (4th) 86. The trial judgment in favour of Lavigne was reversed on the basis that union due raising and use was not subject to the Charter; see Re Lavigne and Ontario Public Service Employees Union: CLC interveners (1989), 56 D.L.R. (4th) 474 (Ont. C.A.).
freely had been abrogated by the closed shop agreement into which she had entered with the union. The court rejected the employer's claim. But, central to this decision was the argument that collective bargaining – which affects the quality of life of workers more than almost anything else – was a purely private commercial kind of transaction, one to which the Charter did not apply. These decisions affirm that unions are only legitimate insofar as they facilitate the buying and selling of labour power. This is not what the historic struggles launched by workers and the unions were all about. To the contrary: they assign a role to Canadian trade unions of the very kind which the totalitarian Polish leadership wanted to assign to its militant workers when they organized themselves into a political union.

(vii) The courts have played a leading role in these developments. The Charter has handed anti-union forces arguments which they did not have before. The courts have proved themselves only too willing to provide these people with a forum in which to make the arguments. The composition of the benches, whether dominantly "progressive" or "conservative," has had but little impact: even members of the acknowledgedly more progressive wings of the courts find it natural to restrict collective activity by workers, especially if such activity is perceived as likely to have a political impact (as contrasted with an economic one, in the sense of a wage increase or a new monetary benefit).

(viii) Participation in respect of planning and investment, the introduction of technology, the decision to implement mass lay-offs, (contrast individual dismissals), is minimal for the minority of Canadian workers who have collective bargaining rights with the right

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80 It is inconceivable that any Canadian politician, no matter how antediluvian, would have sought to attack the right of a union to raise political dues, or its right to a closed shop arrangement. After all, every province in Canada provides for the automatic dues check-off and some measure of preferential treatment for union workers. The legitimacy of the automatic dues check-off has been accepted in Canada since 1946 when Rand, a Supreme Court of Canada judge to-be, recommended its acceptance; see Justice I.C. Rand, "Rand Formula" Canadian Law Reports 2150 (1958) at 1251-53.
to strike attached.\textsuperscript{81} It is virtually non-existent amongst the unorganized workers who constitute over half the work population. The right of participation in such matters is much better developed in Europe, including countries in the eastern block.\textsuperscript{82} That is, in the workplace sphere it is difficult to portray Canadian workers as having won much by way of democratic rights, although the theory of collective bargaining is that they may demand as much control as they would like. But, reality and theory are far apart.

(ix) Canadian workers do have electoral political rights, qua citizens, which are much more beneficial than those found in one-party states. But it is to be remembered that Canadian workers participate as individuals, equipped solely with their talents and resources. This kind of fragmentation makes it very difficult for them to exercise much influence. Certainly this kind of political participation makes them much less effective than they could be if they were allowed to use their power to withhold their productive power in concert in order to achieve their political aims. History, even recent history such as that in British Columbia and Quebec, shows that workers often want to do just that. In this sense, their political participatory rights are much more attenuated than they might have been. Inasmuch as it is argued that it is not true that Canadian working class people are at a disadvantage because, \textit{de jure}, their participatory rights are the same as those of their natural political opponents – persons of wealth – it is obvious that, \textit{de facto}, those opponents have additional means to influence political decision-makers.\textsuperscript{83} Not only do they have more means to help them express

\textsuperscript{81} For instance, in 1985, 85 percent of collective agreements covering more than five hundred employees did not even have provisions which required labour-management committees to monitor – let alone control – the introduction of new technology; see Labour Canada, \textit{Provisions in Major Collective Agreements in Canada covering more than 500 Employees} (Ottawa: Labour Canada, 1985). In respect of mass lay-offs, employers are required to abide by notice and seniority provisions. For some jurisdictions, e.g., Ontario and Manitoba, they may have to pay additional severance payments. But, workers do not participate in the decision, nor can they prevent it.


\textsuperscript{83} In 1904, John Maynard Keynes noted that one of the roadblocks to democracy was that "whatever be the numerical representation of wealth, its power will always be out of proportion." As quoted in R. Skidelsky, \textit{John Maynard Keynes} (London: Macmillan, 1983) at 156.
themselves, to have their views heard and propagated, but they can also withdraw, or threaten to withdraw, their productive power, that is, their capital. They can do so because, should they act in this way, they would be acting, as individuals, in their own best interest. Self-enlightened conduct by exploiting one's individual abilities and resources is the very essence of liberal freedom, whereas self-enlightened conduct by a collectivity of individuals, whose individual self-maximizing activities would have no telling impact on their antagonists, is offensive to pure liberal ideology. While, over time, there has been some mediation of this pristine model, permitting some economic collective action by workers, the basic premises have not changed. It is they which underly the judicial decision-making discussed in this paper.

Moreover, the propertied classes' withdrawal, or threats of withdrawal, of their capital are even more influential when they are made by corporations, that is, collectivities, rather than by individuals. This is true because politically, they are perceived as eunuchs without an axe to grind and because economically, they constitute the largest accumulations of wealth in the country. Corporations, which are aggregates of many small capitals and which often refer to themselves as being made up of many individual co-producers, have been treated as individuals by the law. The courts were instrumental in this useful legal development long before the advent of the Charter. Since the enshrinement of the Charter in the Constitution, however, the courts have taken the personification, the individualization of corporations -- which improves the wealthy classes' political powers enormously -- to bizarre extremes. The case of Southam\textsuperscript{84} which entitled the corporation to privacy, just like any human being, and Big M\textsuperscript{85} -- which held that a corporation may have a religious belief, just like any human being -- illustrate this all too well. This personification, together with the courts' anti-collectivist bias, led Petter to note that:

Corporations are private persons that may invoke Charter rights beyond those enjoyed by their individual shareholders (Hunter v. Southam Inc., supra), including rights (such as freedom of religion) that have no direct relevance to economic entities: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

\textsuperscript{84} Supra, note 8.

Trade unions are statutory entities that may not invoke Charter rights beyond those enjoyed by their individual members, not even rights (such as the right to bargain collectively and to strike) that are central to union activities: Reference Re Public Service Employee Relations Act.


To sum up, the right of the corporations, which are in fact collectives but which are legally treated as individuals, to participate politically by the manipulative use of their economic power is enhanced, at the same time as the courts have cut down the workers' rights to use their economic power to make political gains.

(x) The Charter, on its face, embodies a vision of political freedoms to which most people can subscribe. But, what is frequently forgotten is that the Charter is to be implemented in a society where the treatment of all individuals as equals is a gross distortion of reality. Moreover, the Charter is to be given life by an institution with a historic mission. It is the judiciary's responsibility to protect private property and contract rights. The courts are not concerned with gross inequality in wealth. They assume this to have been "neutrally or naturally" developed. They do not, therefore, focus on the huge disparities in the quality of life and in the gaps in opportunities to participate in political processes which these "neutral and natural" inequalities create. Thus when, armed with the Charter, those who have property have come to the court to attack the rather embryonic rights of the workers as a class, they have won. The courts have treated these powerful people (often appearing in court as large corporations) as individuals confronted by a brutish collective force (such as a union) who are potential oppressors of brave minorities and lonely individuals.

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The jurisprudence which the Canadian courts have produced when confronted by class issues since the advent of the Charter should be a lesson to those who want a more equal, more democratic society. An institution which is democratically unaccountable and whose relative autonomy depends on being seen to be above the fray, is not likely to be responsive to demands for a radically different view of society. The cases which have been discussed clearly demonstrate that rational argument will not convince the courts to read the Charter as requiring a radical revision of political and economic relationships. Of all the institutions we have, the judiciary is the least likely, especially when armed with a classically liberal document such as the Charter, to recognize that the real source of inequality and oppression in our society is private power which results in increased political power for those with economic wherewithal. The courts will make it harder, rather than easier, to get state institutions to act on behalf of the working classes and at the expense of the employing classes. Increasingly this makes the state "the" enemy as it moves front and centre in the advancement of the rich at the expense of the poor. Paradoxically, this buttresses the argument of those who claim that electoral and other direct forms of politics are not useful and that the courts must be looked to for progress.\(^7\) This is dangerous. The courts are not hospitable to arguments which require a recognition that inequality is systemic to our political economy.

\(^7\) It is this which caused my colleague Michael Mandel and I to talk about the legalization of politics; see "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies 84, and also M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall & Thompson, 1989).