

CONSTITUTIONAL LAW—CHARTER OF RIGHTS AND FREEDOMS, SECTIONS 2(b) AND 1—APPLICATION OF THE CHARTER TO THE COMMON LAW IN PRIVATE LITIGATION—FREEDOM OF EXPRESSION—PICKETING IN LABOUR DISPUTES:
Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.

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In *Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.*,¹ the Supreme Court of Canada made several important rulings concerning the extent to which labour picketing is protected by the freedom of expression provision in section 2(b) of the Charter of Rights and Freedoms,² and the application of the Charter to common law principles in litigation between private parties. The court refused to apply the Charter to the employer's application for a *quia timet* injunction against proposed secondary picketing, based on the common law tort of inducing breach of contract. It held that the Charter did not apply to private action, nor to attempts by private litigants to have the courts enforce common law rules that would have the effect of limiting or denying Charter rights and freedoms. The court's ruling that the Charter was not applicable was the only one necessary for the resolution of the case. However, for reasons that are not made apparent, the court also decided that labour picketing did constitute a form of expression within the meaning of section 2(b) of the Charter, but that common law and statutory proscriptions of secondary picketing could be justified under section 1.

Despite what some may regard as a favourable ruling for labour in the court's apparently broad recognition that all forms of peaceful labour

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¹ [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174.

² Constitution Act, 1982, Schedule B.

picketing represent an exercise of the freedom of expression under the Charter, the *Dolphin Delivery* decision provides little comfort for Canadian labour. The net effect of the decision is to preserve the *status quo* with respect to the balance of power between labour and employers in the area of picketing.³

The Facts

Because the case involved an application for a *quia timet* injunction, the factual record available to the court was scanty at best. The respondent, Dolphin Delivery Ltd., was a courier company operating in British Columbia. The appellant union was certified under the Canada Labour Code⁴ as bargaining agent for the employees of Purolator Courier. Purolator operated out of Ontario but had a place of operation in Vancouver prior to June 1981, when it locked out its employees in a labour dispute that was not yet resolved by the time of the Supreme Court of Canada judgment in December 1986. Prior to the lockout, Dolphin Delivery made deliveries in its area for Purolator. After the lockout, Dolphin Delivery began doing business in the same manner with Supercourier, another Ontario company with corporate connections with Purolator. The business of each Ontario company represented about twenty per cent of the total volume of Dolphin's business.

In 1982, the union applied to the British Columbia Labour Relations Board for a declaration that Purolator and Supercourier were "one employer" and that Dolphin and Supercourier were "allies" of Purolator, making the picketing of Dolphin's premises legal picketing under the British Columbia Labour Code.⁵ The Board ruled that it had no jurisdiction because the picketing was in connection with a labour dispute between the federally certified union and Purolator, and was therefore governed by the Canada Labour Code. However, because the Canada Labour Code is silent on picketing, the legality of the picketing had to be determined under the common law.⁶

³ J. Manwaring, *Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of Dolphin Delivery Ltd.* (1987), Ottawa L. Rev. (forthcoming).

⁴ R.S.C. 1970, c. L-1.

⁵ R.S.B.C. 1979, c. 212. The Labour Code was renamed the Industrial Relations Act and was substantially amended by the Industrial Relations Reform Act, 1987, S.B.C. 1987, c.24. Section 37 allows the Industrial Relations Council (until 1987 the Labour Relations Board) to pierce the corporate veil and treat associated or related business under the same control or direction as a single employer. S. 85 of the Act gives the Council a broad discretion to permit secondary picketing of an "ally", defined as a person who in concert or combination with an employer assists him in a lockout or resisting a lawful strike. S. 85 also creates presumptions in favour of an "ally" finding where specified conditions are present.

⁶ With the exception of British Columbia, picketing is for the most part regulated by the courts under the common law. Most labour statutes do not attempt to define

Following the British Columbia Labour Relations Board's refusal to take jurisdiction, the union informed Dolphin that its premises would be picketed unless it stopped doing business with Supercourier. Dolphin then applied immediately for a *quia timet* injunction on the basis of the economic torts of inducing breach of contract and civil conspiracy to injure. The chambers judge granted the injunction before any picketing had occurred, finding that the exact particulars of the connection between Supercourier and Purolator had not been clearly established and also finding that even if Supercourier was a subterfuge created by Purolator to get around the labour dispute Dolphin could not be found to be an ally of Purolator, the primary employer.

The British Columbia Court of Appeal dismissed the union's appeal.⁷ Esson J.A., writing for Taggart J.A. and himself, rejected the union's arguments that the common law injunction infringed the employees' freedom of expression and association⁸ under the Charter. Esson J.A. adopted the conduct-speech distinction used by the United States courts with great frequency in recent years to differentiate between signal picketing and informational picketing. He characterized the proposed picketing as signal picketing and therefore outside the scope of freedom of expression protected under the Charter. He also took the position that even if

picketing or address the legal problems surrounding picketing. However, in Alberta, New Brunswick and Newfoundland, the labour statutes do prohibit secondary picketing and leave the enforcement of these provisions to courts of general jurisdiction. British Columbia has provided a comprehensive scheme for the regulation of picketing in the Industrial Relations Act, *ibid.*, where the jurisdiction over all picketing is transferred to the Industrial Relations Council (formerly the Labour Relations Board). The Act prohibits all picketing that is not expressly permitted, but then expressly permits primary picketing and gives the British Columbia Council a discretion to prohibit picketing that is *prima facie* lawful and permit secondary picketing under a statutory definition of ally picketing. While the regulation of picketing is left primarily to the courts and the common law in other provinces, the situation is a bit more complex in Ontario, where the Courts of Justice Act, S.O. 1984, c. 11, s. 115, places severe restraints on the availability of injunctive relief in the case of picketing over a "labour dispute". Despite a broad definition of "labour dispute" in s. 115, the courts have largely limited the application of s. 115 to primary picketing, thereby leaving secondary picketing to regulation under the common law, where injunctive relief is generally easily available. The situation in Ontario has been made even more complex by a few decisions in recent years where the Ontario Labour Relations Board has taken jurisdiction over secondary picketing under general provisions of the Ontario Labour Relations Act prohibiting conduct by anyone that may induce or encourage an unlawful strike. See *Sarnia Construction Assn.*, [1982] 3 Can. L.R.B.R. 60 (O.L.R.B.) and *Consolidated-Bathurst Packaging Ltd.*, [1982] 3 Can. L.R.B.R. 324 (O.L.R.B.).

For a summary of the law of picketing in Canada, see generally G. Adams, *Canadian Labour Law* (1985), pp. 631-655, and R. Brown, *Picketing: Canadian Courts and the Labour Relations Board of British Columbia* (1981), 31 U.T.L.J. 153.

⁷ (1984), 10 D.L.R. (4th) 198, [1984] 3 W.W.R. 481 (B.C.C.A.).

⁸ The union's arguments based on freedom of association under section 2(d) of the Charter were dropped on appeal to the Supreme Court of Canada.

the picketing at issue could be characterized as expression, common law injunctions against secondary picketing were justifiable limits on freedom of expression under section 1 of the Charter. Hutcheon J.A., in a concurring opinion, found that peaceful picketing was within the scope of freedom of expression, but held that restraints on secondary picketing conducted for the purpose of inducing breach of contract were a reasonable limit under section 1. The applicability of the Charter to judicial enforcement of common law doctrine was not disputed by the employer in the Court of Appeal.

In the Supreme Court of Canada, McIntyre J. candidly admitted that the way in which the case developed, as an application for a *quia timet* injunction based on affidavit evidence, failed to provide what the court would normally require in terms of a secure factual basis to deal with important constitutional issues.⁹ No picketing had occurred and there were no facts on key questions such as the nature of the apprehended picketing, the existence of an ongoing contract between Dolphin and Supercourier that would have been breached had Dolphin refused future deliveries, the union's knowledge that such a contract existed, the damage which could result from any breach of contract, and the intention of the union to cause a breach. Yet after stating that the court would not normally decide constitutional issues without a better factual basis, McIntyre J. stated that the court felt obliged to do so because of the nature of the case. However, the decision to proceed to decide the constitutional issues is puzzling precisely because of the nature of the case. Given its central ruling that the Charter was not applicable to the case at bar, the court did not need to decide either the freedom of expression or section 1 issues. The decision on section 1 is particularly doubtful given the paucity of evidence before the court on crucial issues relating to the question of whether restraints on picketing are a reasonable limit on the union's freedom of expression.

In order to decide the freedom of expression and section 1 issues, the court accepted some questionable findings of the chambers judge and adopted several assumptions about the nature of the picketing and its likely consequences. The chambers judge's conclusions that Dolphin was an unallied third party, that the apprehended picketing would be tortious, and that the dominant purpose of the union was to injure the plaintiff rather than disseminate information and protect the union's interests, were adopted as unreviewable findings of fact. The court also assumed that the picketing would be peaceful, that some employees of Dolphin and other trade union members of customers of Dolphin would decline to cross the picket lines, and that the business of Dolphin would be disrupted to a considerable extent as a consequence.

⁹ *Supra*, footnote 1, at pp. 581 (S.C.R.), 182 (D.L.R.).

While the court's willingness to decide the constitutional issues on the basis of assumptions rather than evidence is contrary to what the court has declared to be the appropriate way to deal with important constitutional questions,¹⁰ it is consistent with prior judicial attitudes and practice in the area of applications for injunctions against labour picketing. The courts have been severely criticized for their willingness to grant interim injunctions to restrain secondary picketing on the basis of judicial imputations and assumptions of the elements of the tort alleged, and of the normal requirements for the granting of injunctive relief.¹¹ The court's willingness in *Dolphin Delivery* to make the constitutional rulings on sections 2(b) and 1 of the Charter on the basis of similar imputations and assumptions can be interpreted as eagerness to confirm the legitimacy of such practices in the lower courts and will do little to dispel widespread perceptions of judicial bias against union activities as reflected in the courts' past treatment of injunction applications against secondary picketing.¹²

Picketing as Freedom of Expression Protected Under Section 2(b)

Prior to the Charter, the courts seldom gave any recognition to the freedom of expression interests, of workers and the public, inherent in labour picketing when they applied common law doctrines to restrain peaceful picketing. As one critic has stated:¹³

The courts, however, gave generally given short shrift to the "free speech" aspect of peaceful picketing: the individual's right to carry on a business without interference has ranked higher than the public's right to know the facts of a dispute.

There have been a few limited exceptions to judicial non-recognition of the freedom of expression aspects of labour picketing. Most notably, in *Williams v. Aristocratic Restaurants (1947) Ltd.*,¹⁴ a majority of the Supreme Court of Canada recognized that the right to picket entailed freedom of speech interests. The case involved secondary picketing at

¹⁰ See generally, *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, (1979), 98 D.L.R. (3d) 1; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, (1984), 9 D.L.R. (4th) 161; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at pp. 457-458, (1985), 18 D.L.R. (4th) 481, at pp. 492-493.

¹¹ S. Tacon, *Tort Liability in a Collective Bargaining Regime* (1980), pp. 101-104; J. Manwaring, *Legitimacy in Labour Relations: The Courts, the British Columbia Labour Board and Secondary Picketing* (1980), 20 Osgoode Hall L.J. 274. The high point of the courts' willingness to grant injunctive relief against secondary picketing came in *Hersees of Woodstock v. Goldstein* (1963), 38 D.L.R. (2d) 449, [1963] 2 O.R. 81 (Ont. C.A.), where the court held that secondary picketing was *per se* illegal and subject to injunctive restraint; see, *infra*, the text at footnote 18.

¹² Tacon, *ibid.*, pp. 1-12.

¹³ *Ibid.*, p. 19.

¹⁴ [1951] S.C.R. 762, [1951] 3 D.L.R. 769.

other non-unionized restaurants operated by the primary employer. Rand J. gave express recognition to the freedom of speech interests of the union members in attempting to persuade members of the public to support their cause. The public's freedom of speech interest in terms of the right to know the facts of labour disputes was also recognized: "[T]he public is obviously and substantially interested in the fair settlement of such contracts."¹⁵ The majority regarded peaceful picketing as an acceptable means of persuasion by force of rational argument.¹⁶

However, *Aristocratic Restaurants* proved to be an isolated example of judicial recognition of the freedom of speech aspects of labour picketing. The lower courts quickly resiled from recognition of the right of free speech in picketing cases and the "right to trade gradually regained its preeminence".¹⁷ The movement away from *Aristocratic Restaurants* culminated in the 1963 decision in *Hersees of Woodstock Ltd. v. Goldstein*¹⁸ in which the Ontario Court of Appeal held that secondary picketing was *per se* illegal and subject to injunction. The extent of the demise of *Aristocratic Restaurants* can be seen in the absence of any reference to that decision in *Dolphin Delivery*, despite the fact that the court commences its reasons on the freedom of expression issue with references to pre-Charter caselaw to demonstrate that Canadian courts placed a high value on freedom of expression and sought to protect it in several decisions prior to the adoption of the Charter.

McIntyre J. seems to hold, if rather cryptically, that all forms of *peaceful* labour picketing fall within the scope of the freedom of expression protected under section 2(b) of the Charter.¹⁹ This was certainly not a foregone conclusion in light of the court's pre-Charter ruling in *Attorney General of Canada v. Dupond*²⁰ wherein Beetz J., writing for the

¹⁵ *Ibid.*, at pp. 786 (S.C.R.), 791 (D.L.R.).

¹⁶ Rand J. also noted that peaceful picketing may be the union's only effective means of communicating information concerning its labour dispute to prospective customers and held that picketing should not be branded as unlawful merely because it is an effective means of persuasion; *ibid.*, at pp. 785-786 (S.C.R.), 790-791 (D.L.R.).

¹⁷ Manwaring, *loc. cit.*, footnote 11, at p. 282. See generally, E. Palmer, *The Short, Unhappy Life of the "Aristocratic" Doctrine* (1959-61), 13 U.T.L.J. 166.

¹⁸ *Supra*, footnote 11.

¹⁹ *Supra*, footnote 1, at pp. 558 (S.C.R.), 187 (D.L.R.). McIntyre J. concludes: There is. . . always some element of expression in picketing. . . Action on the part of picketers will. . . always accompany expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom. . . would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

²⁰ [1978] 2 S.C.R. 770, (1978), 84 D.L.R. (3d) 420.

majority, held that public demonstrations, political or otherwise, did not constitute an exercise of freedom of speech. According to Beetz J.²¹

Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.

The *Dupond* distinction between speech and action is not even referred to in *Dolphin Delivery* and the only vestige of *Dupond* evident in the decision is a short concurring opinion by Beetz J. in which he concludes that labour picketing should not be regarded as a form of expression.²²

In this first significant ruling on freedom of expression under the Charter, the court fails to adopt an explicit theory or statement of purpose of freedom of expression under the Charter which would help to resolve future disputes concerning the scope of that freedom.

The two most commonly expressed arguments for the protection of freedom of expression are the democratic process rationale and the personal autonomy or personhood rationale.²³ According to the first rationale, freedom of speech is viewed as an essential requirement for the proper functioning of a representative democracy. Representative democratic forms of government cannot function unless the citizens are free to formulate views on issues of public significance and express their views to their elected representatives and fellow citizens. Under this view, the scope of freedom of expression is limited primarily to political or non-economic speech required for the functioning of the processes of a democratic government.²⁴ A theory of freedom of expression based on individual autonomy is potentially supportive of a far greater scope of freedom of expression under the Charter. Under this theory, one's liberty interests in self-development and personal dignity through the freedom to express oneself or to receive the expression of others are recognized as the prime purpose of freedom of expression. Restrictions on all forms of expression are suspect for their potential threat to the autonomy or self-development interests of the individual and their disrespect for his or her decision-making capacity.²⁵ Under this theory, attempts to put limits on the scope of freedom of expression become more difficult and there is no basis for distinguishing between public or politically relevant speech and other types such as commercial or economic speech.

²¹ *Ibid.*, at pp. 797 (S.C.R.), 439 (D.L.R.).

²² *Supra*, footnote 1, at pp. 604 (S.C.R.), 179 (D.L.R.).

²³ For an excellent summary of these two theories of freedom of expression see, R. Moon, *The Scope of Freedom of Expression* (1985), 23 Osgoode Hall L.J. 331.

²⁴ This theory of freedom of expression is most closely associated with Alexander Meiklejohn and John Hart Ely. See A. Meiklejohn, *Free Speech and its Relation to Self-Government* (1948), and J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

²⁵ Moon, *loc. cit.*, footnote 23, at pp. 340-342.

Prior to the *Dolphin Delivery* decision there was some concern that the Supreme Court of Canada might adopt a protection of the democratic process rationale for freedom of expression under the Charter and exclude labour picketing from the scope of freedom of expression by characterizing it as economic or commercial speech.²⁶ However, the court did not clearly enunciate any underlying theory of freedom of expression under the Charter and made no attempt to categorize labour picketing as political or economic speech in holding it was protected expression. It should be noted that the employer did not raise these arguments before the court.²⁷

Nor, however, do the court's cryptic reasons provide a strong basis for contending in future cases that freedom of expression is based on a theory that encompasses economic or commercial speech. Indeed the authorities relied on by the court in its discussion of the meaning and significance of freedom of expression are more supportive of a democratic political process rationale. The court refers mainly to pre-Charter Supreme Court of Canada decisions in which some judges suggested that freedom of speech and public discussion might have constitutional status as an essential requirement of the parliamentary form of government adopted in the preamble to the Constitution Act, 1867.²⁸ Following this exegesis on pre-Charter caselaw, McIntyre J. simply concludes that the constitutional status of freedom of expression is now clear due to section 2(b) of the Charter and holds that peaceful picketing is protected expression, with no discussion of the scope of freedom of expression under the Charter. This falls short of a conclusive determination that commercial speech is protected by freedom of expression.

The private ordering of the relations of production is of central political significance in a free enterprise system and communication of information concerning this ordering of relations and the allocation of resources within those relations can be regarded as inherently political

²⁶ J. Weiler, *The Regulation of Strikes and Picketing Under the Charter*, in J. Weiler and R. Elliot (eds.), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), p. 211. An example of a lower court adopting the political process rationale for freedom of expression and excluding commercial speech from protection can be found in *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489, 15 O.R. (2d) 118 (Ont. Div. Ct.).

²⁷ Weiler, *ibid.*, p. 234. The employer's failure to make these arguments, particularly in light of the existence of some lower court decisions which do adopt the distinction between public speech and commercial speech, may be attributable to employer self-interest. Employers will undoubtedly be eager to challenge restrictions on employer commercial speech in labour and business practices legislation in the future.

²⁸ *Boucher v. The King*, [1951] S.C.R. 265, at p. 288, [1951] 2 D.L.R. 369, at p. 380 (referring to [1950] 1 D.L.R. 657, at p. 682), per Rand J.; *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 206, (1957), 7 D.L.R. (2d) 337, at p. 358, per Rand J., and at pp. 326 (S.C.R.); 369-370 (D.L.R.), per Abbott J.; *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 132-133, [1938] 2 D.L.R. 81, at p. 107, per Duff C.J.

speech.²⁹ The decision of picketing workers to communicate information concerning their disputes with employers over productive relations and the decision of listeners (be they consumers or other workers) to honour a picket line may represent the most overtly political activity undertaken by those actors in their lifetimes. Thus labour picketing may be viewed as a form of political speech. As a result, *Dolphin Delivery*'s value as a precedent for free speech protection of commercial speech is uncertain.³⁰

The court does clearly reject the speech-conduct definitional device employed by the majority of the British Columbia Court of Appeal to exclude peaceful labour picketing from the scope of freedom of expression. This "speech-plus" doctrine,³¹ which allows courts to characterize virtually all forms of picketing as action or conduct rather than speech entitled to protection, rests largely upon the assumption that labour picketing operates as a signal rather than as a means of rational persuasion. Implicit in this assumption is a further assumption that it is simply irrational for workers and consumers to act other than in a fashion which furthers their immediate individual self-interest in order to support the welfare of fellow-workers. The speech-conduct doctrine has been used most prevalently by the United States courts in an attempt to retreat from the implications of the broad recognition of labour picketing as free speech in *Thornhill v. Alabama*.³²

The court's rejection of the expression-action or speech-conduct dichotomy should be welcomed. The American doctrine has received powerful criticism from Lawrence Tribe in the following passage:³³

²⁹ Note, *Peaceful Labor Picketing and the First Amendment* (1982), 82 Col. L. Rev. 1469, at p. 1486 (hereafter referred to as, *Peaceful Labor Picketing*).

³⁰ However, the Nova Scotia Court of Appeal recently relied on *Dolphin Delivery* as clear authority for Charter protection for commercial speech. See *R. v. Skimmer* (1987), 79 N.S.R. (2d) 8, holding that s.195.1 of the Criminal Code, R.S.C. 1970, c. C-34, regarding prostitution communications violated s. 2 (b) of the Charter. The United States Supreme Court extended first amendment protection to labour picketing as the working man's means of communication (*Thornhill v. Alabama*, 310 U.S. 88 (1940)) long before it expressly extended such protection to commercial speech in the 1970s (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)). Nor has it since attempted to characterize picketing as commercial speech and thus deserving of less protection than political speech, although it has employed other means to retreat from the strong protection for labour picketing suggested by *Thornhill*. See generally, *Peaceful Labor Picketing*, *ibid.*; Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech* (1982), 91 Yale L.J. 938 (hereafter referred to as *Labor Picketing and Commercial Speech*).

³¹ See *Esson J.A.*'s judgment, *supra*, footnote 7, at pp. 212-214 (D.L.R.), 495-498 (W.W.R.).

³² *Supra*, footnote 29. In fact, the United States Supreme Court has refused to apply the speech-conduct distinction in cases of non-labour picketing (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)) and in other non-labour cases has characterized action or conduct as symbolic expression (*Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Indep. Community School Dist.*, 339 U.S. 503 (1969)).

³³ L. Tribe, *Constitutional Choices* (1985), p. 198.

When background relationships of power come to the foreground—as they do, for example, in labor picketing cases—courts often resort to formalism to conceal what might be viewed as a frank preference for one set of interests over another, or at least as a substantive choice of one constitutional vision over another. The speech-conduct distinction performs exactly this function in cases where expressive activity (typically, union activity) involves elements that could be characterized either as “speech” or as “conduct”. By resolving these cases through categorization rather than analysis of the function that the expressive activity performs in each setting, courts have ignored the inequalities of access to communications media that prevail as much in the economic as in the political arena.

As Tribe points out, the more inexpensive means of achieving relatively broad-based communications, like demonstrations and picketing, involve what may be characterized as higher conduct content than more costly media modes of expression. Thus, the expenditure of money has been treated as pure speech,³⁴ while labour picketing has commonly been treated as conduct. The potential difficulties in terms of inequality of access to effective modes of communication are obvious.

Thus, the speech-conduct distinction may well be a mask for discrimination against the methods of communication favored by the relatively powerless groups in society.³⁵

Despite the fact that the court in *Dolphin* recognized peaceful labour picketing within the scope of freedom of expression, rejected the speech-conduct distinction, and made no express reference to a lower level of protection for labour picketing as non-political speech, the decision nonetheless indicates that not all forms of speech are regarded as equal in terms of the protection they will be afforded by the court. This is implicit in the court’s section 1 analysis, which suggests that labour picketing may rank relatively low in the judicial hierarchy of forms of expression in terms of the level of protection it will receive.

Section 1 Analysis

The end result of the court’s section 1 analysis is the legitimation of restraints on secondary picketing, against third parties who are non-allies, as a reasonable limit on freedom of expression. The sketchiness of the reasoning leaves the decision open to the criticism that the section 1 finding may rest on little more than judicial assumptions and preferences concerning a hierarchy of values and interests in which the right to trade of employers stands far above the freedom of expression interests of workers.

These values are not scrutinized due to the court’s failure to follow the mode of section 1 analysis it advocated in *R. v. Oakes*.³⁶ After a

³⁴ *Ibid.*, p. 199, citing *Buckley v. Valeo*, 424 U.S. 1, at p. 39 (1976).

³⁵ *Ibid.*, p. 200.

³⁶ [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200. In *Oakes* the court stressed that the section 1 inquiry must be approached with the premise of a commitment to uphold the rights and freedoms set out in other Charter sections, and that section 1

passing reference to *Oakes* the court acknowledges that normally some evidence will be necessary for section 1 analysis and the burden of proof will lie on the party supporting the limitation. Nevertheless, the court then dismisses the need for evidence and removes the onus of proof from the employer in *Dolphin Delivery* by relying on the *Oakes* proviso that there may be some cases where “*certain elements* of the section 1 analysis are obvious or self-evident”.³⁷ A finding that the “ends” requirement of a pressing and substantial concern on the part of the employer is self-evident assumes that the employer would suffer economically in the absence of the injunction, despite the lack of any real evidence before the court concerning the extent of the economic harm that might occur from the proposed picketing. The requirement of proof of irreparable damage or harm that is normally imposed for *quia timet* injunctions is not even mentioned. I am not suggesting that the Supreme Court should be making its own findings as to the presence of irreparable harm at that level of appeal. Nevertheless one might have thought that the stringent standards imposed in *Oakes* should at least have led the court to insist that the normal requirement of evidence of irreparable harm be carefully examined in the lower courts, before finding that the injunctive relief was a justifiable limit on protected expression.

The remainder of the discussion of section 1 bears little resemblance to the *Oakes* prescriptions for the “means” analysis. The possibility of adopting a balancing of interests approach is mentioned but viewed as unnecessary, simply on the basis that the case involved secondary picketing. Concerted collective action, in the form of strikes or picketing, is treated as an undesirable but inevitable corollary of collective bargaining. It must be regulated and sometimes limited. It can reasonably be restrained so as to be employed only in a very limited fashion

imposes a stringent standard of justification. Section 1 imposes an onus of proof, on the civil standard, on the party seeking to justify a violation of Charter rights as a reasonable limit, and generally a standard of a very high degree of probability was to be required, with “cogent and persuasive” evidence of the “consequences of imposing or not imposing the limit”; see pp. 137-138 (S.C.R.), 226-227 (D.L.R.).

The section 1 analysis required that both “ends” and “means” tests be met. First, the objective of the measures limiting the Charter right must be of sufficient importance to warrant overriding the Charter right, with a minimum requirement that it relate to concerns that are “pressing and substantial in a free and democratic society”. Under the means aspect of the test, *Oakes* provides a cumulative three-part proportionality test as follows (see pp. 138-140 (S.C.R.), 227-228 (D.L.R.)):

- (1) The measures adopted must be rationally connected to the recognized objective.
- (2) Even if rationally connected to the objective, the measures should impair “as little as possible” the right or freedom in question.
- (3) There must be proportionality between the effects of the measures responsible for limiting the Charter right and the objective which has been identified as of “sufficient importance”.

³⁷ *Ibid.*, at pp. 138 (S.C.R.), 227 (D.L.R.). (Emphasis added).

ion, in terms of time and place, to ensure that it is directed only at the immediate employer. Industrial conflict must not be allowed to spread or have a serious disruptive impact upon trade relations beyond the actual parties.³⁸

The court's willingness to uphold the *quia timet* injunction on an incomplete factual record without any balancing analysis suggests that all restraints on secondary picketing of unallied employers are reasonable limits under section 1 of the Charter. Once the categorization of the picketing as secondary has been made, there will be no inquiry on the facts of particular cases to determine whether in the particular case the interest of workers in expression of the facts of their dispute should prevail over the employers' interests in the right to trade. In short, the proportionality inquiry required by *Oakes* for section 1 analysis will not be made on a case by case basis.

Any doubt that *Dolphin Delivery* means restraints on secondary picketing are *per se* reasonable limits is removed by two further aspects of the court's analysis. First, the court does not even address the *Oakes* requirement that the limitations on a Charter right should be shown to impair "as little as possible" the right in question. A meaningful application of this criterion could suggest a refusal to grant prior restraints on secondary picketing in the absence of clear and convincing evidence of irreparable harm should the picketing be allowed for even a limited time. Second, the court finds that the requirement of proportionality is met in *Dolphin Delivery* because the interim injunction is effective only until trial when the issues can be more fully canvassed on fuller evidence.³⁹ This is unconvincing. In cases involving applications for injunctive relief against labour picketing the case is almost always won or lost at the interim injunction stage. There will be no trial if the employer wins because it will have no cause of action if picketing does not occur. And in the vast majority of cases, the underlying labour dispute is resolved long before the case ever comes to trial. Suggesting that the balancing of interests favours the protection of the employer's trading interest because the union can obtain justice at trial is surely unrealistic.

Having avoided one formalistic definitional device by rejecting the speech-conduct dichotomy in determining the scope of freedom of expression, the court may have simply adopted another in the form of the

³⁸ *Supra*, footnote 1, at pp. 591 (S.C.R.), 189 (D.L.R.). The court's comments on the undesirability of secondary activity reflect the liberal pluralist paradigm of industrial relations which has been identified and criticized severely by some critical labour scholars. One commentator has said that a "great deal of labour doctrine concerns the suppression of other unacceptably disruptive forms of concerted activity", including "any form of worker protest smacking of class-conscious solidarity, notably the so-called secondary boycott"; K. Klare, *Critical Theory and Labor Relations Law*, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (1982), p. 65, at p. 77.

³⁹ *Supra*, footnote 1, at pp. 592 (S.C.R.), 190 (D.L.R.).

primary-secondary distinction as the basis for legitimating restraints under section 1 of the Charter. The difficulties in giving meaningful and functional content to the primary-secondary categorization have provided the basis for a great deal of criticism of the distinction as a criterion for legality, and have led to difficulty and inconsistency in judicial decision-making.⁴⁰ One court has described these difficulties as follows:⁴¹

[No] cosmic principles announce the existence of secondary conduct, condemn it as an evil or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

Such difficulties become particularly acute in the situations of common situs and roving situs picketing, multi-enterprise employers, two employers with corporate connections, and ally and near-ally situations involving the picketing of trading partners of the primary employer.

More importantly, the simplistic primary-secondary dichotomy does not provide for an analysis of the impact of the picketing on the competing interests of the striking workers and the secondary employer and a balancing of these interests to come up with a decision consistent with the functional goals of our collective bargaining institutions.⁴² This has led several critics to advocate the demise of the primary-secondary dichotomy and the adoption of alternative approaches to the regulation of picketing. David Beatty proposed a scheme⁴³ that has been accepted or modified by other critics of the traditional primary-secondary dichotomy.⁴⁴ Under his "functional analysis", the distinction between permissible and impermissible secondary picketing should be whether the type of

⁴⁰ See for example, *Manwaring, loc. cit.*, footnote 3, at p. 274; *Brown, loc. cit.*, footnote 6, at pp. 153-154; D.M. Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 *Can. Bar Rev.* 388.

⁴¹ *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, at pp. 386-387 (1969). One of the most commonly cited definitions of "secondary" activity is that stated by A.W.R. Carrothers, *Secondary Picketing* (1962), 40 *Can. Bar Rev.* 57, at p. 57:

. . . By secondary action I mean the exertion of economic pressure, either through picketing or some other medium, on an employer or other person, to induce him in turn to use his influence, usually of an economic kind (for instance, the maintenance or severance of trade relationships, contractual or otherwise), on an employer with whom the union is engaged in a labour dispute.

Of course, as Beatty has pointed out, applied literally this definition would cover conduct which would generally be regarded as primary and lawful but has secondary impact: see Beatty, *ibid.*, at p. 393.

⁴² Beatty, *ibid.*, at pp. 391-392; *Brown, loc. cit.*, footnote 6, at p. 154.

⁴³ Beatty, *ibid.*

⁴⁴ Beatty's proposal for a functional analysis has been adopted by Tacon, *op. cit.*, footnote 11, pp. 78-79, and appears to be adopted with some modifications by *Brown, loc. cit.*, footnote 6.

pressure exerted by the picketers on the secondary employer is "qualitatively different" from what would have been experienced as a consequence of a successful legal strike of the primary employer. As Beatty puts it:⁴⁵

Specifically this will mean that only when the union seeks to elicit the support of others, be it the public or employees of the neutrals or the neutrals themselves, by persuading such persons to act in a manner different from that which they are persuaded, induced or required to act by a lawful primary strike or primary site picket line will such persuasion be deemed secondary and prohibited. As a practical matter this will mean the union is able to pursue on vertical or horizontal lines those whose business is functionally integrated with (in the sense of being dependantly related to) the primary by means of a legal strike and means of the same character as a legal strike.

For example, because a successful strike of the primary employer would have the effect of stopping the supply of the primary's products to a secondary distributor and the public, striking employees of the primary should be able to picket the secondary distributor to appeal to the public not to buy the primary product and to the secondary's employees not to handle the primary's product. Such picketing should be regarded as primary in a functional sense.

Given the liberal premise that the right to trade is an important value deserving of some protection, a functional approach such as Beatty suggests would at least ensure that the interests of workers in free expression, to support their objective of applying economic pressure by shutting down the operation of the primary employer, are given some recognition in section 1 analysis. It would also recognize, implicitly, that the right of secondaries to trade in the primary's products or supplies is of less importance than their right to trade generally, given that our collective bargaining system already recognizes that the right to trade in the primary's products or supplies can be disrupted as a consequence of a successful primary strike and primary picket line. The secondary's right to trade in the primary's products may also be of less importance when balanced against the workers' right to freedom of expression in that the secondary and its consumers can usually find products or supplies other than the primary's to alleviate the consequences of a successful picket line. Thus in many cases of secondary picketing the secondary's interests in the right to trade will be far outweighed by the workers' interests in freedom of expression, particularly where the primary employer is able to maintain operations in the face of a legal strike by hiring replacement workers or using management personnel. The blunt primary-secondary dichotomy adopted by the court in *Dolphin Delivery* does not allow for the balancing of these interests in particular cases.

⁴⁵ Beatty, *loc. cit.*, footnote 40, at pp. 395-396.

The Application of the Charter

The pivotal ruling in *Dolphin Delivery* lies in the court's finding that the Charter applies to the common law, but does not apply to private litigation between private parties unless one of the parties relies upon or invokes governmental action to infringe the Charter rights of another. The court begins its analysis of the Charter application issue with the finding that the Charter must apply to the common law because section 52(1) of the Constitution Act, 1982, provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". A construction of section 52(1) which excludes the common law would be wholly unrealistic and contrary to the words of the section because the whole body of common law in "great part governs the rights and obligations of the individuals in society".⁴⁶ However, the court then proceeds to undermine almost totally this initial ruling by concluding that the Charter will only apply to the common law where a governmental actor is relying on the common law to abrogate Charter rights. Thus, in effect, the great bulk of the common law will be immune from review for inconsistency with the Charter.

The court starts from the orthodox position that the Charter was created to regulate the relationship between the individual and the government, to restrain government action and protect the individual. The Charter "was not intended in the absence of some governmental action to be applied in private litigation".⁴⁷ The court follows its statement that the Charter does not apply to private litigation with the suggestion that the views of Hogg,⁴⁸ Swinton,⁴⁹ and McLellan and Elman⁵⁰ all support this view. In fact, the authors do not refer to *private litigation* in any of the cited passages. Instead, all take the position that the Charter was intended to regulate the relations between government and private persons and not relations between private persons and private persons. All argue that *private action* is therefore excluded from the application of the Charter in the sense that the Charter should not form the basis for new causes of action between private individuals based on violation by one private actor of another private actor's Charter rights. Thus, if private action results in a restraint on a civil liberty, the injured party may have a remedy under human rights legislation or some other branch of statutory or common law regulating private relations, but not under the

⁴⁶ *Supra*, footnote 1, at pp. 593 (S.C.R.), 191 (D.L.R.).

⁴⁷ *Ibid.*

⁴⁸ P. Hogg, *Constitutional Law of Canada* (2nd ed., 1985), pp. 670-678.

⁴⁹ K. Swinton, *Application of the Canadian Charter of Rights and Freedoms*, in W. Tarnopolsky and G.-A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), p. 41.

⁵⁰ A. McLellan and B. Elman, *To Whom Does the Charter Apply? Some Recent Cases on S. 32* (1986), 24 *Alta. L. Rev.* 361.

Charter. But all treat the question, whether the Charter should apply to private litigation where a court is asked to enforce a common law rule which infringes a Charter right, as a separate issue under the question of what constitutes governmental action. Swinton remains noncommittal on the question of whether the Charter should apply to private litigation in such circumstances.⁵¹ McLellan and Elman suggest that it is likely that the Charter will have an indirect impact on private activity by this route,⁵² while Hogg⁵³ advocates the adoption of the *Shelley v. Kraemer*⁵⁴ and *N.Y. Times Co. v. Sullivan*⁵⁵ doctrine in such cases to preclude the judicial enforcement of common law doctrines that would infringe Charter rights.⁵⁶ Although Hogg's position on the central question at issue in *Dolphin Delivery* is revealed with some clarity later in the judgment,⁵⁷ McIntyre J.'s assertion that his conclusion, that the Charter does not apply to private litigation, has been adopted by most commentators who have dealt with this question is not convincing.

McIntyre J. supports his conclusion that the Charter does not apply to the common law in private litigation with a textual analysis of section 32(1).⁵⁸ On his reading, section 32(1) specifies the actors to whom the Charter will apply. Because it refers to the Parliament and legislatures separately from the "government", it treats them as specific branches of government separate from the executive branch of government. Therefore, the word "government" is not used in the generic sense to refer to the whole of the governmental apparatus of the state, but rather only to the executive or administrative branches of government. Thus the Charter applies only to the legislative, executive and administrative branches of government, and it will apply to them whether their action is involved in public or private litigation. Actions by the legislature in the form of

⁵¹ Swinton, *op. cit.*, footnote 49, pp. 55-56.

⁵² McLellan and Elman, *loc. cit.*, footnote 50, at pp. 369-370.

⁵³ Hogg, *op. cit.*, footnote 48, pp. 676-678.

⁵⁴ 334 U.S. 1 (1948).

⁵⁵ 376 U.S. 254 (1964).

⁵⁶ See also McLellan and Elman, *loc. cit.*, footnote 50, at p. 369, where the authors describe these cases and suggest their likely adoption under the Charter because of the probability that court orders will be viewed as government action.

⁵⁷ *Supra*, footnote 1, at pp. 599-600 (S.C.R.), 195-196 (D.L.R.). Here too, in introducing a quotation from Hogg, *op. cit.*, footnote 48, p. 677, McIntyre J. uses "private litigation" as if it were synonymous with "private action", the phrase used by Hogg in the cited passage.

⁵⁸ S. 32(1) of the Charter is as follows:

32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

legislation, or by the executive or administrative branches relying on statutory authority or on the common law, will be subject to the Charter. It is only in this fashion that the Charter can apply to the common law, that is, where it is the basis for some governmental action which is alleged to violate a Charter right or freedom.⁵⁹ Because of the absolute requirement for governmental action or intervention by some governmental actor, as that term is defined by McIntyre J., the Charter will only apply to private litigation between private parties where one party invokes or relies upon legislative, executive or administrative action to produce an infringement of the Charter rights of another.⁶⁰

The court rejects Hogg's contention that the Charter should "apply to any rule of the common law that specifically authorizes or directs an abridgement of a guaranteed right" such that if a court order to enforce a common law rule or doctrine would infringe a Charter right, the Charter would apply to preclude the order and thereby modify the common law rule. Despite the common perception that courts and their processes form part of the governmental apparatus, and that court orders and state processes in place to enforce those orders are forms of governmental action, the Supreme Court holds that for the purposes of Charter application the order of a court is not governmental action. McIntyre J. concludes:⁶¹

... I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation.

With this ruling, the court appears to have rejected, at a very early stage in the Charter's development, the *Shelley v. Kraemer* principle

⁵⁹ *Supra*, footnote 1, at pp. 599 (S.C.R.), 195 (D.L.R.).

⁶⁰ *Ibid.*, at pp. 602-603 (S.C.R.), 197-198 (D.L.R.). The court here relies on *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513 (Ont. C.A.), as a prime example of the necessary governmental action which will allow for the application of the Charter to private litigation between private parties. In *Blainey*, a twelve year old girl brought a complaint against the respondent association that it had discriminated against her on the basis of sex contrary to the Ontario Human Rights Code, R.S.O. 1980, c. 340. The Ontario Human Rights Commission upheld the respondent's defence that s.19(2) barred the complaint by providing an exemption from the equal treatment provision for athletic organizations which restricted membership to persons of the same sex. According to McIntyre J., in *Blainey*, an action between private parties, the Charter was applicable because one of the parties acted on the authority of a statute which infringed the Charter rights of another. Thus the Charter would be applicable in *Dolphin Delivery* only if one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the union.

⁶¹ *Supra*, footnote 1, at pp. 600 (S.C.R.), 196 (D.L.R.).

that no individual has the right to demand action by the state which results in the denial of the constitutional rights or freedoms of others.⁶² Citizens in Canada will be entitled to enlist the power and processes of the state to assist them in denying Charter rights and freedoms of others through court enforcement of common law rules which result in the infringement of such rights and freedoms. This is so despite the court's earlier finding that "the whole common law. . . in great part governs the rights and obligations of the individuals in society" and to exclude the common law from Charter application "would be wholly unrealistic and contrary to the clear language employed in section 52(1) of the Act".⁶³

The court's fear that Hogg's position would lead to all private litigation being subject to the Charter would appear to be exaggerated. Hogg maintains that the Charter should not be applicable to private action so that it would be unavailable as a cause of action where a private individual seeks redress for, or the restraint of, private action by others which infringes on Charter rights. It is only where a private actor seeks to have the processes of the state, by means of a court order enforcing common law rules, assist in the infringement of the Charter rights of others, that the Charter should be applicable to preclude the granting of the Charter-infringing order. Under such an approach the court would preserve better its legitimacy as interpreter of the values of the Charter. Under the approach adopted by *Dolphin Delivery* the court may be perceived as placing itself above the Charter in its role as judicial lawmaker under the common law.

McIntyre J. attempts to deal with this argument by stating that courts are "bound by the Charter as they are bound by all law, but in doing so they act as neutral arbiters. . .".⁶⁴ The court's defence of the apparently inherent contradiction in the statement that judges are bound by the Charter but they are not bound by it in their role as adjudicators at common law appears to be based on the long outdated and discarded premise of legal formalism that judges are merely finders and declarers of pre-existing common law principles and rules and are not law and policy makers. To attempt to characterize the judiciary as simply neutral arbiters in common law disputes is to deny the instrumental role the courts have played in creating and shaping common law rules to preserve and further a system for private ordering and allocation of entitlements based on liberal values regarding property rights and market economics. The instrumental nature of the judicial development of the common law in this

⁶² In *Shelley v. Kraemer*, *supra*, footnote 54, at p. 22, Vinson J. held that no individual has "the right to demand action by the State which results in the denial of equal protection of the laws to other individuals".

⁶³ *Supra*, footnote 1, at pp. 593 (S.C.R.), 191 (D.L.R.).

⁶⁴ *Ibid.*, at pp. 600 (S.C.R.), 196 (D.L.R.).

regard has been documented in the United States context by Morton Horwitz.⁶⁵ Similar findings concerning the judicial development of the common law economic torts to deal with the concerted collective worker activity have been made by several Canadian writers.⁶⁶ The picture painted by these critics is not one of crass instrumentalism on the part of the judiciary, but rather one of common law policy-making by a judiciary imbued with liberal values and preferences concerning the value of property rights, the right to trade and free market economics, and far removed from the experience, interests and concerns of workers. This led to the development and application of the economic torts in the collective bargaining context in a fashion which gave little or no weight to the expression of worker interests or values. In light of this, the reference to judges as mere neutral arbiters in resolving common law disputes rings hollow.

There is a curious irony to the court's ruling on Charter application for those who have advocated the removal of the courts from the decision-making process in the area of labour relations policy because of concerns about institutional competence and liberal judicial values and preferences which fail to take adequate account of collective worker interests. These concerns were in large part responsible for a virtually wholesale transfer of jurisdiction over labour relations and labour disputes to expert administrative tribunals and arbitration panels with the implementation of statutory collective bargaining regimes. These concerns also led to the enactment of strong privative clauses to attempt to exclude the workings of administrative labour boards and arbitration boards from judicial review, and to repeated calls by commentators for the courts to show deference to such tribunals and boards in the sphere where judicial review remained possible. And commentators have called on the courts to avoid the undue constitutionalization of labour law under the Charter, based on similar concerns about renewed judicial involvement in labour relations policy.⁶⁷ The real irony of the *Dolphin Delivery* decision on Charter application is that, while the labour relations policy choices of legislatures and expert administrative tribunals will be subject to review for consistency with the Charter, and hence provide the opportunity for renewed judicial entanglement and intervention in legislative policy making, the labour policy choices of the judiciary in shaping and applying common law doctrines, already severely criticized for being imbued with liberal economic values and assumptions that are antithetical to collective worker activity and interests, will go unreviewed for consistency with Charter values.

The court's ruling that legislative choices concerning labour policy are reviewable under the Charter, while judicial policy choices in the

⁶⁵ M. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

⁶⁶ Tacon, *op. cit.*, footnote 11; Manwaring, *loc. cit.*, footnote 3.

⁶⁷ Weiler, *op. cit.*, footnote 26, p. 241.

formation and application of common law doctrines are not, could be troublesome for labour in another important respect. The common law concerning labour relations has largely developed as a refuge for employers' economic and property interests in their struggle with labour. As workers increasingly resorted to concerted collective activity to protect their interests, employers resorted to the courts for the protection of their interests, and the courts obliged by developing the common law doctrines of criminal and civil conspiracy, trespass, nuisance, inducing breach of contract, and intimidation. While a statutory collective bargaining regime has largely supplanted most of these common law devices for the restraint of collective worker action, the vestiges of common law doctrines that remain applicable in the labour relations context continue to be primarily devices for the protection of employers' property interests and right to trade at the expense of workers' freedom to resort to collective action and expression. At the same time, legislative choices embodied in modern schemes for collective bargaining, for the most part, promote and protect the collective rights and freedoms of workers and, in order to facilitate the organization of workers and collective worker activity, place restrictions on what had hitherto been regarded as individual rights and freedoms of employers and individual employees. For example, laws protecting employees' right to organize and engage in union activity can be viewed as restrictions on employer freedom of speech and freedom of contract. In short, the common law generally protects employer rights and interests at the expense of worker freedom, while collective bargaining legislation generally legitimates and protects workers' collective activity at the expense of employers' individual rights and freedoms.⁶⁸ Hence there can be little comfort for labour in the *Dol-*

⁶⁸ I recognize that this is a simplistic generalization, particularly with regard to the general characterization of modern collective bargaining regimes as primarily concerned with protecting collective worker activity and furthering worker interests. Critical legal studies scholars such as Klare and Van Wezel Stone have demonstrated ably the extent to which modern collective bargaining regimes may have co-opted labour and masked the real political and power relationships by legitimating concerted collective worker activity only within narrowly prescribed confines, while at the same time prohibiting more disruptive forms of concerted worker activity. In short, I acknowledge that collective bargaining regimes may have performed a channelling and legitimating function and thereby avoided or precluded the need for a more meaningful change in the relations of production in our society. Nevertheless, I remain of the view that modern collective bargaining regimes advance collective worker interests more than the prior common law regime and, for the most part, provide workers with protection for organizational and union activity at the expense of what were previously regarded as individual employer rights and freedoms under the common law. See generally Klare, *op. cit.*, footnote 38; K. Van Wezel Stone, *The Post-War Paradigm in American Labor Law* (1981), 90 *Yale L.J.* 1509.

phin Delivery ruling that the Charter does not apply to judicial enforcement of common law doctrines but will apply to legislative choices concerning labour policy.⁶⁹

⁶⁹ I do not suggest that the court is likely to embark on a wholesale constitutionalization of collective bargaining law under the Charter. The court, in fact, has already expressed a great reluctance to do so in the three right-to-strike decisions released on April 9, 1987. See *Reference Re Public Service Employee Relations Act (Alta.)* (1987), 87 C.L.L.C. 12,149 (S.C.C.), esp. at p. 12,151, per Le Dain J., and at pp. 12,161-12,162, per McIntyre J.; *Public Service Alliance of Canada v. The Queen* (1987), 87 C.L.L.C. 12,189 (S.C.C.); *Retail, Wholesale and Department Store Union, Local 544 v. Gov't of Saskatchewan* (1987), 87 C.L.L.C. 12,201 (S.C.C.).

However, in these cases unions were advocating the recognition of freedom of association as a collective freedom protecting concerted collective worker activity. It remains to be seen whether this hands-off stance will be maintained where Charter complaints are more oriented to the rights of individual employers or individual anti-union employees. Two pointers which may cause labour to fear that the hands-off stance will be applied unevenly are McIntyre J.'s emphasis, in *Reference Re Public Service Employee Relations Act*, that freedom of association belongs to the *individual*, not to groups; and the statement *obiter* by five judges in *National Bank of Canada v. Retail Clerks Int'l Union*, [1984] 1 S.C.R. 269, at p. 296, (1984), 9 D.L.R. (4th) 10, at p. 31, that an order of the Canada Labour Relations Board, requiring an employer to send a letter to its employees admitting violations of the Canada Labour Code and pledging to respect the employees' rights in the future—a very common type of order in Canada—was contrary to the employer's freedom of expression under the Charter.