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**IS COLLECTIVE BARGAINING PROTECTED BY
CANADA'S CHARTER OF RIGHTS?**

Allan McChesney

Thesis submitted to
the School of Graduate Studies and Research
in partial fulfillment of the requirements for the
LL.M. degree in Law

Université d'Ottawa/University of Ottawa



Allan McChesney, Ottawa, Canada, 1989



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Is Collective Bargaining Protected by

Canada's Charter of Rights?

by Allan McChesney, April 1989

Revised in part November 1989

1. Introduction

April 9, 1987 was not a bright spring day for Canadian labour leaders. On that date, the Supreme Court of Canada released its trilogy of decisions on the meaning of "freedom of association" in the Charter of Rights.¹ The highest court ruled that under Canada's Constitution, neither the right to strike nor the right to bargain collectively were part of guaranteed associational rights. Or did they so rule?

A major objective of this essay is to demonstrate that though the Supreme Court did not find strike rights to be protected, the Court may not have conclusively resolved the issue of whether a right to collective bargaining is guaranteed. A second purpose of this paper is to examine and to develop lines of reasoning that have not been thoroughly addressed in constitutional jurisprudence and which might serve to frame Charter protection for collective bargaining in future litigation. The "right to bargain collectively" will be explored in the light of Charter section 7 (guaranteeing liberty and security of the person) and of section 15 (proclaiming equality rights). The significance of international law will be pondered. A central question of the study is whether collective bargaining, or elements of it, might be fundamental in Canada's democratic society.

In the Supreme Court's labour relations trilogy, the dissenting judges, Chief Justice Dickson and Madam Justice Wilson, reasoned that the Constitution Act, 1982 does safeguard both the right to collective bargaining and the freedom to strike. The majority found that the meaning of "freedom of association" in the Constitution does not encompass strike rights. It will be asserted here that while four Justices held that the freedom to strike is not protected, only three of those judges stated definitively that collective bargaining rights are not safeguarded.

Only six judges took part in writing decisions on the trio of freedom of association cases. If only three of these Justices ruled that bargaining rights are not covered by the Charter, may we conclude that aspects of the bargaining rights question remain open? If so, even without having to overrule itself, the Supreme Court could hold in a future case that the Charter guarantees some collective bargaining^{1A} rights for Canadian workers.

It is appropriate to state at the outset that in the months following the issuance of the trilogy, many published commentaries expressed the view that both the freedom to strike and collective bargaining rights were found unprotected.² Prima facie, at least, that opinion was shared by some leading Canadian authorities on labour rights under the Constitution.³ Yet it was possible to read the law as it stood in 1987 and reach a contrary conclusion. Subsequent rereadings of the leading appellate decisions have served to confirm the initial view that the question of constitutional protection for collective bargaining rights has not been resolved. The substantiation for and implications of that assertion are put forth in the following pages.

2. The Trilogy of Supreme Court of Canada Decisions

2.1 An Overview

In a number of Canadian jurisdictions, conflicts involving freedom of association under the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982) had worked their way to the top of the judicial pyramid by the end of 1985.⁴ The central focus of interpretation was section 2(d) of the Charter:

2. Everyone has the following fundamental freedoms:

·
·
·

(d) Freedom of association.

The Supreme Court of Canada did not formulate its own conclusions until three pivotal cases had been argued before the Court. This delay clearly allowed the members of the Court to test arguments put to them against a wider backdrop of factual and statutory circumstance. The three decisions, though issued jointly on one day, are quite separate factually. In each judgment, analysis of constitutional law is cross-referenced to the legal analysis contained in the companion judgments in the trio.

One result of the cross-referencing of interpretive elements is of course shorter written reasons. Advocates for the losing (trade union) side could fairly question whether the reasoning presented by the dominant group of judges is, in real terms, too short.⁵ The plurality of judges who stated that neither a right to strike nor a right to collective bargaining are enshrined in section 2(d) dealt rather tersely with some issues put forward by the small army of legal talent representing main litigants and interveners.⁶ The two

dissenting judges, as well as Mr. Justice McIntyre, the author of an opinion that primarily concurs with the governing plurality, found it necessary to examine the law with a wider lens and a greater variety of filters. Chief Justice Dickson and Madam Justice Wilson joined forces in forceful dissent on the core conundrum, the extent of the rights contained within "freedom of association".⁷

All published commentaries reviewed appear to agree on what the dissenting opinions in the trilogy say about the right to strike and collective bargaining.⁸ The reasons upon which controversy turns are those articulated by Mr. Justice McIntyre. Although his reasoning is carried forward with more philosophical fuel, he arrives at the same conclusion as the plurality with respect to the right to strike, producing a majority against its protection in the Charter.⁹ What Mr. Justice McIntyre does not say, though leading authorities seem to disagree here, is that collective bargaining rights are outside the circle of section 2(d) of the Charter.

During the preparatory research stages of this thesis, there were few published commentaries available dealing with the rationale and ramifications of the "freedom of association" trilogy. It is prudent to point out that the weight of early published works ran against the opinion expressed here regarding the inconclusiveness of the jurisprudence culminating in the Supreme Court trilogy. On balance, they appeared to agree with one another on a key point, that the Supreme Court found both strike and bargaining rights to be outside the scope of Charter guarantees. These authorities will be discussed in Part 3 infra. When all was reread and reconsidered, however, there still seemed good reason to hold the opinion that the Supreme Court had indeed left room for important components of collective bargaining in the Charter's house

of rights.¹⁰

2.2 The Three Leading Cases

The issues in each of the freedom of association appeals that comprised the trilogy were of sufficient normative import to inspire government counsel representing a majority of Canadian jurisdictions to take part in one or more of the hearings.¹¹ Two causes had provincial origins. The one action that focussed on a federal statute was the Public Service Alliance case.¹² This matter had originated in the Federal Court as a challenge to the federal anti-inflation scheme governed by the Public Sector Compensation Restraint Act.¹³ This legislation acted to constrain income raises for public sector employees. It extended the life of collective agreements for two or more years and suspended the right to strike during the duration. Madam Justice Reed of the Federal Court Trial Division found that freedom of association did not include a right to strike or protection for collective bargaining.¹⁴

The Federal Court of Appeal agreed with Reed, J. In its brief judgment, the Court of Appeal construed freedom of association under the Charter to be limited to the right to join an association. Although one's right to be part of a group was guaranteed, there was no protection of objects for which the association was formed, nor of the means pursued by the association to achieve its purposes.¹⁵

The second case in the trilogy examined the imposition of restrictive labour negotiation conditions by the Government of Alberta on its public sector employees.¹⁶ The primary questions determined by the Alberta Court of Appeal concerned the statutory removal of strike and lockout rights and their replacement by imposed compulsory arbitration. The Alberta Court of Appeal

reached conclusions similar to those held by their federal counterparts in the Public Service Alliance case, finding that freedom of association under the Charter has a limited content.¹⁷

The third case in this group also came from a provincial appellate court.¹⁸ The Dairy Workers controversy concerned a back-to-work statute enacted by the provincial government to head off threatened strikes and lockouts involving twelve dairies in Saskatchewan. The law in question, the Dairy Workers (Maintenance of Operations Act)¹⁹ declared that the expired collective bargaining agreement would remain in force, suspended the right to strike and installed a compulsory arbitration system in substitution.

The Saskatchewan Court found that the legislation violated section 2(d) of the Charter of Rights. Chief Justice Bayda, and also Cameron, J.A. who wrote a separate concurring opinion, agreed that freedom of association extended beyond the bare right to join an association. Some of the means by which an association pursued its objects were protected by the Charter. One of these was the right to strike, seen by the Court as a necessary piece of equipment on the union side of collective bargaining manoeuvres.

2.3 The Content of Freedom of Association

In the progression of the trilogy along the curial ladder, the predominant quandaries addressed by the judiciary surrounded the potential problems presented by enshrinement of a right to strike in the Constitution. A majority of the participating judges, including those forming a Supreme Court majority, held that the right to strike is not protected by the Constitution. Rather than dwell on the Court's reasoning on what appears to

be the closed issue of strike rights, this paper will struggle with the more interesting puzzle linking freedom of association with collective bargaining.

Although many sources will be analysed herein, the primary focus must be on the high water mark of the law to date, the Supreme Court trilogy. In formulating their judgments, the Supreme Court of Canada chose to make the Alberta Labour Reference their central decision, against which the judgments in the other two cases are cross-referenced. An outline of the factual background and reasons in that matter will therefore be set out first.

2.3 (a) Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act, Alberta Union of Provincial Employees et al. v. Alberta (Attorney General)²⁰

Seven questions had been referred to the Alberta Court of Appeal by the provincial government, all dealing with the constitutionality of parts of three pieces of legislation. The Public Service Employee Relations Act²¹ applied to provincial public servants generally. The Labour Relations Act²² covered, inter alia, firefighters and hospital workers, and the Police Officers Collective Bargaining Act²³ was, as suggested by its title, applicable to police officers.

Two primary issues were raised in the case (hereinafter referred to as the Alberta Labour Reference): (1) whether the provisions of the three named statutes offended the Charter, in that they prohibited strikes and imposed compulsory arbitration to resolve impasses involving the designated groups; (2) whether the provisions of those statutes that related to the conduct and

allowable subject matter of arbitration were inconsistent with the Charter. In ways that the target trade unions found unfair, the Acts in question blocked or limited the arbitrability of certain items and required the arbitration board to consider other specified factors in arriving at its award.²⁴ In their judgment, the Alberta Court of Appeal determined that the impugned provisions addressed in the first question did not breach the Charter. They declined to answer the second query.

The Supreme Court of Canada, *per* Le Dain, J., with Beetz and La Forest JJ. concurring, dismissed the public employees' appeal, holding that section 2(d) of the Charter (set out at Chapter 2.1, *supra*) does not guarantee a right for union members to bargain collectively or a right to strike.²⁵ On the question of whether a right to strike was encompassed by section 2(d), McIntyre, J. also concurred in the negative reply.²⁶

The reasons of Le Dain, J., speaking for the plurality, express the view that section 2(d) does guarantee the freedom to work for the creation of an association, to be a member of an association, to maintain its existence and to participate in its lawful activities without penalty or reprisal. In the view of the plurality, however, the concept of freedom of association must have meaning for a wide range of organizations or associations of a political, religious, social and economic nature. These bodies have a great diversity of objects, and are widely varied in their methods of pursuing these purposes. It is in this wider perspective, and not merely with regard to the perceived needs of trade unions, that the Court must construe "freedom of association". This broader view must come into play when the Court considers the implications of extending the constitutional safeguard to cover a right to engage in a particular activity.

This perception of the concept of freedom of association also held true, in the eyes of Mr. Justice Le Dain, when the particular activity was said to be essential to the meaningful existence of an association, in this case a trade union. The premise that the concept of freedom of association would be empty and meaningless without specific constitutional protection for union associational activities was rejected. The rights for which constitutional safeguards were sought in the Alberta employees' appeal were found not to be fundamental rights or freedoms. The modern rights to strike and to bargain collectively were held to be the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts in Canada as requiring a specialized expertise. Developments in this area, stated Le Dain, J., should be left to be regulated through legislated policy, rather than by the judiciary.

The concurring reasons of Mr. Justice McIntyre brought to four, and therefore to a majority, the number of judges holding in favour of the Alberta government in the appeal. McIntyre, J. ruled that the purpose of freedom of association is to guarantee that activities and goals may be pursued in common. Section 2(d) protects the exercise in association of rights if they have Charter protection when exercised by an individual. It also safeguards the freedom to associate for the purpose of activities that are lawful when performed by an individual, but which are not necessarily constitutionally guaranteed when performed alone.

McIntyre, J. elaborated on his views by stating that the fact of association will not by itself confer additional rights on individuals, so that an association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual. Since the right to strike is not

independently protected by the Charter, nor expressly permitted by law for an individual, it is not protected by section 2(d). The framers of the Constitution did not include a specific reference to the right to strike and this omission speaks strongly against any implication of a right to strike. The right to strike accorded by legislation throughout Canada is of relatively recent vintage. In the absence of specific reference to a right to strike in the Charter, it cannot be said that it has now acquired status as a fundamental right that should be implied.

Those portions of Mr. Justice McIntyre's reasons that illuminate the constitutional position of a right to collective bargaining will be discussed at 3.2 below.

On both the issue of a right to strike and that of a right to collective bargaining, Chief Justice Dickson dissented, with Madam Justice Wilson concurring.²⁷ At a minimum, held the Chief Justice (here agreeing with all of his colleagues), subsection 2(d) guarantees the liberty of persons to be in association or to belong to an organization. In the shared opinion of Dickson, C.J.C. and Wilson, J., however, the reach of section 2(d) extends beyond a concern for associational status, to give effective protection to the interests toward which the constitutional guarantee is directed. The purpose of the Charter protection is to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in pursuit of her or his objectives. This means that what freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with and mutually to support their fellow human beings in the varied activities in which people engage.

Dickson, C.J.C. added however (again in agreement with all of his colleagues) that the fact that an activity is capable of being carried out by several people acting together, as well as individually, does not cloak it with constitutional protection against legislative prohibition or regulation. The overarching consideration that remains is whether a legislative enactment or an administrative action interferes with the freedom of persons to join together and act with others in common pursuits. The type of legislative purpose that would render legislation constitutionally invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

Focussing on collective bargaining, the Chief Justice stated that association has always been a vital means of protecting the essential needs and interests of working people, and the capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. Furthermore, the right of workers to strike is an essential element in the principle of collective bargaining. Freedom of association, in the context of labour relations, includes the freedom to bargain collectively and to strike.

Although effective constitutional protection of the associational interests of employees in the collective bargaining process requires the protection of their freedom to strike, this was subject to section 1 of the Charter:²⁸

Section 1

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In view of their conclusion that the Alberta legislation being challenged did not abrogate a Charter right, it had not been necessary for the majority of deciding judges to bring section 1 of the Charter into the fray. In the Alberta Labour Reference, Dickson, C.J.C. ruled that the offending laws were not justifiable pursuant to section 1.

In accordance with the series of Supreme Court judgments that had earlier construed section 1, there was an obligation on the part of the Alberta government to impair as little as possible the freedom of association of those affected by the legislative prohibition of strikes.²⁹ Such a restriction needed to be accompanied by a mechanism for dispute resolution that adequately protected workers' interests. Looking at the legislation reviewed through the Alberta Labour Reference, Chief Justice Dickson found that the arbitration system provided was not an adequate replacement for the affected employees' freedom to strike. The provisions in the Acts that related to the arbitration schemes did not themselves limit freedom of association in violation of the Charter. Rather, these provisions contributed to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of the statutory limitations to be justified under section 1.

2.3 (b) Public Service Alliance of Canada v. The Queen in Right of Canada et al.³⁰

In order to reduce uninformative repetition, the approach taken in the assessment of this second case in the trilogy will take its lead from the method of cross-referencing adopted by the Supreme Court in molding its three linked judgments. The core decision is the Alberta Labour Reference.

The Public Service Alliance of Canada (hereinafter referred to as PSAC) represents public servants in the federal jurisdiction. The litigation launched by the union arose in Federal Court as PSAC sought a declaration that the Public Sector Compensation Restraint Act³¹ was inconsistent with the Charter.

The Act applied only to public sector employees, including those of the government and of its agencies. Compensation plans in force on June 29, 1982 were extended for a period of two years, and wage increases were fixed at 6 percent in the first year and 5 percent for the second. For those groups not covered by a compensation plan on June 29, 1982, the Act extended their previous compensation plan for one year and provided for an income increase of 9 percent for that year. At the end of that initial extension, these latter groups were also subject to a two year period with increases based on the "6 and 5" scheme described earlier. During everyone's prescribed periods of extension, collective bargaining on both compensatory and non-compensatory components of the relevant collective agreements was precluded.³²

As was stated in the Introduction, the Federal Court, at trial and on appeal, held that the Act did not violate section 2(d) of the Charter. The Supreme Court of Canada agreed, dismissing the labour union's further appeal.

Beetz, Le Dain and La Forest JJ. adopted the reasons expressed per Le Dain, J. in the Alberta Labour Reference, concluding that subsection 2(d) of the Charter includes neither a right to bargain collectively nor a right to strike.³³ Consequently, the challenged federal legislation could not infringe the Charter.

McIntyre, J., also adopting his own reasons from the Alberta Labour Reference, held that the Public Sector Compensation Restraint Act did not

interfere with collective bargaining so as to infringe the Charter guarantee of freedom of association.³⁴ The effect of the Act was simply to forbid the use of the "economic weapons" of strikes and lockouts for a two-year period. This might limit the bargaining power of PSAC, but it did not, in the view of McIntyre, J., violate freedom of association.

Once again, Chief Justice Dickson and Madam Justice Wilson dissented, though their views did not coalesce as they had in the concurrently released Alberta Labour Reference judgment. Wilson, J. and the Chief Justice agreed that for the reasons given by him in the Alberta Labour Reference, the Public Sector Compensation Restraint Act violated subsection 2(d) of the Charter.³⁵ Dickson, C.J.C. elaborated that in the labour relations context, freedom of association includes the freedom to participate in determining conditions of work through collective bargaining and the right to strike. By automatically extending the terms and conditions of collective agreements and arbitral awards and by fixing wage increases for a two-year period, the Act infringed the freedom of public sector employees to engage in collective bargaining.

The Chief Justice specifically stated that two exception provisions in the statute did not alter his conclusion concerning its breach of Charter section 2(d). Section 7 of the Act permitted parties to a collective agreement to agree to amend any terms or conditions of the agreement or of an arbitral award, if related to matters other than compensation. Section 16 permitted the Governor in Council to exempt an employee or group of employees from the effects of the Act by suspending its operation vis-a-vis that individual or group.

In his brief critique of these sections of the Act,³⁶ the Chief Justice reiterated that the freedom to strike is a necessary incident of collective

bargaining. Under neither of the statutory provisions examined did PSAC have effective bargaining power, since it lacked the legal capacity to withdraw services collectively or even to remit a dispute to binding arbitration. Without these capacities, employees seeking non-compensatory amendments (under section 7) or employees requesting the Governor in Council to suspend the operation of the Act (under section 16) were not "in an effective position to bargain".

Where Dickson, C.J.C. and Wilson, J. expressed disagreement was over the question of justifications under Charter section 1 for the perceived violations of Charter section 2(d).³⁷ The Chief Justice held that the leadership role of government in economic matters and its concern to control inflation could justify, at the time of passage of the Act, the imposition of controls on federal public sector employees and the suspension of collective bargaining on compensation.

Applying section 1 of the Charter, Wilson, J. reasoned that though the goal of controlling inflation had been of sufficient importance to warrant limitations on bargaining and strike rights, that did not justify imposing limitations on federal public sector employees only. Madam Justice Wilson held that this selective imposition did not meet the section 1 test in R. v. Oakes, [1986] 1 S.C.R.103 at p. 139:³⁸

... the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

Madam Justice Wilson observed that the federal government's true intention had been to provide indirect inspiration for voluntary income level

controls in the private sector, by establishing mandatory controls in the public sector. The government had not demonstrated that its purpose had been achieved. The conclusions reached by Wilson, J. (at p. 458) were that the measures adopted were not carefully designed, but were "arbitrary" and "unfair" constraints placed upon a captive constituency, the government's own employees.

2.3 (c) Government of Saskatchewan et al. v. The Retail, Wholesale and Department Store Union, et al., [1987] 1 S.C.R. 460

This case arose from an escalating industrial conflict that followed unsuccessful contract talks between several unions and the only two big dairy businesses in Saskatchewan. The unions threatened a series of rotating strikes and the dairies countered with blanket lockout notices. The province passed The Dairy Workers (Maintenance of Operations) Act,³⁹ temporarily prohibiting both strikes and lockouts. The Saskatchewan Court of Queen's Bench had dismissed the unions' application for a declaration that the Act infringed section 2(d) of the Charter. Their appeal to the Court of Appeal was allowed, and the Government appealed further to the Supreme Court.

Once again relying on the reasons expressed by Le Dain, J. in the Alberta Labour Reference, Justices Beetz, Le Dain and La Forest⁴⁰ held that Saskatchewan did not violate section 2(d) of the Charter, since this does not include a guarantee of the right to bargain collectively or to strike. Their conclusion in the Dairy Workers case accorded with that of McIntyre, J.,⁴¹ who also ruled in favour of the Saskatchewan Government. He of course relied on his own reasons as stated in the Alberta Labour Reference.

Consistent with his reasoning in the two other branches of the trilogy, Chief Justice Dickson dissented on the issue of whether subsection 2(d) of the Charter enshrines a right to strike.⁴² He noted that the Dairy Workers (Maintenance of Operations) Act⁴³ (i) compelled workers to "resume the duties of their employment" (section 3(a)); (ii) extended the terms of the former collective bargaining agreement (section 6); (iii) forbade employees from participating in a work stoppage during the period of extension (section 7(c)); and (iv) imposed final and binding arbitration if a new or amended collective bargaining agreement had not been concluded between the employer and the union within 15 days of the coming into force of the Act (section 8). Based on his reasons as set out in the Alberta Labour Reference, the Chief Justice was of the opinion that the Act violated section 2(d) of the Charter to the extent that it interfered with the freedom of the affected employees to engage in strike activity that would have been lawful in the absence of the Act.

As was the case in Public Service Alliance v. Canada, Chief Justice Dickson⁴⁴ and Madam Justice Wilson⁴⁵ disagreed on the justifiability of the impugned legislation pursuant to section 1 of the Charter. Each of them of course applied the principles refined in R. v. Oakes.⁴⁶ Nevertheless, they arrived at contrasting conclusions about the factual circumstances prevailing in Saskatchewan at the time of passage of the Dairy Workers (Maintenance of Operations) Act and about the way these circumstances accorded with the parameters of Charter section 1.

Particular elements of the Oakes principles were refashioned by Dickson, C.J.C. (at page 462) to fit the case at hand:

In order for the legislation to be saved under s. 1, the objective advanced to justify the legislation must relate to a 'pressing and substantial concern'. Moreover, the legislative objective must be weighed against the deleterious effects of the measures which limit the enjoyment of the Charter right. In view of these principles established in Oakes, the relevant question to be answered in making such a determination is whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as to justify the limitation of a constitutionally guaranteed freedom in respect of those employees.

In the opinion of the Chief Justice, a legislature is entitled to abrogate the right to strike if the effect of a strike or lockout would be especially injurious to third parties, provided that the legislature substitutes a fair arbitration scheme to resolve related disputes. In the view of Dickson, C.J.C., the potential economic harm threatened by a total work stoppage in the dairy processing industry justified intervention within the legislature's ambit of discretion. Moreover, the compulsory arbitration scheme enacted in the anti-strike law met the Oakes criteria of proportionality.⁴⁷

Madam Justice Wilson found that the Dairy Workers (Maintenance of Operations) Act could not be saved under Charter section 1. Though economic regulation is an important government function, the prevention of economic harm to a particular sector is not per se a sufficient objective to justify the limitation of the freedom of association guaranteed by section 2(d) of the Charter. If Charter rights are restricted in the name of economic regulation, "then it must be done in response to a serious threat to the well-being of the body politic or a substantial segment of it".⁴⁸ In Madam Justice Wilson's frame of reference, the evidence put forward by the government in the case at

bar fell far short of establishing that degree of economic harm to the dairy industry and to the public.

3. The (Possibly) Unresolved Issue of Collective Bargaining

3.1 Authority for the Proposition that "Freedom of Association" Does Not Include A "Right to Bargain Collectively"

The core of the reasoning of each of the six judges participating in the Supreme Court trio of freedom of association judgments is to be found in the Alberta Labour Reference. In the immediate aftermath of the issuance of these three decisions, it is understandable that the focus of attention might have been on the pronouncements made by the four judges who ruled that "freedom of association" did not include a right to strike.⁴⁹ In at least one looseleaf service aimed at labour relations practitioners,⁵⁰ there was an impression presented that the same four judges had as a unit found collective bargaining not to be protected by section 2(d). Scholars who wrote papers or articles focussing on Charter associational rights were of course more painstaking in their assessments.⁵¹ Nevertheless, little has been written that might lead a reader to reassess the meaning of the trilogy. In part 3.2 below, this thesis will try to demonstrate that there is a possibility "freedom of association" under the Charter protects more than just the right to found, join and support an association.

It is well to reiterate here the opinion that in the trilogy, only two dissenters, the Chief Justice and Madam Justice Wilson, categorically held that both a right to strike and a right to bargain collectively are contained in Charter section 2(d). For present purposes, what matters most is whether,

and to what extent, McIntyre, J. dissented in part on the question of a right to bargain collectively. With respect to the Alberta Labour Reference judgment, it takes a careful reading (and, some might say, a bit of wishful thinking) to deduce that McIntyre, J. left the question open.

It is not difficult to surmise how a casual reader (or one facing a deadline) might conclude that a majority of the Supreme Court held firmly against the expanded view of subsection 2(d) of the Charter. Anyone who read just the headnote, or looked only at the reasons of the plurality, drawn up by Mr. Justice Le Dain, could find this to be a logical conclusion. The summary provided by the headnote does not indicate clearly that although he shared the plurality's views concerning a right to strike, Justice McIntyre does not come down squarely on their side with regard to collective bargaining rights. It might be recalled that fully 21 pages of McIntyre, J.'s reasons are taken up with a complex discussion of "The Scope of Freedom of Association" in section 2(d),⁵² and this would be rather difficult to encapsulate accurately in a headnote.

The plain opening words of Mr. Justice Le Dain in the Alberta Labour Reference present a picture of harmony of thought among four of the six deciding judges. Repeated analysis, however, affirms the tentative opinion formed after reading the trilogy on April 10, 1987 (the day after its release) -that the interpretation of Justice McIntyre's ideas conveyed by the passage set out below⁵³ may not be borne out by the actual statements he himself made in the Alberta Labour Reference:

The judgment of Beetz, Le Dain and La Forest JJ.
was delivered by

LE DAIN J. — The background, the issues and the
relevant authority and considerations in this appeal

are fully set out in the reasons for judgment of the Chief Justice and Justice McIntyre. I agree with McIntyre J. that the constitutional guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike, and accordingly I would dismiss the appeal and answer the constitutional questions in the manner proposed by him. (Emphasis added)

Lawyers and others working in litigation or negotiation in the labour relations field have a constant barrage of case reports made available for their reading. As with most busy practitioners, for initial information on developments, they often must rely on bulletins, legal newspapers and looseleaf reporting services targetted to advocates. Here is what one such service printed concerning the trilogy:

Right to Strike

The Supreme Court of Canada ruled on April 9 that the Charter does not guarantee the right to strike or to bargain collectively. We will report this case in detail in the May issue.

(Focus on Canadian Employment and Equality Rights, Vol. 1, No. 16 (April, 1988), page 125).

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Editorial

The Supreme Court Has Spoken

While most people have welcomed the protection afforded by the Charter of Rights and Freedoms, one group which has not been overjoyed by the new case law is trade unionists.

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Three long-awaited decisions of the Supreme Court of Canada rendered on April 9 were met by outrage from union leaders, some of whom even called for amendments to the Charter. All three cases focused on section 2(d) of the Charter, which simply states: "Everyone has the following fundamental freedoms: ... (d) freedom of association."

The first decision involved the constitutionality of Alberta legislation that prohibits strikes and imposes compulsory arbitration to settle collective agreements. ... Five of the seven Justices concluded that such laws do not contravene the constitutional guarantee of freedom of association.

Specifically, the Court held that the right of freedom of association does not include a guarantee of the right to bargain collectively and the right to strike.

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A similar result was reached in a decision rendered on the same day concerning the constitutionality of a Saskatchewan statute passed during a labour dispute to temporarily prohibit strikes and walkouts in the province's dairy industry.

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The third case involved federal legislation, the Public Sector Compensation Restraint Act, ... Once again, the majority of the Court held that such legislation did not violate the Charter because the freedom of association does not include a guarantee of the right to bargain and the right to strike.

(Focus on Canadian Employment and Equality Rights, Vol. 1, No. 17 (May 1987) pages 127-128).⁵⁴

Next, let us turn to an analysis of the trilogy prepared by Canadian academic scholars. Their more careful canvassing of the issues also does not provide much support for the idea that a future array of Supreme Court judges

might carve a space for collective bargaining within section 2(d) of the Charter. Professor Ken Norman of the University of Saskatchewan delivered a comprehensive post-trilogy legal analysis of matters under the Charter in October, 1987.⁵⁵ In his address, he traced the progress of constitutional cases dealing with "freedom of association" in the Canadian courts. His paper carried a critique of the reasons of Mr. Justice McIntyre in the Alberta Labour Reference. Elements of Professor Norman's presentation will be examined more closely later in this thesis as part of a discussion concerning why and how collective bargaining rights might be construed in Charter section 2(d). With respect to the trilogy's meaning, Professor Norman appeared to agree (at page 21 of his address) with the summary quoted above:

"The plurality opinion authored by Le Dain, J., concurred in by Beetz and La Forest JJ., takes up only a few lines beyond two pages in order to assert the conclusion that collective bargaining and the right to strike are not constitutionally justifiable as embraced by the fundamental freedom of association. McIntyre, J. reaches the same conclusion after discussing the meaning to be given to s. 2(d) at some length".

Another article that does not fully address the possible differences between the reasons of McIntyre, J. and those of the plurality was authored by Professor Donald D. Carter, Director of the Industrial Relations Centre at the School of Industrial Relations, Queen's University. Professor Carter's text reads as follows:⁵⁶

"Three recent decisions of the Supreme Court of Canada, each of them dealing with the issue of whether Canada's existing collective bargaining system is given some measure of constitutional protection by the Charter, ... each involved a challenge to government legislation that curtailed existing collective bargaining rights ... In each of these three cases the

Supreme Court of Canada made it clear that it was not prepared to read the Charter as elevating collective bargaining and strike activity to fundamental rights that are beyond the reach of our legislatures".

Professor Carter went on to give a terse summary of the holdings of Mr. Justice McIntyre. He began this by stating that McIntyre, J. had been "speaking as one of the majority" and then refers to elements of McIntyre, J.'s reasons where he indeed was ad idem with the plurality. Though perhaps not intended, the message one might gain is that all four judges ruled definitively against a reading of subsection 2(d) that protects any collective bargaining rights.

One of the factors that has attracted attention away from the trilogy in the labour law domain has been the focus on the concept of a "freedom not to associate" for individual workers, principally in the Lavigne litigation.⁵⁷ That is the central topic pondered in a number of recent publications,⁵⁸ including one by Assistant Professor of Law Brian Etherington of the University of Windsor.⁵⁹ In the main body of his text, Professor Etherington understandably made only passing reference⁶⁰ to the cases that came to form the Supreme Court trilogy. Before the article went to press, however, he was able to add a Postscript dealing with this cluster of judgments.⁶¹ Here is an excerpt from the first two paragraphs:

"While not wishing to explore the ramifications of these decisions fully in this brief postscript ... it is important to note two aspects of these decisions which have implications for the analysis in the foregoing article.

The pivotal issue in all three cases was the extent to which the freedom of association in the Charter would provide protection for the right to strike and bargain effectively. The upshot of the three decisions was that four of six judges (Le Dain,

Beetz, La Forest and McIntyre, JJ.) held that freedom of association did not encompass protection for the right to strike or bargain collectively". (Emphasis added)

Professor Etherington then elaborates on the judgments for a further two pages, bringing out the differences among the decisions and reasons. As was the case with the other pieces described above in this segment of the thesis, Professor Etherington presents a scholarly and informed analysis. What that analysis does not set out to do is to see whether the nuances of McIntyre, J.'s reasons might permit some protection for collective bargaining as a concept under the Charter.

Two other scholars tackled a range of questions linking the Charter with the employment relations field, Timothy J. Christian, Dean of the Law Faculty of the University of Alberta, and Keith D. Ewing, of Trinity Hall, Cambridge, a Visiting Professor at the University of Alberta.⁶² Their joint article contained an exacting discussion of the Supreme Court of Canada's responses to the quandaries presented by freedom of association under the Charter.⁶³

In this sophisticated summary of the trilogy (lengthier than in any other work thus far encountered on that precise subject),⁶⁴ the article detailed the complex premises upon which McIntyre, J. based his conclusions. Unlike some other writers, the authors did not leave the impression that McIntyre, J. joined with the plurality in the wholesale ruling out of a right to collective bargaining as an attribute of section 2(d) of the Charter. For the purposes of their article, Professors Christian and Ewing did not need to dwell on whether McIntyre, J. had left more room than was commonly supposed⁶⁵ for collective bargaining rights in the Charter. Though they reported clearly and informatively on what McIntyre, J. said in this area,⁶⁶ the focus of their

ensuing analysis was not on collective bargaining, but on issues of union security posed by the concept of a right of individuals not to associate.⁶⁷

3.2 Finding Room for Collective Bargaining Rights in the Charter: An Alternative View of the Supreme Court Trilogy

We have seen that some authorities concluded that a majority of the bench participating in the freedom of association trilogy found no place for collective bargaining rights in section 2(d) of the Charter. Certainly the opening remarks quoted earlier⁶⁸ from the reasons of Le Dain, J. in the Alberta Labour Reference convey his perception that McIntyre, J. concurred in the plurality's views on both the right to strike and collective bargaining. Can a case be made for a different perception? What did McIntyre, J. say in the Alberta Labour Reference about collective bargaining, as distinct from the right to strike?⁶⁹ Did early case analyses misread him?⁷⁰

As a minimum, McIntyre, J. agreed with Le Dain, Beetz and La Forest, JJ. that freedom of association includes the right of individuals to establish, maintain and belong to organizations to promote their (lawful) common interests.⁷¹ In this "first" approach, no constitutional protection is accorded to the purposes of the association or to the means of achieving these purposes.⁷²

The second option has been referred to as the "so-called" American approach⁷³ or as "a narrow American gloss on the status quo ante the Charter".⁷⁴ The idea is that freedom of association guarantees the collective exercise of constitutional rights. Put another way, with a slightly different stress, the freedom includes the right to engage collectively in those activities that are constitutionally protected for each individual.⁷⁵

McIntyre, J. concluded this part of his discussion with a statement (at page 400) that proved pivotal in his final resolution:

It will be seen that this approach guarantees not only the right to associate but as well the right to pursue those objects of association which by their nature have constitutional protection.

The third option discussed by Mr. Justice McIntyre postulates that freedom of association stands for the principle that: (a) an individual is entitled to do in concert with others that which she or he may lawfully do alone;⁷⁶ (b) conversely, individuals and organizations have no right to do as a group what is unlawful when done individually. That principle had been adopted by Chief Justice Bayda,⁷⁷ writing for the majority at the Saskatchewan Court of Appeal level of the Dairy Workers case (now part of the Supreme Court trilogy).

The fourth approach set out by McIntyre, J. was attributed to another of the judges figuring in a previous stage of a trilogy case, Mr. Justice Kerans, who wrote for the majority in the Alberta Labour Reference in the Alberta Court of Appeal. The relevant concept did not, however, originate in the Alberta Labour Reference, but in the reasons of Mr. Justice Kerans in Black v. Law Society of Alberta.⁷⁸ As Kerans, J.A. put it, there are certain activities carried out by individuals that are so fundamental to Canadian society that they do not need "formal expression" in the Constitution. The freedom to associate with others in the exercise of these rights is included within the Charter's "freedom of association". Examples given by Kerans, J.A. were marrying, establishing a home and family, pursuing an education and gaining a livelihood.

Fifth in McIntyre, J.'s analysis⁷⁹ was the proposition that freedom of association under section 2(d) of the Charter extends constitutional protection to all those activities which are essential to the lawful activities of an association. Once again, as with the third approach, this notion had formed part of the reasoning in a case wherein employees had successfully challenged legislation, relying on the Charter of Rights. In the Broadway Manor⁸⁰ judgment of the Ontario Divisional Court, it was held that freedom of association included the freedom to bargain collectively and to strike, since these activities were essential to the objects of a trade union. Without them, in the Court's view, the association would be emasculated. McIntyre, J. (at page 402) quoted two central passages from Broadway Manor:

But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law. (Per Galligan, J. at p. 409).

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It follows, and it is trite to say I suppose, that the freedom to associate carries with it the freedom to meet to pursue the lawful objects and activities essential to the association's purposes, being in this instance the well-being, economic or otherwise, of its members. (Per Smith, J. at p. 463).

Mr. Justice McIntyre did not continue with the concluding sentence of the paragraph just quoted from Smith, J.'s reasons:

The freedom to associate as used in the Charter, not being on its face a limited one, includes the freedom to organize, to bargain collectively and, as a necessary corollary, to strike.

The final option⁸¹ among the half dozen mentioned by McIntyre, J. is the most sweeping. It would extend the protection of section 2(d) of the Charter to acts which must necessarily be done jointly, rather than individually, provided that the intent of the action is not to inflict harm. This protection would be subject to the limitations in place under section 1 of the Charter. This approach was formulated by Chief Justice Bayda of Saskatchewan in the provincial appellate judgment of the Dairy Workers case.⁸² Mr. Justice McIntyre quotes this passage from the reasons (at pages 620-21) of Bayda, C.J.S.:

To summarize, a person asserting the freedom of association under para. 2(d) is free (apart from s. 1 of the Charter) to perform in association without government interference any act that he is free to perform alone. Where an act by definition is incapable of individual performance, he is free to perform the act in association provided the mental component of the act is not to inflict harm. Such then is the "unregulated area" to use Professor Lederman's expression relative to the freedom of association. Such is the "sphere of activity within which the law (has guaranteed) to leave me alone", to use the words of the author of Salmond on Jurisprudence with an interpretation from s. 1 of the Charter. [Emphasis added by McIntyre, J.]

In the end, Mr. Justice McIntyre rejected the last three approaches and adopted the first three.⁸³ Given that Justices Dickson and Wilson placed few constraints (other than Charter section 1) upon their acceptance of collective bargaining under the umbrella of Charter section 2(d), the definition arrived at by McIntyre, J. means that at least three among six judges might agree that freedom of association includes:

- (1) the right of individuals to group together for lawful common objectives;

- (2) the right of individuals to exercise collectively the constitutional rights which they have as individuals;
- (3) the right of individuals to exercise collectively "all group acts which can be lawfully performed by an individual, whether or not the individual has a constitutional right to perform them" (page 408).

The options not embraced by Mr. Justice McIntyre, are briefly reiterated below, along with his reasons for their rejection:

- (4) Freedom of association covers those collective activities that have attained a fundamental status in our society "because they are deeply rooted in our own culture, traditions and history" (page 406).

McIntyre, J. rejected the fourth option (though perhaps not completely)⁸⁴ because, in his view, freedom of association is concerned with how activities or goals are pursued, not with the particular activities or goals themselves. The purpose of freedom of association is to ensure that various objectives may be pursued not only individually, but also in common. When this purpose was considered, Mr. Justice McIntyre held that section 2(d) of the Charter "cannot be interpreted as guaranteeing the collective exercise of specific acts or goals, whether or not they are fundamental in our society".

- (5) The approach approved by the Ontario Divisional Court in Broadway Manor⁸⁵ became the fifth one canvassed. This contends that freedom of association protects those lawful activities without which an association would have a meaningless existence (e.g., for trade unions, a right to carry out lawful strikes).

This option was not acceptable to Mr. Justice McIntyre, because in his opinion (set out at pages 404-405), it rejected "the individual nature of freedom of association". According to McIntyre, J., to accept the fifth approach would be to accord an independent status to the lawful aims, purposes, and activities of an association. The Charter-protected rights of the association would exceed those of the individual, merely by virtue of the fact of association, and confer greater constitutional rights upon members than upon non-members.⁸⁶

- (6) The sixth option delineated was "that any actions which are incapable of being performed by an individual, and are inherently collective",⁸⁷ may be performed in concert, with the caveat that the intent of the action is not to inflict harm.

This, too, is cast aside by Mr. Justice McIntyre (at pages 405-406) for the reasons he expressed in relation to the fifth, or Broadway Manor approach. The sixth approach would, in even more sweeping terms, elevate activities to a constitutional pedestal just because they were performed in association:

For obvious reasons, the Charter does not give constitutional protection to all activities ... There is simply no justification for affording Charter protection to an activity merely because⁸⁸ it is performed by more than one person (page 405).

It is the time once again to focus on the issue of collective bargaining, per se. Did McIntyre, J.'s pronouncements concerning the scope of freedom of association rule out constitutional protection for collective bargaining, as some of the commentators stated, and as others (perhaps unintentionally) implied?⁸⁹ None of the extracts from McIntyre, J.'s reasons thus far examined stated so categorically.

To shed further light on the question just posed, the views stated by Mr. Justice McIntyre will be slightly refashioned, and also re-ordered, moving from the options receiving the least support from him toward the approach that in essence received approval from the court as a whole:

- (1) Collective bargaining activities that may be carried out only as a group, such as strikes, are not protected merely by reason of their collective nature.⁹⁰
- (2) The Charter does not grant an independent protected status to all lawful goals of an association, just as it does not confer constitutional protection on all acts of an individual which are essential to her or his personal goals.

Thus a union, as a collectivity, would not have its freedom of association guaranteed, nor all elements of the exercise of freedom of association, such as, for example, the right to strike.

- (3) The Charter does not necessarily protect activities "which may be said to be fundamental to our culture and traditions and which by common assent are deserving of protection" (page 401) merely because they are carried out in common with other people.

Here, relevant to this "fourth" option, we see a small fissure opening in the supposed wall keeping collective bargaining rights out of section 2(d) of the Charter. At page 406 of his reasons, Mr. Justice McIntyre says that while certain activities are "important if not fundamental", their importance is not a consequence of their potentially collective nature. For our purposes, it is noteworthy that two of the examples of such (possibly) fundamental activities listed in the reasons of McIntyre, J. (at pages 401 and 406) are marrying and "gaining a livelihood". He adds that their importance

flows from the structure and organization of our society, "and they are as important when pursued individually as they are when pursued collectively".

McIntyre, J. adds this expansion of his thoughts at page 406:

This is not to say that fundamental institutions, such as marriage, will never receive the protection of the Charter. The institution of marriage, for example, might well be protected by freedom of association in combination with other rights and freedoms.

Taking the most liberal view of this statement, and substituting words at chosen junctures, it is possible (some may say "far-fetched") to amend this passage as follows:

This is not to say that fundamental institutions, such as (collective bargaining), will never receive the protection of the Charter. The institution of (collective bargaining), for example, might well be protected by freedom of association in combination with other rights and freedoms.

Later (at page 413) in the midst of explaining why he thinks the right to strike should not be constitutionalized, Mr. Justice McIntyre writes the following:

It cannot be said that [the right to strike] has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy It may well be said that labour relations have become a matter of fundamental importance in our society, but every incident of that general topic has not. (Emphasis added).

In the sentence left out of the foregoing quotation, McIntyre, J. states that there is no basis for implying a constitutional right to strike. Though that "incident" of collective bargaining is ruled out of the Charter, one can

deduce that other elements might well receive approval in the correct circumstances.

- (4) Freedom of association under the Charter means that individuals may do in concert those acts which are not lawfully prohibited when done alone.

Aside from prohibitions against strikes, most labour legislation regulates, rather than forbids, facets of collective bargaining. As Mr. Justice McIntyre opined, however, the range of group activity protected by this (the "third approach") is to some extent illusory, because legislatures can determine what constitutes lawful and unlawful activity for the individual:

If the state chooses to prohibit everyone from engaging in an activity and that activity is not protected under the Constitution, freedom of association will not afford any protection to groups engaging in the activity (page 408).

In this formulation, freedom of association as an independent right (i.e. not linked to another constitutionally protected right, as in postulation (3) immediately above) comes into play when the state has permitted an individual to engage in an activity and yet forbidden the group from doing so. In support, McIntyre, J. (at pages 408-409) quotes from Chief Justice Dickson (at page 367 of the same judgment) who states that "if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect".

Mr. Justice McIntyre concludes this segment of his reasons with his own words, as follows:

Finally, this approach fully realizes the value or purpose of association. Activities which the state permits an individual to pursue may be pursued in a group. Associations engaged in scientific, educational, recreational, and charitable results would receive protection even though these activities or pursuits may not be independently protected by the Charter, provided these activities are not forbidden at law to individuals.

If lawful "recreational" activities of associations may receive constitutional protection within Justice McIntyre's construct, does it not seem likely that many collective bargaining activities carried out by trade unions would be similarly treated? When an employee association negotiates for better safety conditions in a place of work, chances are it will be carrying out a lawful and perhaps constitutionally protected pursuit. Some group activities of labour unions are of course of an educational, recreational or charitable character, and these may or may not be part of the collective bargaining process.⁹¹

- (5) McIntyre, J.'s "second" approach ascribes to freedom of association the guarantee that individuals may band together to exercise their individual constitutional rights collectively. Individual rights enjoyed by employees, including the active exercise of those rights, do not lose constitutional protection by being exercised in common with other employees.

McIntyre, J. professed (at page 407) that people must be free to engage collectively in those activities enshrined in the Constitution for each individual:

For instance, the indispensable role played by freedom of association in the democratic process is fully protected by guaranteeing the collective exercise of

freedom of expression. Group advocacy, which is the heart of all political parties and special interest groups, would be protected under this definition. As well, group expression directed at educating or informing the public, would be protected from government interference. ... Indeed, virtually every group activity which is important to the functioning of democracy would be protected by guaranteeing that freedom of expression can be exercised in association with others. (Emphasis added, except the underlining of the words "government interference" which appears in the printed judgment).

- (6) Comparing the reasons of Le Dain, Dickson and McIntyre, JJ., one can state that the entire Supreme Court bench in the trilogy accepted that freedom of association includes the right to "associate with others in common pursuits" or to form and support groups designed to further "common purposes", though neither the precise actions or objects of the group are automatically given Charter protection (pages 399 and 407).

Based on McIntyre, J.'s definition, the right to organize workers to establish a union, the right for workers to band together as a union and the right of workers to join a union are probably protected by the Charter. To be assured of a constitutional safeguard, specific actions or plans involving employees acting in concert would need to be protected under one or more of the formulations listed in (3) through (5) immediately above.

3.3 The Closing Comments of Mr. Justice McIntyre in the Alberta Labour Reference

At the very least, it is submitted that the foregoing analysis casts doubt on the opinion expressed by Le Dain, J. in the Alberta Labour Reference (at page 390) that McIntyre, J. joined fully in his conclusions concerning the

narrowness of Charter section 2(d) in its protection of collective bargaining activities. That of course does not determine the issue. After dealing with six ways of looking at freedom of association,⁹³ Mr. Justice McIntyre developed variations upon his six options, and in doing so, quoted from authors who appeared to be more unequivocally opposed to constitutional guarantees for collective bargaining than he seemed to be. A feature of this further consideration of associational rights (at pages 409-420) is the clear and repeated enunciation by McIntyre, J. of premises justifying the exclusion of strike rights from the ambit of subsection 2(d). Yet at none of the places where one might have expected him to attest to the inappropriateness of protecting any collective bargaining activities under the Charter does Mr. Justice McIntyre actually do so. This reality, though perhaps circumstantial in its evidential force, could easily be missed by an observer concentrating on the dominant issue of the right to strike.

At pages 412-413 of his reasons, Justice McIntyre briefly discusses the legislative history of the Constitution Act, 1982, Part I of which is the Charter. He presumes that the framers of the Constitution must have been aware of the history of labour relations and strikes and the development of the relevant body of law:

"Indeed, questions of collective bargaining and a right to strike were discussed in the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Issue No. 43, pp. 68-79, January 22, 1981). It is apparent from the deliberations of the Committee that the right to strike was understood to be separate and distinct from the right to bargain collectively. And, while a resolution was proposed for the inclusion of a specific right to bargain collectively, no resolution was proposed for the inclusion of the right to strike. This affords strong support for the proposition that

the inclusion of a right to strike was not intended.
(Emphasis added).

McIntyre, J. explicitly stresses the significance of the fact that no one proposed that a specific right to strike be spelled out in the Charter. The circumstances of the proposal for and avoidance of a specific right to collective bargaining, and the significance of the Joint Committee's approach to the issue, will be discussed immediately below. For now, the point to ponder (admittedly not a particularly telling one) is whether we should imbue McIntyre, J.'s reasons with further significance. If the absence of a resolution in favour of a right to strike provides "strong support" for the idea that there was no intention to include a right to strike, is the obverse also true? In other words, did McIntyre, J. mean to imply that the presence of a resolution in favour of a distinct right to bargain collectively affords "strong support" for the notion that this latter right's inclusion was intended?

It is logical now to wonder how the aforementioned resolution regarding collective bargaining was handled when presented at the Joint Committee hearings. The Acting Minister of Justice assured the Special Committee that collective bargaining rights were included by necessary implication under the banner of "freedom of association":

Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that it is already covered in the freedom of association that is provided in the Declaration or Charter; and that by singling out association for bargaining, one might tend to diminish all the other forms of association which are contemplated ... church associations; association of fraternal organizations or community organizations. (Testimony of Hon. Robert Kaplan, Minutes of Proceedings and Evidence of the Special Joint

Committee of the Senate and the House of Commons on the Constitution of Canada, Issue No. 43, at pages 69-70).

The trade union movement no doubt wishes that it had been more forceful in lobbying in favour of a delineated right to bargain collectively in the Charter.⁹⁴ Nonetheless, one could contend that McIntyre, J.'s reliance on the proceedings of the Special Joint Committee for one purpose bodes well for their use in future litigation in support of bolstering collective bargaining rights, through a more liberal interpretation of section 2(d).

The usefulness of the travaux preparatoires or constitutional record as an aid to interpretation of the Charter was put into perspective by the Supreme Court of Canada in Reference Re Section 94(2) of The Motor Vehicle Act (1986), 24 D.L.R. (4th) 536. Lamer, J., speaking for the majority, made it clear that the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution are admissible in constitutional litigation. He hedged this, however, with doubt about the weight to be given to such evidence as speeches and statements to the Special Joint Committee, given their inherent unreliability.⁹⁵ Returning to the reasons of Mr. Justice McIntyre, we see that at pages 415-416 he quotes an extract from a work by Peter Gall⁹⁶ that questioned whether collective bargaining has any right whatsoever to be accorded Charter protection:

Collective bargaining is extremely important in our society and has been for some time. But will it always be so? Can we confidently predict that 50 or even 20 years from now collective bargaining will still be the primary activity of trade unions? Or will we have adopted some other technique for setting terms and conditions of employment, such as full-scale interest arbitration or greater reliance on legislated standards. If we cannot reject this out of hand, and I do not think we can, then we must seriously question

whether collective bargaining is the kind of activity that warrants constitutional status. The Charter enshrines the fundamental principles of individual liberty. The activities of man may change over time, but these principles remain constant. Collective bargaining does not have this timeless quality, and accordingly, we should be leery of giving it constitutional protection under the concept of freedom of association.

In the quoted segment, Peter Gall was referring to the concept of "collective bargaining" (which would include resorting to strikes in global terms as one facet in bargaining). In the two pages preceding this quotation and in the 1 1/2 pages following, Mr. Justice McIntyre does not mention "collective bargaining" as such. He focusses only on the right to strike. If he were ruling that a right to bargain collectively cannot be found in section 2(d) of the Charter, a logical place to say so would have been just before or just after the passage from Gall. In fact, McIntyre, J.'s comment following the quotation is this: "To constitutionalize a particular feature of labour relations by entrenching a right to strike would have other adverse effects". (Emphasis added).

The next authority turned to by Mr. Justice McIntyre is Professor Joseph Weiler. At page 417 of his judgment, McIntyre, J., after registering concern about the constitutionalizing of a right to strike, quotes a rather lengthy extract (taking up about 2 pages in the report) from one of Professor Weiler's works.⁹⁷ A few portions that reveal the gist of this thought-provoking quotation are set out below:

The doctrine of exclusive representation is but one of hundreds of critical policy choices made by our legislatures in the evolution of the current system of collective bargaining in Canada. Others include restrictions of employer and employee free speech, ... (etc.).. All these ingredients of collective

bargaining law could be attacked as unjustified restrictions of collective bargaining rights. There are examples in many other jurisdictions in Canada and in other democratic industrialized countries where these restrictive aspects of collective bargaining law do not exist. How will a judge determine whether these meet the standards of a free and democratic society?

I won't belabour this point any further. I believe our current system of collective bargaining law ... is too complicated ... to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as "reasonable" and "justifiable" in a free and democratic society. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation.

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For the same reasons that the courts have been increasingly excluded from the role of umpiring collective bargaining disputes, they should not be re-entering the mainstream of labour law development in their capacity as interpreters of concepts such as "freedom of association" in section 2(d) of the Charter. The courtroom is not the place to be developing collective bargaining policy.

In summary, my concerns about interpreting freedom of association in section 2(d) to "constitutionalize collective bargaining" go beyond the problems that this would present for industrial relations in Canada Where the Charter is ambiguous as to the extent to which a certain right or freedom is protected, the better approach is for our courts to proceed very cautiously ...". (Emphasis added).

If Mr. Justice McIntyre intended to put a damper on the spark of collective bargaining rights in section 2(d), his commentary on Professor Weiler's musings would have been an ideal place to make it plain. He does not. McIntyre, J.'s first statements after concluding the Weiler quotation not only do not focus on collective bargaining as a right, but serve to put

into question whether he felt that the constitutionality of the concept of a "right to bargain collectively" was something that the Court had to decide in the trilogy. What appears below is taken from McIntyre, J.'s judgment (at page 419) immediately after Professor Weiler's warnings about the judiciary trying to apply section 1 of the Charter to disputes involving elements of collective bargaining:

"A further problem will arise from constitutionalizing the right to strike. (Emphasis added). In every case where a strike occurs and relief is sought in the courts, the question of the application of s. 1 of the Charter may be raised to determine whether some attempt to control the right may be permitted. This has occurred in the case at bar ... The Court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike. In the PSAC case, the court must decide whether mere postponement of collective bargaining is a reasonable limit, given the Government's substantial interest in reducing inflation and the growth in government expenses. In the Dairy Workers case, the Court is asked to decide whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike actions and lockouts. None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature. However, if the right to strike is found in the Charter, it will be the courts which time and time again will have to resolve these questions ...".

After a further half paragraph of his reasons, in which collective bargaining is again not mentioned, Mr. Justice McIntyre sets out his answers to the seven constitutional questions raised in the Alberta Labour Reference, stating at the outset that he would dismiss the public sector unions' appeal. In his response to every question posed but one, McIntyre, J. rules in the

Alberta government's favour, and then in each instance finishes with either of the following phrases:

(a)"... since the Constitution Act, 1982 does not guarantee a right to strike"; or

(b)"... since the Constitution Act, 1982 does not guarantee a specific form of dispute resolution as a substitute for the right to strike".

The seventh constitutional question came closest to a quandary catching the wide reach of collective bargaining:

7. Does the Constitution Act, 1982, limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining:

- a) an employee who exercises managerial functions;
- b) an employee who is employed in a confidential capacity in matters relating to labour relations;
- c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;
- d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

The answer of Mr. Justice McIntyre was this: "I prefer not to answer this question, for the reasons given by the Chief Justice". Dickson, C.J.C. had declined to respond to Question 7 because the Court, on a Reference procedure, "need not answer a question that is too vague to admit of a satisfactory answer". Chief Justice Dickson expressed agreement with what Kerans, J.A. had said on the point in the Court of Appeal. Portions of Kerans, J.A.'s judgment selected by Dickson, C.J.C. (at pages 389-390) are reproduced here, in part:

... On the other hand, the categories mentioned in the question seem to strive to describe employees who, because of the nature of their work, would have a very direct, significant and immediate conflict between duties owed to fellow members of the unit (assuming that the unit demands some measure of solidarity) and the special duties owed to the employer. There was no serious argument offered against the proposition that an exclusion is justified in a free and democratic society if it could be demonstrated that there is a significant conflict of duty on the part of the employees, because, I suppose, the collective-bargaining system as we know otherwise could not work The real dispute seems to be whether in fact there is, for a given employee under the categories in the legislation, a significant conflict of duty. That of course, is a fact-issue which we cannot decide, nor are we asked to. In the end, it is impossible to offer any meaningful answer to the question and respectfully I decline to offer any further answer.

It will be seen that the adoption by McIntyre, J. of Kerans, J.A.'s attitude toward the seventh constitutional question neither adds to nor takes away from our earlier discussions concerning constitutional protection for collective bargaining.

3.4 What Did McIntyre, J. Really Mean in the Alberta Labour Reference?

As scholars have attempted to find the nut of McIntyre, J.'s reasoning in the Alberta Labour Reference, they have no doubt been hampered by the absence of a clearer statement from him in that judgment concerning the place of collective bargaining among the Charter rights. By way of contrast, we were faced with the plain assertion by Mr. Justice Le Dain, speaking for two other judges, that they were joined by McIntyre, J. in finding that neither a right to strike nor a right to bargain collectively were safeguarded by section 2(d). In parts 3.2 and 3.3 of this thesis, there is ample detailing of McIntyre, J.'s uncategorical assurances that he would not enshrine a right

to strike within the walls of "freedom of association". Why then, did McIntyre, J. not offer an unambiguous opinion on a broader right to bargain collectively? As it turns out, Mr. Justice McIntyre did contribute some sharper illumination of his views. The problem is that he did not do so in the Alberta Labour Reference itself.

At the conclusion of Dickson, C.J.C.'s reasons in Public Service Alliance v. Canada,⁹⁸ one encounters the reasons of Mr. Justice McIntyre in that decisionnote McIntyre, J. commences by adopting the Chief Justice's recitation of the facts in PSAC, and also his description of the issues. After expressing due deference to the Chief Justice and to his other judicial colleagues, McIntyre, J. states that he differs from them in his answers to the constitutional questions posed in PSAC. Mr. Justice McIntyre then adds welcome clarification to our search:⁹⁹

The Chief Justice bases his reasons on the first issue --that of freedom of association under s. 2(d) of the Canadian Charter of Rights and Freedoms - upon the proposition that freedom of association in the context of labour relations includes freedom to engage in collective bargaining and the right to strike. For the reasons I expressed in the Reference re Public Service Employer Relations Act (Alta.), [1987] 1 S.C.R. 313 (judgment delivered concurrently), I am of the opinion that s. 2(d) of the Charter does not include a constitutional guarantee of a right to strike. My finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association.¹⁰⁰
(Emphasis added)

No doubt it will be patent to anyone familiar with the areas canvassed at parts 3.2 and 3.3, supra, that this late affirmation by Mr. Justice McIntyre does not really clear the air. Nevertheless, McIntyre J.'s retrospective self-assessment reinforces the opinion that Mr. Justice Le Dain

did not accurately reflect the crux of his brother judge's analysis when ascribing conformity to their views in the Alberta Labour Reference.

Given the possible consequences that Mr. Justice McIntyre's explanatory words connote, it is remarkable that none of the reporters or scholarly writers whose works are discussed in part 3.1 above either quoted or discussed the passage just cited. Perhaps they did not feel that it warranted particular notice. The presence of this passage in the PSAC case did not negate the need for analytical perusal of McIntyre, J.'s reasons in the Alberta Labour Reference. As the review undertaken here demonstrates, the lack of certainty enduring about many significant facets of the freedom of association puzzle would necessitate a close review (such as that taken at 3.2-3.4) before making even a minimal attempt at filling the lacunae. A consideration of some troublesome unknowns appears below.

Before offering a list of unknowns wanting consideration in the wake of the trilogy, it is fitting to acknowledge that this essayist's characterization of the nature of McIntyre, J.'s stance is now apparently shared by at least two authorities.^{100A} These have come to attention latterly, during updating of earlier material, and certainly after the analysis presented at 3.1-3.4 was all but completed. Needless to say, the two observers just alluded to, (both judges), whose decisions are cited infra at 4.0, found their views independently of the preparatory work for this thesis, and so far as can be discerned, independently from one another. The discovery of this reported jurisprudence during the latter stages of thesis drafting did not shape, but rather affirmed, key elements of the analysis already (tentatively) completed.

In the aftermath of the trilogy and of other constitutional litigation, these are some areas needing further exploration (and undoubtedly there are others unnamed):

- (1) Have aspects of collective bargaining, other than the right to strike, been ruled out of Charter territory?
- (2) Which aspects of collective bargaining have received an assist from statements in the trilogy, or from judicial pronouncements in other constitutional cases?
- (3) What other arguments (including Charter-based propositions) can be made for or against the coating of particular facets of collective bargaining with constitutional protection?
- (4) Assuming for the moment that leaders and many workers in the trade union movement will care whether collective bargaining is covered by the Charter (and that will be pondered as well), what are some arguments for and against attempting to achieve this goal through litigation?

This essay does not set out to forecast the result of the possibilities or tendencies discussed herein, should similar analysis be applied in Charter litigation. Although each of these matters is examined in this study, its central objective continues to be to draw attention to the fact that the trilogy has left more issues unresolved than was apparently widely supposed, and to see where elaboration on these inconclusively explored questions might lead us.

4. The Early Development of Post-Trilogy Jurisprudence

4.1 Interpretations of the Trilogy in Freedom of Association Cases - The Early Judgments

In attempting to apply the trilogy and related constitutional judgments in litigation shortly postdating the trilogy, the judiciary brought to light some of the remaining areas of uncertainty concerning collective bargaining under the Charter. Analysis of this early jurisprudence will therefore aid in reaching a more refined vision of the potentialities that exist for further developments in the relevant legal territory.

The first reported case that referred to the trilogy was Re Professional Institute of the Public Service of Canada and Commissioner of the Northwest Territories et al. (1987), 43 D.L.R. (4th) 472, a decision of Mr. Justice Marshall of the Northwest Territories Supreme Court. The source of the dispute being litigated was preferential legislation in the Northwest Territories that has ensured a virtual monopoly for the Northwest Territories Public Service Association in collective representation of Northwest Territories public sector employees. The Public Service Act,¹⁰¹ section 42(1), provided that if an association of public service employees sought to bargain on behalf of those employees, it must be incorporated via a Northwest Territories statute.¹⁰²

The Professional Institute of the Public Service of Canada (P.I.P.S.) represented various groups of employees whose responsibilities (and hence, jobs) were being transferred from the Government of Canada to the Government of the Northwest Territories. The application by P.I.P.S. to become territorially incorporated had been refused, and it was thus precluded from

collectively bargaining on behalf of its members. The validity of the governing Act was challenged pursuant to section 2(d) of the Charter.

At page 475 of the judgment, Mr. Justice Marshall relates a summary of the outcome of the Supreme Court labour trilogy that echoes those cited earlier in this paper. Dealing with the Alberta Labour Reference, Marshall, J. had this to say:

"In that Reference, the majority, per Beetz, Le Dain and La Forest, JJ., held that the constitutional guarantee in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike". (Emphasis added).

With all respect due to this scholarly judge, this summation, though it does not refer directly to Mr. Justice McIntyre's reasons, somewhat overstates the degree of harmony among the "majority" concerning bargaining rights. An examination of the remainder of Marshall, J.'s judgment in P.I.P.S. v. NoteW.T. reveals that, notwithstanding the words just quoted, Marshall, J. well understood the essence of what McIntyre, J. had iterated. He also encapsulated clearly (at pages 477-478) the central conclusions of both McIntyre, J. and the plurality, highlighting areas of concordance and distinctiveness.

At the end of the day, Mr. Justice Marshall ruled that the impugned statute should be declared inconsistent with section 2(d) of the Charter. As Marshall J. noted (at pages 477-478), Mr. Justice McIntyre explicitly accepted that the concept of freedom of association includes at least the right to join with others "and to establish and maintain organizations and associations". The wider scope ascribed to freedom of association by Chief Justice Dickson

and by Wilson, J. would certainly encompass the right to found and sustain a trade union. Moreover, in the plurality's reasons, among the listed attributes of freedom of association worthy of special recognition were "the freedom to work for the establishment of an association, to belong to an association, and to maintain it".

Marshall, J. did not feel that the Government of the Northwest Territories had discharged the onus on it to establish that the legislative scheme that limited freedom of association was reasonable and justified pursuant to Charter section 1:

The requirement of prior legislative approval is anomalous in Canadian labour legislation. There is no evidence that the government's objective of orderly and representative collective bargaining could not be achieved by a system of independent certification based on objective criteria, as has been established in other jurisdictions. (p. 478)

P.I.P.S. also succeeded, but for different reasons, on the appeal of Marshall, J.'s judgment. The main body of the Northwest Territories Court of Appeal is constituted of appellate judges from Alberta adopting the Northwest Territories mantle.¹⁰³ It will be recalled that the Alberta Court of Appeal had taken a relatively restrictive stance on freedom of association at the first stage of the Alberta Labour Reference.¹⁰⁴

Kerans, J.A., who had participated in the determination of the Alberta Labour Reference, wrote the judgment for the Northwest Territories Court of Appeal in Professional Institute of the Public Service of Canada v. Commissioner of the Northwest Territories and Northwest Territories Public Service Association (Intervenor), [1988] 5 W.W.R. 684.

A feature of this appellate decision was a problem put forward by the intervenor, the dominant labour union in the Northwest Territories public sector (and until the time of the appeal, the only recognized one).¹⁰⁵ Mr. Justice Marshall, at first instance, had granted a declaratory order that the offending provision, subsection 42(1) of the Public Service Act, was inconsistent with the Charter and "thus of no force or effect".¹⁰⁶ That ruling was rather problematic for the intervenor union. While helping to maintain the union's monopoly, the challenged subsection was also one of the foundations of its legality. Following a suggestion made by the Northwest Territories government, Kerans, J.A. arrived at a resolution that interpreted the legislation to remain in force, but that allowed P.I.P.S. to be certified after merely being "recognized" by the certifying body (in this case the NWT Legislative Assembly, or "Commissioner and Territorial Council") rather than needing "incorporation" through legislation.

To reach his conclusion, Kerans, J.A. first prepared theoretical groundwork in the field of statutory interpretation. He then presented his understanding of the meaning of the Supreme Court's labour trilogy along with a new twist on the construction of freedom of association, apparently of his own devising. The end product is a resolution that seems to protect adequately the interests of all three appellate parties and may indeed be the correct result under the Constitution. Nevertheless, it is possible to take issue with the way Mr. Justice Kerans purported to apply the reasoning of the trilogy. Of principal concern is his description of the search for union certification as an "activity" of the union, rather than as an element in the "establishment" of the union. At page 693 of his reasons, Kerans, J.A. gave his version of the meaning of the trilogy:

The Supreme Court of Canada there overruled the Alberta Court of Appeal, which had said that the distinction between organizational and other activity is fragile and not a satisfactory way to delineate the right. I was a member of the overruled court, but must apply the settled rule. Dickson, C.J.C., Wilson J. concurring, agreed with the Alberta view. Four judges ... did not. Le Dain J. ... expressed the issue as whether particular activity of an association in pursuit of its object is to be constitutionally protected or left to be regulated by legislative policy. He decided, three others concurring, that, unless the goal pursued itself involved fundamental rights or freedoms, it was not protected indirectly by freedom of association.

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It was emphasized that the reasons of Le Dain J. did not quite attract majority support. McIntyre J. came to the same conclusion, but offered his own reasons. He canvassed six possible meanings for protected freedom of association. The fifth and sixth would apply to the pursuit of certification, but he rejected them. The fourth was that offered by the Alberta Court of Appeal: protection of activity in pursuit of goals relating to "fundamental" human activities. He also rejected it. He seems to have embraced the third and second, which protect activity by groups that for individuals is respectively permitted by law or protected by the Charter, and thus also the first, which protects mere organizational activity.

One may beg to differ with aspects of the foregoing analysis. The Supreme Court in the Alberta Labour Reference did find distinctions between "organizational and other activity". Le Dain, J.'s reasons (at page 391) seem to ascribe importance to, inter alia, the freedom "to work for the establishment of an association" and to treat this as a notion separate from the freedom "to participate in its lawful activity". McIntyre, J. accepted that freedom of association includes the right "to establish and maintain organizations", as well as some additional things which individuals might then

do through associating. Given the broader reach of the dissenting opinions, it is certain that a majority held that the efforts of founding and sustaining a group (such as a legally recognized trade union) are protected by the Charter. Contrary to what could be inferred from Kerans, J.A.'s words, however, the Court did not clarify where founding activities end and other activities begin.¹⁰⁷

Given the aforementioned differences of opinion as what the trilogy held and as to which activities constitute "organizational" endeavours, one must also question the reasoning of Kerans, J.A. in the following passage (at page 693 of the P.I.P.S. v. N.W.T. appeal judgment):

It seems to me that it must follow that the right to certification is another example of particular activity in pursuit of the goal of collective bargaining that is a mere creation of statute.

The seeking of a licence is not an organizational activity; rather it is common pursuit of a goal. It is said for the institute [P.I.P.S.] that the freedom protects preparatory activity; it seems not to be correct if the "preparation" is activity in pursuit of a goal that is a first step to yet another goal.

As Kerans, J.A. remarked, union certification procedures no doubt are a creation of statute. There is some merit, however, in the view that, nonetheless, the seeking of certification is a step in the establishment of an organization, a key one for trade unions wishing establishment as a legal entity. Based on one reading of the reasons of a majority of the Supreme Court judges writing in the Alberta Labour Reference, this preparatory or organizational step would be protected under Charter section 2(d).

Mr. Justice Kerans found that there was no constitutional right to a fair certification process as an aspect of freedom of association¹⁰⁸ (as proposed by P.I.P.S.). Nevertheless, he did uphold another proposition of

P.I.P.S., by finding there to be a violation of freedom of association in the requirement that the proposed bargaining agent be incorporated.¹⁰⁹ At page 694, Kerans, J.A. recorded the complaint by P.I.P.S. that the law being opposed (i.e. the one requiring statutory incorporation) meant that the legislative assembly, and not the employees, would be the final arbiter of the constitution of their representative body, entailing decisions on the objects, membership terms, rules for internal governance, and even on whether the union should be a legal entity. According to Mr. Justice Kerans, Marshall, J., at trial, had found that this was an interference with the freedom of association of the employees.

Notwithstanding, then, that the pursuit of certification is not itself a protected activity, if a law requires of the pursuers that they organize themselves in a certain way, then the law is meddling in organization activity, and the Charter is engaged. That is this case. (Emphasis in original) (per Kerans, J.A., at page 695).

It seems worth reiterating the perception that it would have been more accurate, and more in keeping with the trilogy, for the Court of Appeal also to adopt the opinion of Marshall, J. at first instance: that the legislative certification scheme was in breach of section 2(d) because it interfered with an incident of the work of establishing an organization. The logic of this is shown by this common-sense delineation of steps offered by Mr. Justice Marshall:¹¹⁰

The result then is that the impugned legislation reaches a measure or stage farther back ... in the growth and development of operational alliances of individuals. Put another way, individuals first associate. The next step involves the coming into being of the association or alliance, the status of corporation, or the establishment of status. This may vary with the alliance; here it is an employee association. Next, the body now established takes

action to achieve its collective aims. These, I think, can be seen as the three stages in its evolution.

One can have mild quarrels with parts of this compact guide. It could be said that although people begin by associating, they continue doing so at each stage, and that some late joiners first associate by adhering to an existing entity. Nevertheless, Marshall, J.'s characterization has a certain appeal, and helps to pinpoint some of the kinds of "founding" activity that arguably might be safeguarded in the trilogy's vision of the Charter vis-a-vis collective bargaining.

For ease of reference, it is appropriate next to examine a decision rendered by a colleague of Marshall, J., namely Mr. Justice de Weerdit of the Northwest Territories Supreme Court. The case is styled Miller et al. v. Commissioner of Northwest Territories, Minister of Personnel of Northwest Territories and Northwest Territories Public Service Association (Union of Northern Workers)¹¹¹ (hereinafter referred to as Miller v. Northwest Territories). This matter involved the same applicant union as in the P.I.P.S. v. N.W.T. hearing and appeal just discussed herein. The Miller judgment was reportedly rendered in April, 1988, about 7 months after the decision of Marshall, J. and 3 months prior to the appellate ruling in P.I.P.S. v. N.W.T.

The Charter argument favouring the existing public sector union in the Northwest Territories (known either as the Northwest Territories Public Service Association or as the Union of Northern Workers) had been lost by the government in front of Marshall, J. Circumstances were such that the Northwest Territories Public Service Association (N.W.T.P.S.A.) stood to take members away from P.I.P.S. regardless. On the basis of Marshall, J.'s

judgment, still in force at the time of de Weerd, J.'s decision, P.I.P.S. could bargain collectively without an Act of the Northwest Territories incorporating it. Unfortunately for P.I.P.S., there was a contractual obligation in the existing collective agreement between the territorial government and N.W.T.P.S.A. that required the government to deal only with the latter union in relation to members of the territorial public service.¹¹²

Leaving P.I.P.S. entirely out of the picture, the government had negotiated with N.W.T.P.S.A. an arrangement for acceptance of former P.I.P.S. members into its ranks. The P.I.P.S. members who had launched the case at bar were nurses whose positions would come within the jurisdiction of the territorial government after an imminent transfer of health services responsibility from the Government of Canada.¹¹³ The applicants had been given notice of lay-off and contemporaneously had received offers of employment in the public service of the Northwest Territories, to take effect on the same future date. The nurses in question sought, *inter alia*, a declaration that N.W.T.P.S.A. lacked authority to represent them, a declaration that the agreement entered into between that union and the Government of the Northwest Territories was without force or effect, and injunctive relief.¹¹⁴

One source of precedent considered by Mr. Justice de Weerd was the Supreme Court of Canada labour trilogy. Unlike a number of commentators who preceded him, it appears that de Weerd, J. described the content and spirit of those judgments impeccably in his recently reported judgment. Nonetheless, de Weerd, J. did not base his final ruling on the trilogy. There is a good measure of harmony between the views arrived at early in the preparation of this thesis and those more latterly expressed by de Weerd, J. in Miller v.

N.W.T. concerning the meaning of the trilogy. Here are selected portions of his reasons (taken from pages 465-467):

"... McIntyre J. ... went ... beyond the minimum requirements of [the Alberta Reference], which centred upon the right to strike, and examined the question of collective bargaining on a more general level. If I correctly understand his views, he was not as yet prepared to include all aspects of collective bargaining in the fundamental freedom of association. To that extent, one must read with care the brief reasons for judgment delivered by Le Dain J.
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... it cannot be said that this bodes well for any attempt now to constitutionalize collective bargaining as an aspect of freedom of association in Canada. Only the dissenting judges, Dickson C.J.C. and Wilson J., were prepared to go as far as that ... The most that can be said is that some aspects of collective bargaining may yet be held by our highest court to have constitutional protection, bearing in mind changes in the composition of that court, the views of Dickson C.J.C. and Wilson J. in what is now described as the "trilogy" ... and the carefully expressed views of McIntyre J. in P.S.A.C. v. Can. at p. 453 (referring to Ref. re Pub. Service Employee Rel. Act).

Having neatly encapsulated the flavour and remaining uncertainties of the trilogy, Mr. Justice de Weerdit went on to frame his decision in Miller v. N.W.T. around a version of a "freedom not to associate",¹¹³ which had not been an issue in the trilogy. According to de Weerdit, J., for the purpose of deciding the case at bar, the important distillation from the trilogy was that freedom of association under section 2(d) of the Charter:

... means at least freedom for the applicants to belong to P.I.P.S.C. even if they are to be employed by the territorial government, if that is their individual wish. It also means that they are not to be compelled to belong to the union, even if the union

is the only bargaining agent recognized by that government.

As I understand the reasons for judgment of Marshall J. in P.I.P.S.C., V. Commr. of N.W.T. that is essentially what he said.¹¹⁴

Mr. Justice de Weerdit next reiterated (at page 468) the main problem faced by a group of employees wishing to become an effective bargaining agent in the Northwest Territories, that it must first obtain territorial government acceptance,¹¹⁵ since there was no legislation in the Northwest Territories setting up quasi-independent labour relations mechanisms. The next paragraph, in which the central basis for de Weerdit, J.'s decision appears, did not seem to follow directly from the discussion which preceded it:

Put bluntly, freedom of association as a constitutional right must surely be available to employees. Absent statutory requirements to the contrary, what is there to say that an employer must accept P.I.P.S.C. or any other entity as a bargaining agent for its employees? Or for its candidates for employment? If the freedom to choose one's present or future bargaining agent without restriction is constitutionally guaranteed, is this not also a similar guarantee for the employer's freedom to reject that agent as someone the employer chooses not to be associated with in the collective bargaining process?

The foregoing, and what de Weerdit, J. says in continuation, may open our eyes as to some of the perhaps unexpected directions pointed to by the trilogy. Viewed from the perspective of the interests of organized labour, it may seem like an unfortunate and dangerous extension of the idea of "freedom not to associate"¹¹⁶ which further tips the power balance in favour of employers, particularly if they are government bosses. A third alternative (none of these three being mutually exclusive) is that de Weerdit, J. is

adopting a realistic approach to likely labour law developments in the atmosphere of the Charter. He continues thus (at page 468):

The better view, as seems to me to emerge from the evolving constitutional law on the subject, is that choice of an employees' bargaining agent acceptable for purposes of the collective bargaining process requires either the parties' mutual consent or validly enacted legislation that will enable all concerned to know who the employees' bargaining agent is to be, and to require acceptance of that agent by all concerned, bearing in mind that more than one bargaining unit, and more than one candidate for the position of bargaining agent for any such unit, may emerge.

In the result, de Weerd, J.'s decided that his hands were tied, and he could not interfere with the arrangements made between the current public sector union and the territorial government. He remarked that the nurses were free to exercise their choice to remain members of P.I.P.S., but there was nothing on the statute book or in the Charter which obliged the government to deal with P.I.P.S. as the applicants' bargaining agent. Their preference for P.I.P.S. "seems to be fated to become little more than a preference for non-membership in the union, a choice which is always open to them" (page 469).

Thus, de Weerd, J. began by confirming the appraisal set out earlier in this thesis concerning essential elements of the trilogy, but his primary contribution was in the area of the "freedom not to associate" upon which this study does not focus.

Granted that this paper deliberately skirts the all too expandable topic of non-association featured in the Lavigne controversy, it is nevertheless instructive to look at the second phase of the judgment in that case, wherein White, J., for the Supreme Court of Ontario, fashioned his remedy: Re Lavigne and Ontario Public Service Employees Union et al. (No. 2) (1987), 41 D.L.R. (4th) 86 (hereinafter Re Lavigne and OPSEU (No. 2)).^{116A} Broadly speaking,

Mr. Justice White was choosing between an "opt-in" formula, whereby workers who wish to support certain union activities (including aspects of collective bargaining) would have to make an active choice to contribute funds for designated purposes, or an "opt-out" formula, according to which employees who object to their money being used for particular ends would have to raise an objection.

Relying primarily on the history of union security developments in Canada, Mr. Justice White opted for the opt-out option. For 41 years, the "Rand formula" had held primacy in Canadian collective bargaining relations, and though the plaintiff Lavigne was to be given partial relief, the Rand system ought to be left intact, held White, J. The formula is named for the late Mr. Justice Rand, who had applied a practical and efficacious way to settle the bitter Ford Dispute of 1946.¹¹⁷ At page 100 of Re Lavigne and OPSEU (No. 2), White, J. quotes these historic words of Mr. Justice Rand:¹¹⁸

On the other hand, ... the employees as a whole become the beneficiaries of union action, and I doubt if any circumstance provokes more resentment in a plant than this sharing of the fruits of unionist work and courage by the non-member. It is irrelevant to try to measure benefits in a particular case, the protection of organized labour is premised as a necessary security to the body of employees ... it would not then as a general proposition be inequitable to require of all employees a contribution towards the expense of maintaining the administration of employee interests, of administering the law of their employment.

The Rand formula had been around for at least 41 years,¹¹⁹ but longevity is not a guarantor of Charter enshrinement. At page 104-105 of his judgment, Mr. Justice White quotes Dickson C.J.C. who had cautioned in the Alberta Labour Reference "that the meaning of a provision of the Charter is not to be determined solely on the basis of pre-existing rights or

freedoms".¹²⁰ The flip side of this coin, of course, is that the Charter does codify some existing rights, and as Mr. Justice White observes (at page 104) "all of the freedoms articulated in the Charter, to some extent or other, have been part of the disposition of the common law for a long time". White, J. adds that part of Canada's "pluralistic" society is in "the long recognized grouping of certain of its members known as unions". Bearing in mind the interrelated notions just discussed here, White, J., at page 105, opines that whatever remedy he devises in Lavigne and OPSEU (No. 2) "should interfere with the association rights of the applicant and members of the union as little as possible".

Much of what White, J. related concerning the Rand formula and about his eventual order may be of assistance in postulating which fragments of collective bargaining mechanisms may be found safeguarded within section 2(d) of the Charter in the aftermath of the trilogy. White, J.'s final disposition did weaken the union's power to dispense funds received from workers as it liked, but he strove to leave the Rand foundation in place, partly because it "has worked":

It is accepted and promulgated by Parliament and provincial legislatures in their enactments. It has been accepted by organized labour, and indeed unorganized labour to date. It is accepted by management. One would not be extravagant if one were to consider that industrial peace - which involves the settlement of economic issues between organized labour and their employees - has been greatly aided by the application of the Rand formula. Further, one can easily contemplate some considerable disruption or unnecessary curtailment of industrial peace by a court's ill considered description or unnecessary curtailment of the continued use of the Rand formula. In my view in a prima facie sense the access of unions to non-members' dues is an accepted principle of labour law in Canada (page 100).

It will be recalled that Mr. Lavigne, the official protagonist in this case, was not a member of OPSEU, but objected to having any of the funds which he had compulsorily contributed to the union used to support political causes. White, J. listed (at page 100) a number of categories of non-members who passively support contentious union activities when compulsory dues check-off is employed: those who object to such activities, and those who are apathetic, neutral or indifferent. Accepting a principle of "expectation interest" relied on in two precedents,¹²¹ White, J. (at page 101) held that it seemed reasonable to consider the settled economic expectations of unions with respect to the dues received from non-members who are apathetic, neutral or indifferent. The historical fact that the Rand formula had been part of unions' expectations for 41 years could not be disregarded in formulating a remedy in this case.

On the main issue of Mr. Lavigne's complaint, White, J. found that the test to be applied with respect to any impugned expenditure was whether it was made for a purpose reasonably related to collective bargaining or to the administration of the collective agreement, rather than for a political, ideological or social purpose external to the collective bargaining framework. The union must provide some voluntary plan through which an objecting non-member would have access to adequate redress, to include a quick decision from an impartial arbiter on the propriety of any challenged expenditure.

Mr. Justice White (at page 117) acknowledged that unions may in a sense advance collective bargaining causes through political party contributions, but thought that making use of this method to further a union's objectives was fraught with difficulty for the freedom of people in a democracy to support the political party of their individual choosing:

If a union financially supports a specific political party, and if that political party has in its platform a promise to improve the lot of union members as to collective bargaining rights guaranteed by statute, one can see that funds used by the union in support of that political party do promote collective bargaining concerns. However, ... the threat to an individual's fundamental freedom of association to support the political party of his or her choice ... invokes the Charter; ... even the probability that workers' interests will be advanced by union support for a specific political party cannot justify an infringement of the freedom of association of the non-member involved.

It is arguable that this judgment is authority only on the right to dissent for non-members of unions. Nevertheless, it is worthy of note that at pages 116-117, White, J. said that if an employee objects expressly to the use of dues paid "unwillingly" by him to a union to support a political party, "to ignore his objection is to take a course contrary to the democratic process". Mr. Lavigne was not himself a member of OPSEU, and the issues raised in the litigation have yet to be determined by the Supreme Court of Canada. One can therefore still ask whether the freedom of association of a worker extends to "political" efforts by his or her union, as an adjunct to collective bargaining, such as lobbying or support for a particular political party.

Another Ontario case deals more directly with ideas grappled with in the Supreme Court of Canada labour trilogy. Mr. Justice Rosenberg demonstrated, it is submitted, a clear understanding of what the various judges in the trilogy decided and did not decide.

Re Hutton (1988), 62 O.R. (2d) 673¹²² involved a claim by four Ontario Provincial Police (OPP) officers that they were entitled to have better collective bargaining rights, equivalent to those already made available to municipal police officers of similar rank in the province.¹²³

Among senior and junior officers of the provincial and municipal police forces in Ontario, the only group completely cut off by statute from rights to bargain collectively were OPP officers above the rank of staff sergeant.

When he considered the Charter implications of the challenged legislation, what Mr. Justice Rosenberg said concerning the Alberta Labour Reference¹²⁴ aligned harmoniously with that presented at 3.2-3.4 above:

In Reference re Public Service Employee Relations Act, etc. ... the majority found that the right to strike was not guaranteed by s. 2(d) of the Charter and although it was not necessary in order to answer the [seven constitutional] questions, Justices Beetz, Le Dain and La Forest held that the right to collective bargain (sic) was not protected by s. 2(d) of the Charter. The position of Justice McIntyre is not as clear. (Emphasis added).

To illuminate the problems faced in Re Hutton, Rosenberg, J. (at pages 691-692) also quoted from McIntyre, J.'s reasons in P.S.A.C. v. Canada:¹²⁵

In my opinion, the Public Sector Restraint Act, 1980-81-82-83 (Can), c. 122 does not interfere with collective bargaining so as to infringe the Charter guarantee of freedom of association. The Act does not restrict the role of the trade union as the exclusive agent of the employees. It requires the employer to continue to bargain and to deal with the unionized employees through the union. It also permits continued negotiation between the parties with respect to changes in the terms and conditions of employment which do not involve compensation. The effect of the Act is simply to deny the use of the economic weapons of strikes and lock-outs for a two-year period. This may limit the bargaining power of the union, but it does not, ¹²⁶in my view, violate freedom of association.

It was Rosenberg, J.'s finding (at page 692) with respect to the trilogy, that "the Supreme Court of Canada appeared to be evenly divided on the question of whether or not collective bargaining received any protection" under section 2(d) of the Charter:

Since they are so divided and since in any event their reasons are obiter, I prefer the approach of McIntyre J. and would hold that the complete prohibition against collective bargaining of the commissioned officers is contrary to s. 2(d) of the Charter and for the reasons previously stated¹²⁷ is not justified by s. 1 of the Charter.

4.2 Lessons Learned from the Post-Trilogy Freedom of Association Cases

The cases dealt with in Chapter 4 have been those, significant for our purposes, that were reported to November, 1988. Subsequent judicial commentary on the impact of the trilogy will be analyzed in Chapters 5 and 6. It can be asserted that the early post-trilogy jurisprudence has helped to hone our perception of questions left unresolved by the Supreme Court of Canada and pointed the way toward some possible answers.¹²⁸

- (1) The trilogy's view of freedom of association would encompass a right to found and to sustain a trade union (see Marshall, J.'s judgment in P.I.P.S. v. N.W.T.).
- (2) There are divergent judicial views as to whether the search for formal union certification is an "activity" not protected by the Charter, or an aspect in the "establishment" of the association that might draw Charter protection (see discussion of P.I.P.S. v. N.W.T. both at trial and on appeal).
- (3) Though a fair union certification process may not be an aspect of protected freedom of association, a requirement that a union be incorporated might violate the Charter, because the members would not be able to decide on the constitution of their representative body, including its objects, rules for membership and procedure, and even

whether the association should apply for certification (Kerans, J.A. in the P.I.P.S. v. N.W.T. appeal).

- (4) The Supreme Court of Canada appeared to be evenly divided on whether or not collective bargaining received any protection under section 2(d) of the Charter (Rosenberg, J. in Re Hutton).
- (5) The reasons in the trilogy that deal with collective bargaining (as contrasted with strike rights) may be obiter (Rosenberg, J. in Re Hutton).
- (6) Some aspects of collective bargaining may yet be held by our highest court to have constitutional protection (de Weerd, J. in Miller v. N.W.T.).
- (7) Certain collective bargaining mechanisms of long standing, notably the Rand formula, may be fundamental to Canadian society and, therefore, worthy of Charter protection. At a minimum, they may not be subject to curtailment through the use of the Charter (based on White, J.'s reasoning in Lavigne).
- (8) Though union activities related directly to collective bargaining might come under the Charter umbrella, actions that are undertaken for a wider political, ideological or social purpose might not be so protected (White, J. in Lavigne).
- (9) A complete denial of collective bargaining rights for a group would probably trigger section 2(d) of the Charter and require justification under Charter section 1 (Rosenberg, J. in Re Hutton).

5. Beyond the Trilogy: Is there a constitutional setting for collective bargaining?

5.1 Is there a way into the Charter for collective bargaining? Will the path accommodate groups as well as individuals? Is the path worth following?

The three questions that form a subtitle to this part are closely interrelated. There is strong authority for the view that the Supreme Court trilogy forecloses any possibility for a right to bargain collectively to be built into the Charter. What's more, authoritative opinion holds that the courts ought to maintain a distance between the Charter and collective bargaining — if there is a gap, it should be plugged, not entered. In the Alberta Labour Reference, both Le Dain, J. (at 391-2) and McIntyre, J. (at 416-17) suggest that the labour relations field is too complicated for the courts to review regularly through constitutional (or administrative law) litigation and should remain in the hands of legislators and specialized tribunals. McIntyre, J. cites Joseph Weiler,¹²⁹ who states the belief that Canada's system of collective bargaining law is too sophisticated to be scrutinized for reasonableness under the Charter, and Peter Gall, who opines that today's model of bargaining is not imbued with a "timeless" character, may change over time, and is not worthy of constitutional safeguard.¹³⁰ In any event, recent judicial authority appears to agree with early commentators on the trilogy, stating that the whole issue is closed. In a relevant and major decision, Mr. Justice Henry of the Supreme Court of Ontario set out (and applied) what he thought to be the principles established by the trilogy:¹³¹

"(a) The right to collective bargaining is not a fundamental right or freedom guaranteed by the Charter

but is entirely the creature of statutes of recent origin.

(b) The Court ought not to extend the guaranteed fundamental rights and freedoms to give Charter protection to such non-fundamental rights and freedoms.

(c) The constitutional guarantee of freedom of association in s. 2(d) of the Charter does not include a guarantee of the right to bargain collectively; therefore the right of each individual to bargain for a contract is not a constitutionally protected activity.

(d) The exercise of applying s. 1 of the Charter to review legislation in this field, and to substitute their judgment for that of the legislature's is not one for which the courts are suited".

Based on Henry, J.'s assessment, the door to Charter freedom of association would seem barred to collective bargaining.¹³² Although Henry, J. is not alone in his opinion,¹³³ there are reasons to doubt the correctness of his stated views. It would seem preferable to adopt McIntyre, J.'s own assessment (repeated here from the PSAC case at page 453) of what the Alberta Labour Reference left open:

My finding in that case does not ... preclude the possibility that ... aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association.

It was contended earlier in this thesis that the judges ruling in the trilogy were not called upon to decide whether collective bargaining was constitutionally entrenched. Even if their pronouncements on this matter were found to be part of the ratio, on the crucial points for our deliberation, it was submitted that there was at most a 3-3 tie, which leaves the question open for a future court to decide. This viewpoint has also been put forward by Neil Finkelstein:

It is difficult to predict with any certainty what the trilogy means to labour law. No majority endorsed any particular formulation of freedom of association, so an authoritative and innovative construction is still possible, even under the strictest view of stare decisis.¹³⁴

Finkelstein also concludes that it is "arguable that at least some aspects of collective bargaining" come within section 2(d) of the Charter.¹³⁵

As for the problem of courts trying to apply the Constitution to labour law, the words of Chief Justice Dickson are instructive:

While it may be true that the Charter was not framed for the purpose of guaranteeing rights conferred by legislative enactment, the view that certain rights and freedoms cannot be protected by the Charter's provisions because they are the subject of statutory regulation is premised on a fundamental misconception about the nature of judicial review under a written constitution.

The Constitution is supreme law. Its provisions are not to be circumscribed by what the Legislature has done in the past, but, rather, the activities of the Legislature — past, present and future — must be consistent with the principles set down in the Constitution.¹³⁶

The ultimate court has been able and ready to view other socially volcanic areas from the vantage point of the Charter, such as language rights and the refugee determination process.^{136A} Moreover, the balanced approach taken by the Chief Justice himself in the trilogy illustrates that labour relations laws can be assessed in light of the Charter without upsetting the legislative apportionment. Dickson, C.J.C., in dissent, applied section 1 of the Charter to various specific elements of the impugned legislation, deciding that some passed muster under section 1, and others did not.¹³⁷ In the Dairy Workers case and in Public Service Alliance of v. Canada, Mme. Justice Wilson disagreed with his assessment concerning the justifiability of the challenged

statutes, undertaking her own Charter 1 analysis.^{137A} The two learned Justices did not attempt to design legislative enactments to replace those which they respectively found wanting. The judicial deference toward legislatures exhibited in their reasons belies the concern expressed by Le Dain, J. that the judiciary might set aside the "principle of judicial restraint" by constitutionalizing matters properly within the legislators' purview.¹³⁸

A concern implicit in the passage just quoted from the plurality judgment of the trilogy is that current methods of bargaining collectively should not become imbedded in stone through constitutional enshrinement. Elected politicians must have flexibility to respond to shifts in the economic and social climate. As we have seen from the words of Dickson, C.J.C. and Wilson, J., however, requiring governments to comply with minimum Charter protections for employees would not necessarily or be likely to concretize any one mode or system for arranging collective bargaining relationships.

The restraint demonstrated by Wilson and Dickson, JJ. is generally in keeping with the admonition of the Chief Justice found in R. v. Edwards Books and Art Ltd.:

A 'reasonable' limit is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The Courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line".^{138A}

The Chief Justice elaborated on this theme in P.S.A.C.^{138B} stating that the primary role of the judiciary is to ensure that "the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the Charter".

It has been argued that in his section 1 analysis in the trilogy, Dickson C.J.C. was too deferential:

In essence, he refused to question seriously whether the government's decision to apply compensation controls to the public sector was rationally related to the goal of reducing inflation ... This deference stands in stark contrast to the analysis in Oakes which had emphasized that governments bore a 'rigorous' burden of justifying limits on Charter rights.¹³⁹

The reasoning developed in the preceding paragraphs is in accord with views expressed in a recently published article, which canvasses the area of constitutional judicial review in much greater depth. After looking specifically at the trilogy, the authors conclude as follows:

In each of these examples then, the only constraint which Dickson C.J.C. and Wilson J. would have imposed on any of the legislatures was that they go about pursuing their purposes in a way which would minimize the limitation of the constitutional freedoms ... Such judgments can hardly be described as substantial or serious invasions or usurpations of legislative sovereignty. They offer no support for the critics' claim that judicial review entails an inversion of constitutional roles.^{139A}

Reflecting on a number of cases, including the trilogy and Dolphin Delivery, [1986] 2 S.C.R. 573, the writers add this:

In the end then, careful analysis of all of the judgments that have been written by the Supreme Court concerning the constitutional protection which workers' freedom to protect and bargain collectively enjoys should dispel any fear that judicial review will invade substantially the realm of politics and the sovereignty of the legislature. Constitutional adjudication does not set the courts adrift to fashion policy, in labour law or elsewhere, out of whole cloth (p. 615).^{139B}

Assuming then, that there is room for manoeuvre on the question of collective bargaining from the perspective of constitutional review, and that it would not be an impractical or inappropriate task for the courts, is it in the interests of those who wish to preserve the benefits of collective bargaining to seek the imprimatur of the Charter? Many would counsel against this course. Based on centuries of experience, trade unionists and sympathetic academics might advise that things are best left in the bailiwick of the legislatures. The courts cannot be trusted to look after workers' interests, and the individualist orientation of the Charter stacks the deck against them.¹⁴⁰

From their very beginnings, trade unions have been viewed by the courts as illegal conspiracies in restraint of trade, and it took repeated pressure by working people on elected representatives to overturn judicial decisions and to protect trade union activities from constant attacks in the Courts. Moreover, it was democratically elected governments, and not appointed judges, which the trade union movement persuaded to legislate the modern day collective bargaining system, so as to provide working Canadians with the collective power to counter-balance the otherwise unchecked power of employers.^{140A}

Some learned observers worry that the courts may produce solutions through philosophical discourse and Charter litigation that will prove unworkable.¹⁴¹ The "traditional Canadian way" of changing labour laws has been "through extensive consultation with unions and employers, often conducted through Royal Commissions, task forces or legislative committees, supported by high quality economic or industrial relations research".¹⁴² Labour relations laws, within each jurisdiction, usually constitute "an integrated and finely balanced system", and many concepts "cannot be fully appreciated without a detailed understanding of the system as a whole".¹⁴³

Moreover, when it comes to the specifics of a collective agreement, the best judges of what are acceptable terms are the parties. Everyone may be better off if the courts maintain a "hands off" attitude to labour relations under the Charter. From the perspective of organized labour, the chances of persuading a court that collective bargaining ought to draw Charter protection must seem quite removed, and perhaps pointless, since the strike threat, which is so essential to making the whole bargaining process effective, has been left unshielded by the trilogy.¹⁴⁴

Events of the past few years have shown that the aforementioned viewpoints have shortcomings. Many constitutional challenges were launched precisely because Parliament and other legislatures were passing legislation that removed some of the collective bargaining power of public sector employees. Some observers see this as a continuing trend, indeed "the end of the era of free collective bargaining".¹⁴⁵ What's more, the current focus of litigation is on cases wherein the workers, organizations and established collective bargaining mechanisms are on the defensive and, therefore, forced to argue Charter provisions.¹⁴⁶ In addition, the free trade agreement with the United States has the potential of fundamentally altering the labour relations picture, and it appears that the situation of Canadian workers, thus far, is more advantaged than that of their American counterparts.¹⁴⁷

It cannot be doubted that the quandaries surrounding collective bargaining in the era of the Charter are of profound importance. Bearing in mind the conclusion stated here that the Supreme Court has left many of the questions unresolved, one might recall that, in addition to the Chief Justice of Canada and Madam Justice Wilson, two superior courts in Canada have ruled that freedom of association includes the right to bargain collectively is

protected by the Charter.¹⁴⁸ The remainder of this thesis will explore arguments that could assist the courts in deciding whether the conclusion reached by those decisions was indeed correct.

5.2 Are Collective Bargaining Rights Fundamental to Canadian Society?

How does one determine what is "fundamental"? It will be asserted that a right need not be solely "individual" in nature to be "fundamental". It will be suggested here that there are two co-determinants of what constitutes a fundamental right, history and social philosophy, and that on both grounds, collective bargaining as a concept, and perhaps specific attributes of it, may be "fundamental" in Canada.

The question posed in the title is important for several reasons. Although the headings may be there for guidance only,^{148A} section 2(d) of the Constitution appears in that segment of the Charter titled "Fundamental Freedoms". To be construed as a proper occupant of Charter "freedom of association", collective bargaining or elements of it may require a "fundamental" character. One of the determinants employed by the plurality in the Supreme Court trilogy, to conclude that a right to bargain collectively was not part of section (2d), was Le Dain, J.'s view that modern collective bargaining is simply a recent creation of statute. McIntyre, J. used similar reasoning when forming part of the majority who denied that constitutional protection was present for strike rights. Moreover, we have interpreted McIntyre, J.'s trilogy judgments to allow for associational guarantees for certain important aspects of Canadian life, when carried out collectively, if these are found to be "fundamental". That is aside from any reinforcement

which such concepts might achieve through linkage to other sections of the Constitution, an area to be explored later in this Chapter.

One could dispute the contention that because much collective bargaining legislation is relatively new, the concept must be viewed as merely a phase in the development of industrial relations, which must not be "constitutionalized". In Canada and in the homeland of our common law, England, there is a long history of mutual effort by workers seeking to improve wages, working situations and societal conditions, and to increase the degree of control they had over their lives. This brings to mind the notion that, functioning ideally, trade unions epitomize the participatory spirit that is at the heart of a liberal-democratic national community. Before considering this postulate further, let us consider some of the evidence of the roots of collective bargaining in Canada's history and belief system. In 1968, the Woods Task Force Report on Canadian Industrial Relations stated definitively:

Freedom to associate and to act collectively are basic to the nature of Canadian society ... Together they constitute freedom of trade union activity: to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanctions, including taking a case to the public in the event of an impasse. Collective bargaining legislation establishes rights and imposes duties derived from these fundamental freedoms
(Emphasis added)¹⁴⁹

The notion that the current statutory framework for collective bargaining may be built upon an historical foundation "basic to the nature of Canadian society" was not addressed by the plurality in the Supreme Court trilogy. McIntyre, J. did touch on the area. He conceded that freedom of association was not new in Canada and was "part of our social and legal

fabric".¹⁵⁰ He added that the Charter guarantee of freedom of association must be construed with reference to "the nature, history, traditions, and social philosophies of our society".¹⁵¹ In relation to trade unions, however, his focus was on law. He said that laws in Canada had long recognized that unions could exist "with rights and duties fixed by law" and that individuals could lawfully participate in their activities.¹⁵²

The Chief Justice who also did not elaborate on Canada's history, stated thus:

Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe or exploitative working conditions.¹⁵³

It would seem that the Canadian historical record accords with the impressions conveyed by Dickson, C.J.C.

As long ago as 1794, employees of the North West Fur Trading Company struck for higher pay. A more pervasive labour movement arose later in Canada as industrial workers combined to deal with the exploitation of individuals associated with new forms of industrial production. Activity aimed at altering employment conditions was hampered by legislation based on English statutes, and by accompanying judicial interpretation. Along with attempts at improving their working situations, during the 19th century, organized labour added activities designed to obtain relief from anti-union laws.¹⁵⁴

The culmination of such joint endeavours was the enactment of ameliorative legislation in Canada in 1872. The new law did not grant affirmative rights to unions. Rather, it took away certain civil and criminal liabilities facing employees who associated for mutual benefit.¹⁵⁵ Worsening

working environments that accompanied the growth of manufacturing, together with a lengthy depression in the latter 19th century that dampened bargaining power, fostered expansion of workers' associations, and also of militancy.¹⁵⁶ This atmosphere led to legislative experimentation (provincial and federal) intended to promote industrial peace. Federal enactments were eventually consolidated in the Industrial Disputes Investigation Act (S.C. 1907, c. 20):¹⁵⁷

[The] legislation implied certain policy judgments which were later to mature in modern collective bargaining legislation. These were recognition of the legitimacy of collective bargaining itself, of the possibility that strikes might result, and of the propriety of even-handed government intervention to assist in the establishment of a permanent, bilateral relationship.¹⁵⁸

The next substantial changes followed the Great Depression. In response to the heated industrial conflict of that era, the U.S. Congress passed the National Labour Relations Act (or Wagner Act) in 1935.¹⁵⁹ The Act established that employees had the right to join the trade union of their choice and to participate in collective bargaining through it. The statute forbade certain practices which employers used to thwart unionization.¹⁶⁰ Change came later in Canada. From 1937-1942, some provinces, as well as the federal government, passed legislation evincing support for the right of association and collective bargaining.¹⁶¹ During World War II, the federal government instituted Wartime Order P.C. 1003 of 1944, pre-empting much of provincial labour jurisdiction. This set of regulations established administrative machinery to foster collective bargaining.¹⁶²

Not long after the war, virtually all provinces, as well as the federal government, introduced industrial relations statutes applicable to private

sector employees, statutes that shared underlying assumptions favourable to collective bargaining.¹⁶³

As Arthurs, Carter and Glasbeek explain, these laws all provided

a mechanism for the designation, by majority choice, of one union as the exclusive bargaining agent of the employees; a legally enforceable duty of the employer to recognize, and bargain in good faith with, that union; and the prohibition of employer 'unfair labour practices' which might interfere with selection of, or participation in, the union of employees.¹⁶⁴

Thus, in the postwar period, legislation encouraged collective bargaining in the private sector. The federal and provincial governments also "encouraged collective bargaining and union formation in the public sector", beginning with amendments to the Quebec labour code in 1964, and spurred on by the federal Public Service Staff Relations Act (S.C. 1966-67, c. 72) of 1967.¹⁶⁵ In 1986, the situation was summarized thus:

At present, every Canadian jurisdiction grants collective bargaining rights to their public employees, but these rights range from the right to bargain collectively over a narrow range of issues without the right to strike to full collective bargaining including the right to strike.¹⁶⁶

There is an arguable case that many current collective bargaining rights are part of a long continuum that makes them part of Canada's fundamental character, although the phrase "freedom of association" was not a commonly used term of art.¹⁶⁷

One might agree that labour associational freedoms were not granted by law, but "were recognized negatively so to speak, in the first instance".¹⁶⁸ This view holds that legislators, starting in 1872, "ceased from doing anything to prevent union organization and activities, but at the same time enacted no provisions to promote them".¹⁶⁹ On that basis, one may assert that

worker freedom of association does not stem from modern labour legislation, but is rooted "much deeper into the common law".¹⁷⁰ Discussion of these roots, albeit from only the unions' perspective, can be found in the Supreme Court factum submitted on behalf of employees (Respondents) in the Dairy Workers¹⁷¹ component of the trilogy. The Respondents submitted that

"the common conception that "combinations of workers to fix or better their conditions of life are illegal by common law" is a misconception; and ... that from the earliest times the prohibitions, restraints and penalties upon combinations for such purposes derive solely from legislated enactments ...".¹⁷²

It was put forward by the Respondents that the "misconception" was as a "habit" that arose from the frequency of legislative intervention made historically against combinations of workers.¹⁷³ After a step-by-step historical examination,¹⁷⁴ the Factum (at page 23) submitted that "there never was a "common law" doctrine that combinations of workers to seek to improve their conditions of life were, or are, unlawful". This assertion flies bravely in the face of the historical record of antipathy displayed by judges toward trade union activity.^{174A} The clearest English judicial statement presented by the Respondents in Dairy Workers was that of Lord Chief Justice Campbell, in Rowlands Case¹⁷⁵ indicating

that it was the clear right of English workmen to make the best they could of their own labour, and to refuse to work unless upon terms that they thought were satisfactory; that each might do that, and that the whole might do it.

There are more modern statements of the view that important aspects of collective bargaining were legal under common law. In Mogul S.S. Co. v. McGregor, [1892] A.C. 25, at p. 47, Lord Bramwell noted that

... a combination of workmen, an agreement among them to cease work except for higher wages and a strike in consequence was lawful at common law.

This opinion was adopted by the House of Lords in 1942 in Crofter Harris Tweed.¹⁷⁶ In 1962, a similar view was expressed by a judge of the Supreme Court of Canada:

I do not agree with the contention of the respondents that the right to strike is expressly given to employees by s. 3 of the Labour Relations Act. That section, saying that every person is free to join a trade union and to participate in its lawful activities, [is] meaningless. No statutory permission is necessary to participate in the lawful activities of any organization.

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The statute ... implicitly recognizes that employees may lawfully strike by restricting that undoubted right during the currency of collective agreements ... the right existed at common law at the time of the passing of the Labour Relations Act.¹⁷⁷ (Emphasis added)

Whatever the historical or current attitude of the judiciary, the ideas found in modern statutory protections were not developed or initiated by legislators. A final word on the pre-Charter common law is excerpted here from a Charter case:

It is important to note that the freedom to associate freely, to bargain and to withdraw services were not conferred by statute. They were developed under a dynamic of their own. The various statutes dealing with labour relations merely served to recognize and regulate them in the interest of order and industrial peace.¹⁷⁸

A glimpse of history can also help to illuminate the place of collective bargaining in Canada's social philosophy. We have remarked that Order-in-

Council P.C. 1003 imported tenets of the U.S. Wagner Act into Canada in 1944. This was probably not done primarily to elevate collective bargaining in the scheme of things, but to bolster the war effort.¹⁷⁹ The need for national unity apparently had prompted similar actions during the First World War. A 1918 Order-in-Council set out, inter alia, the following principles:

2. That all employees have the right to organize in trade unions, and this right shall not be denied or interfered with in any manner whatsoever, and through their chosen representatives should be permitted and encouraged to negotiate with employers concerning working conditions, rates of pay or other grievances.

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4. That employers should not discharge or refuse to employ workers merely by reason of membership in trade unions or for legitimate trade union activities during working hours.¹⁸⁰

At the conclusion of World War I, Canada joined with other Parties to the Treaty of Versailles¹⁸¹ in recognition that "peace can be established only if it is based on social justice" and that improvement of the "conditions of labour" was urgently required, including "recognition of the principle of freedom of association". (Preamble to Part XIII, which established the International Labour Organization). Among the General Principles espoused is this: "The right of association for all lawful purposes by the employed as well as by the employers". (Article 427). If Canada could agree to link "freedom of association" explicitly to the employment relationship and to conditions of labour in the 1919 armistice, does that not suggest that freedom of association for workers is "fundamental" and deserving of Charter recognition 70 years later? In 1919, and no doubt subsequently, the presence

of free trade unions has been considered one indicium of a just and democratic country.^{181A}

The observable alliance between reasonable trade union freedom and democracy suggests that collective bargaining may be a fundament of a liberal-democratic society such as Canada. In that regard, the Woods Task Force on Labour Relations in 1968 professed that:

to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system.¹⁸²

Several provincial statutes now proclaim this commitment,¹⁸³ and the preamble to the Canada Labour Code, Part V (Industrial Relations), states:

Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And whereas the Parliament of Canada ... deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;^{183A}

The quoted preambulatory language demonstrates a commitment to democratic processes within the labour-management relationship. This is in keeping with democracy in the wider community. The Woods Task Force had endorsed such a course "not only because of its virtues ... but also because we see no

alternative that is compatible with the heritage of Western values and institutions".¹⁸⁴ The analogy between "industrial citizenship" and democratic participation in society was noted by Dickson, C.J.C.:

Freedom of association is ... a sine qua non of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society ... Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.

Freedom of association is the cornerstone of modern labour relations.¹⁸⁵

Chief Justice Dickson (at pp. 368-369 of the judgment) later cites Paul Weiler's characterization of collective bargaining as "intrinsically valuable as an experience in self-government"¹⁸⁶ and quotes two other relevant passages from Reconcilable Differences:

An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.¹⁸⁷

... collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. That is the essence of collective bargaining.¹⁸⁹

Further support for this avenue of thought was taken by Dickson, C.J.C. (at p. 369 of his reasons) from the Woods Task Force Report:

One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of the western world.

Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.¹⁸⁹

According to one expert historian, trade union policies, for the most part, "are determined through democratic decision-making and are carried out by elected officers after extensive debate within the organization concerned". Leaders who have flaunted the will of the majority "have historically been removed from office after a brief period".¹⁹⁰ That sounds remarkably like the workings of a democratic society. As Paul Cavaluzzo has observed, freedom of association is a fundamental freedom "because it enhances democratic values".¹⁹¹ Yet, "not all associations have the same democratic effect" and therefore "all are not deserving of the same constitutional protection".¹⁹² It would appear that a "right to bargain collectively" may in some way be sufficiently fundamental in the Canadian democratic system to warrant notional inclusion within the Charter's "freedom of association" provision.¹⁹³ Moreover, according to some constructions of recent legal history, collective bargaining may have resided in section 2(d) all along.

A virtually unnoticed article of the Charter is section 26, which does not concern itself with whether pre-existing rights were "fundamental":

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

The preeminent purpose of this provision is a cautionary one. It was included to make clear that the Charter is not to be construed as taking away any existing undeclared rights or freedoms.¹⁹⁴ It also lends support to the view taken by the members of the Supreme Court of Canada in Singh v. M.E.I.¹⁹⁵ that the Canadian Bill of Rights still applies where not overridden by a

Charter right. Rights that have been found by various courts to be existing, but undeclared, include physical access to the courts,¹⁹⁶ the right to enter into private contracts¹⁹⁷ and the freedom to determine, within the limits prescribed by law, the terms and provisions of contracts.¹⁹⁸ Certainly the latter two examples are not entirely remote from our considerations.

A quite important instance of referral to section 26 has been in Reference re An Act to Amend the Education Act.¹⁹⁹ Three of the five participating Ontario Court of Appeal judges ruled that, in accord with section 26, section 29 of the Charter dealing with minority education rights²⁰⁰ must be interpreted as protecting these rights from being weakened by Charter provisions 2(a) (freedom of conscience and religion) or 15 (equality). The difference between the views of the majority and the dissenting judges was that the latter thought section 29 protected only constitutionally guaranteed rights, whereas the majority (aided by section 26) thought that the protection of section 29 extended as well to laws passed pursuant to constitutional authority prior to the Charter's existence. The conclusion of the majority's reasoning was that Ontario legislation extending full funding to Roman Catholic separate high schools²⁰¹ would be protected under section 29.

It is uncertain that any of the precedents created pursuant to section 26 will be useful to answer questions about the right to collective bargaining. What can be observed, based on these cases, is that section 26 has been a determinant employed in ruling on the constitutionally protected status of some of the kinds of activities and legal rights involved in collective bargaining, namely economic and social rights (including rights pertaining to contracts) and both legislated and common law rights. What's

more, in the case of the Education Reference, the court, as it would be compelled to do when contemplating a right to bargain collectively, had to ponder likely tensions among different individual and group rights. Many facets of worker organizing and other components of collective bargaining, whether legislatively regulated or not, were taken for granted during the decades preceding the advent of the Charter. Such longstanding incidents of life in Canada might gain a measure of constitutional protection through an inventive argument based on section 26.

In formulating a claim based on section 26, one would need to consider any possible linkage with Justice McIntyre's "fourth approach" to the interpretation of section 2(d) of the Charter. He allowed that at some future time Charter protection may be accorded to the collective exercise of fundamental elements of life in Canada that are not now enumerated in the Constitution. One problem for proponents of a Charter right to bargain collectively is that a precondition set by McIntyre, J. was that for them to be eligible, any of these unsung rights must be interpreted as being guaranteed by the Charter for individuals. Illustrations of possible candidates were rights to marry, establish a home, found a family, pursue an education and gain a livelihood.²⁰² The familial examples do not seem pertinent to our inquiry (though trade unionists sometimes call each other "sister" or "brother"), but the latter two examples may prove interesting in discussion of Charter section 7 (Chapter 6 of this thesis). Unlike the right to gain a livelihood or to pursue an education, the right to found a conventional family can be accomplished only in association, as is the case with union organizing and bargaining. For that reason, even the "family" examples could potentially be of assistance to jurists.

Collective bargaining can be seen as merely the manifestation of, or a united use of, the individual right of freedom of association. The reasoning in the trilogy was that freedom of association is primarily, but not uniquely, an individual right.²⁰³

A close examination of how the trilogy handled this issue was carried out by Professors Petter and Monahan. They remarked that neither Dickson, C.J.C. nor McIntyre, J. found it possible to draw an adequate analogy between individual and group activity that would assist in determining whether a right to strike was protected by freedom of association:

McIntyre, J. seems to believe that, in the absence of an analogy between individual and group activity, the latter is not protected by freedom of association. Dickson, C.J.C. ... reached precisely the opposite conclusion. In his view, the absence of a parallel between individual and group action supported the conclusion that legislation curbing the latter violates freedom of association.²⁰⁴

Although Le Dain, J. for the plurality, joined with McIntyre, J. in deciding that the right to strike is not protected, it is unclear as to whether he adopted this aspect of his brother's reasoning. Hence, it may be contended that the interpretation chosen by the Chief Justice could still be applied in later jurisprudence to the broader subject of collective bargaining.²⁰⁵

Even if McIntyre, J.'s view is found to be binding law, that does not decide the matter. It appears that section 26 might be invoked to protect group rights, as the Ontario Court of Appeal did in the Education Reference.²⁰⁶

The Charter is not solely a shrine for individual rights and freedoms. In harmony with Canada's value system and constitutional tradition, the

Constitution proclaims and protects a number of rights that are primarily collective in nature. The Chief Justice remonstrated on this point in the trilogy.

It would be ... unsatisfactory to overlook our Constitution's history of giving special recognition to collectivities or communities of interest other than the government and political parties. Sections 93 and 133 of the Constitution Act, 1867 and ss. 16-24, 25, 27 and 29 of the Charter, dealing variously with denominational schools, language rights, aboriginal rights, and our multicultural heritage implicitly embody an awareness of the importance of various collectivities in the pursuit of educational, linguistic, cultural and social as well as political ends. Just as the individual is incapable of resisting political domination without the support of persons with similar values, so too is he or she, in isolation, incapable of resisting domination, over the long term, in many other aspects of life.²⁰⁷

It would appear that in Canada, a right need not be solely individual to deserve "special recognition". A right can be partly collective and still be preserved as "fundamental" under the Charter.

It is necessary ... to recognize that groups and various forms of community are also important to the individual, and that rights which protect and promote communal forms of action are equally important and compatible with our constitutional history.^{207A}

Although this thesis shies away from consideration of the putative right "not to associate", it is instructive to perceive what some leading decisions in that area have said about workers' existing rights in the collective bargaining field. For the most part, the judiciary has treated these as almost untouchable. White, J., in the second Lavigne judgment, dealing with remedy,²⁰⁸ declined to interfere with the "Rand formula" of compulsory dues check-off. He thought that it was appropriate to give unions access to non-members' contributions (provided that these were used for what he considered

to be collective bargaining purposes). This enduring practice was part of the expectation of all parties; it is "an accepted principle of labour law in Canada" and it "has worked".²⁰⁹

In Arlington Crane,²¹⁰ Henry, J. does not philosophize on the importance of collective bargaining when deciding that in Ontario's construction industry, regardless of the high degree of statutory regulation, collective bargaining is a private matter not subject to Charter scrutiny.²¹¹ The result is that he leaves the system intact.

Although the ratio of their judgment was in essence similar to that in Arlington Crane, the judges ruling on the appeal of Lavigne supported the "Rand formula" in obiter. As at trial,²¹² the Respondents argued that requiring Merv Lavigne involuntarily to contribute to the Ontario Public Service Employees Union violated a negative "freedom not to associate" contained within Charter section 2(d). The Court's principal finding was that there was no governmental action involved such as to require evaluation under the Charter, but the Court did choose to express views as to whether section 2(d) might otherwise have been violated. They asked themselves:

is the freedom of association of an employee who is a member of a bargaining unit covered by a collective agreement containing an agency shop provision²¹³ infringed by the mandatory requirement that he pay an amount equal to regular union dues regardless of the fact that he does not belong to the union?²¹⁴

Their reply was:

Viewing freedom of association as a positive right, we think it clear that there could be no infringement of that²¹⁵ right in the circumstances posed by the question
...

The Court found that the Rand formula does not "impair any aspect of an employee's positive Charter right to freedom of association".²¹⁶ Even if one assumed that a negative freedom of association existed, the requirement of a monetary payment by Mr. Lavigne to the union would not violate that provision.²¹⁷ It may be that the attitude displayed by the judiciary toward existing bargaining mechanisms reduces the need for Charter protection of them. Certainly, in the cases so far, there appears to be a high degree of acceptance of the worth of longstanding labour relations principles.

In concluding this part of the paper, a further source of social and legal evidence must be reviewed, the travaux preparatoires of the Constitution Act, 1982. As was discussed at pages 39-40, supra, the constitutional record is admissible as an aid to interpretation, though its weight as evidence is uncertain.²¹⁸ The minutes of the proceedings of the constitutional committee reveal that the exchange of interventions concerning workers' association rights was directly relevant to this thesis.²¹⁹

An amendment was proposed such that clause 2(d) would read "freedom of association including the freedom to organize and bargain collectively". The proposer, Svend Robinson, M.P., did not seek to extend the "right to strike as such".²²⁰ He exhorted that the reference to bargaining rights be made explicit, as to recognize "one of the most fundamental values of Canadian society".²²¹ In reply,²²² the Solicitor-General (and Acting Minister of Justice), Robert Kaplan, assured that "freedom to organize and bargain collectively ... is already covered in the freedom of association that is provided in the ... Charter".

The analysis provided in this part of the thesis would appear to lend support to the assessment made by the Honourable Mr. Kaplan. A right to

bargain collectively may be considered sufficiently fundamental in Canada, in historical and/or philosophical terms, that it can be accommodated within section 2(d) of the Charter. That may possibly be so even if collective bargaining has a mainly collective character. Moreover, this theoretical right (or portions of it, such as a right to certain aspects of union security) may be protected independently of, or in conjunction with section 2(d) through the little understood workings of Charter section 26.

The arguments marshalled in this part, particularly those related to democratic participation by individuals in workers' organizations, are also relevant in the consideration of Charter section 7 which immediately follows.

6. Collective Bargaining and Liberty and Security of the Person: Section 7 of the Charter

Section 7 of the Canadian Charter of Rights and Freedoms proclaims:

"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

This article is in that part of the Charter headed "Legal Rights",²²³ yet there have been many attempts by constitutional litigants to persuade the courts to vest it with meaning related to the domain of "economic and social rights", which is not listed as a category in the Charter. It appears that most of the cases have been launched by business or professional interests, alleging infractions of their right to "liberty" and/or "security of the person". Few of these initiatives have been undertaken in the social policy field, though the idea of doing so is not new.²²⁴ As far as can be ascertained, the courts have given only minimal attention to the prospect of

weaving section 7 into the debate about a right to bargain collectively.²²⁵ This thesis will attempt such an analysis, focussing on the way in which the collective bargaining process may enhance "liberty and security of the person" for the individual employee.

The right to combine and to act in concert in the labour relations context may have implications for the economic security of union members. There is more involved than economics, however. As we noted in Chapter 5.2, both unions and the bargaining process are meant to operate democratically. Involvement in such democratic processes may be valuable in itself as a lesson in political awareness, and can be seen as a source of pride and some "clout" for an otherwise fairly powerless individual, particularly one employed by a large organization. This involvement might add to a person's sense of "belonging", of solidarity with one's peers or community. On its own, or as part of a federation or coalition, a trade union may give an opportunity for its members to influence national or regional political decision-making. Successful lobbying, or even support for a particular political party, could have repercussions in social policy fields that impact on the quality of life of a worker and his or her family. The political and legislative climate can in turn influence the atmosphere and scope for collective bargaining, the undertaking and results of which affect the employee's daily working life more directly. It is perhaps trite to observe that the issues of collective bargaining do not concern simply the salary cheque or pay packet. Industrial disputes, union rules and collective agreements could deal with, *inter alia*, job security, union security, power relationships, health and safety, the general working environment and job satisfaction.

One could conceivably argue that all of the factors listed in the previous paragraph involve "security of the person", and some may also be characterized as relating to the meaningful exercise of "liberty". A somewhat similar analysis could perhaps be applied to political parties, or to other concerted activity, such as campaigns by anti-union lobby groups. It is submitted, however, that attributes of active participation in a trade union may be uniquely suited to section 7 protection. Assessment of the merits of this submission may be facilitated by reference to dicta from the labour relations trilogy. It would appear that, relevant to a person's involvement in a union, certain observations of Dickson, C.J.C. with respect to "freedom of association" resonate harmoniously when directed at section 7:

In my view, the "fundamental" nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.

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As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live.

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Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an

employer.²²⁶

This concern about the ability of an individual employee to pursue her or his interests when confronted with more powerful overseers is addressed further by the Chief Justice:

Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. ... While trade unions also fulfil their important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections,²²⁷ and equitable humane working conditions.

Justice McIntyre, in his trilogy reasons, did not deal so directly with the potential benefits for individuals of unionization. What he had to say about freedom of association in general, however, appears quite apt if applied to the collective bargaining process. It is suggested that one could safely adopt the following precis of McIntyre, J.'s position concerning the purposes of protecting freedom of association:

1. many goals can be achieved through collective action;
2. associations do more than serve individual interests, actually promoting general social goals;
3. freedom to associate in opposition to the State provides a democratic safeguard;
4. participation and association educates members in the operation of democratic institutions; and
5. associations serve as a conduit for political views".²²⁸

Not surprisingly, an idealized image of the profound role of organized labour is shared by its elected leaders. At a 1985 conference on employee

relations and the Charter, a speech by the then Secretary-Treasurer of the Canadian Labour Congress included these thoughts:

Indeed, the whole trade union movement is based on the recognition that, left alone, an individual worker's right to dignity, to economic well being and security, to health and education, is undermined in the absence of collective organization. Rather, only through the collective strength that comes with unionization can individuals protect and advance these economic and social interests. That is, far from being destructive of individual rights, collective action is necessary to protect them.²²⁹

The words of Shirley Carr speak to the idea that a concerted activity can enhance not only "security", but also "liberty" for an employee. This interpretation may be of little assistance, however, if the courts decide, as some could argue, that section 7 is not applicable to the regulation of "economic rights". Section 7 has obvious implications in criminal procedure, and some courts have leaned toward the view that its applicability is limited to instances of physical restraint, particularly if the words "life, liberty and security of the person" are viewed as an indivisible whole.²³⁰ Individual Supreme Court of Canada members have opined that a wider interpretation may be called for, and that each element of the phrase "life, liberty and security of the person"²³¹ has a separate, though related, meaning.²³² Nonetheless, this terminology has been construed as being meaningful primarily in relation to the other "Legal Rights" provisions (sections 8-14) that follow it in the Charter,²³³ a construction that could constrain section 7 from attaining applications outside the ambit of procedure. The Supreme Court has indicated, however, that section 7 guarantees are not limited to the procedural sphere, but may be applied to the substance of legislation.²³⁴

Although the functions of employee organizations are not limited to the seeking of economic gain for their members, a court could deny any relevance of section 7 to the field of collective bargaining because of the primacy that financial goals occupy in union activities. A number of decisions have held that the concepts of "liberty" and/or "security of the person" in section 7 do not shelter business interests, property rights or economic rights, though some courts would exclude only "purely" economic rights.²³⁵

No cases were discovered in preparing this thesis which worked through the question of whether a union as an entity (as contrasted with its members as individuals) could benefit from section 7 protection. The Supreme Court has held that a corporation, unlike its officers, cannot avail itself of the protection offered by section 7. The word "everyone" in the section "excludes corporations and other artificial entities incapable of enjoying life, liberty and security of the person".²³⁶ Of probable concern in the negotiation and implementation of collective agreements is the issue of whether section 7 contains a "freedom of contract", including perhaps "freedom to contract" and "freedom not to contract". More than one case has said it does not.²³⁷ One Ontario judge held that the liberty of two parties to enter into contractual arrangements is protected,²³⁸ but a higher court has stated otherwise²³⁹ (though without referring to section 7), and has stated specifically "that in the context of collective bargaining legislation there is no Charter guarantee of freedom of contract".²⁴⁰

A judgment that is pertinent to our concerns involved a challenge by an employer (and allied intervenors) to "first contract" legislation in Manitoba.²⁴¹ The statutory provision being assailed²⁴² permitted the Manitoba Labour Board, under specified conditions, to impose an initial collective

agreement on an employer (and on its employees' bargaining agent). Among the grounds of challenge to the law was infringement of employers' liberty under Charter section 7. Since, in the court's view, only economic or commercial rights of employers were affected by the statute, section 7 would afford no protection to management's position.²⁴³

Although the trend has been away from imputing an economic twist to section 7, no definitive judgment has been rendered by the Supreme Court, and the presence of an "economic" factor has not prevented it from upholding other Charter rights. The cluster of language rights decisions of late 1988 held that, under Charter section 2(b), a right of freedom of expression in one's own (official) language extended even to commercial forms of expression.²⁴⁴

Granted that bargaining on economic issues may be a large part of a union's *raison d'être*, there are other bases on which an individual member could obtain constitutional solace from section 7. In addition to pay and pension matters, a collective employment contract may deal with a number of more social issues that impact on liberty and security. Aside from benefits such as health, dental and insurance plans (that could be seen as just other forms of compensation), these are other items of a "social" nature to be dealt with in the workaday world: hours of work, vacations, maternity leave, day care, sick leave, employment related education and the general environment as it relates to health, including safety, air quality, noise levels, and the presence of toxic substances or other potentially harmful emissions. Some of these, prima facie, would still qualify under a view that restrained section 7's usefulness to questions of physical or mental integrity, or to "the bodily well-being of a natural person".²⁴⁵

To infuse "security of the person" with notions of "social security" would be consistent with the thinking expressed by the Law Reform Commission of Canada in a 1980 report, which stated that "security of the person" means "not only protection of one's physical integrity", but also "the provision of necessities for its support".²⁴⁶ In similar vein, a 1982 article pondered whether "security of the person" might protect against infringement of the "right to physical, mental and social well-being".²⁴⁷ Article 25 of the Universal Declaration of Human Rights (1948) states that everyone has the right to "a standard of living adequate for the health and well-being of himself and of his family" including "necessary social services, and the right to security in the event of unemployment, sickness" and so forth. Each of the three sources just cited were referred to by Madam Justice Wilson in Re Singh and MEI (1985), 17 D.L.R. (4th) 422 at 460, when examining section 7, but she declined to formulate her own interpretation. She did, however, (at p. 459) note that decisions taken under section 1(a) of the Canadian Bill of Rights,²⁴⁸ guaranteeing the right to "life, liberty, security of the person and enjoyment of property", were too unclear to be helpful in this regard.

Before moving on from the "social" sphere, it is well to recall that a valuable thrust of unions' work historically, and even today, has been as societies for mutual support and social solidarity, offering opportunities to meet socially with fellow workers and their families, and "mutual aid in sickness and in poverty".²⁴⁹ Like other job-related groups, moreover, organized labour also does not depend solely on management or the government for job-related or "life skills" training:

The labour movement has always viewed the education of workers on all matters of a social, economic or political nature to be one of its most significant responsibilities. The central labour bodies annually

conduct institutes, seminars and summer schools for thousands of unionists, and extensively promote the Labour College of Canada. As well, these bodies sponsor workshops and conferences, and publish a wide variety of educational materials".²⁵⁰

As we have seen, the trilogy and certain labour relations scholars have stressed that a major merit of participation in collective bargaining is the experience it gives an individual in democratic forms of decision-making, within the union movement, within the bargaining process, and in the wider democratic workings of the country.²⁵¹ Dickson, C.J.C., holding that particular federal legislation could not be justified under Charter section 1, stated that "the collective bargaining process serves important and democratic functions" and that "participation of employees in determining their rights and obligations in the workplace cannot be undermined without good reason".²⁵²

W. Craig Riddell states:

An advantage of collective bargaining is that it provides employees with an opportunity for democratic participation in the determination of conditions which affect an important part of their lives. Although such participation could take place in the absence of unions, the norm in the unorganized sector remains authoritarian determination of these conditions.²⁵³

It would be naive not to realize that, like our governments, unions do not always act democratically, that associational conduct could "submerge the individual",²⁵⁴ and that there may be a certain degree of coercion involved in instituting a decision decided by majority rule; but that is how democracy operates.²⁵⁵ Another attribute of democracy applied in collective bargaining is the "rule of law", according to an observation of Paul Weiler that bears repetition here:

An apt way of putting it is to say that good collective bargaining tries to subject the employment

relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.²⁵⁶
(Emphasis added)

It is suggested that the phrases underlined in the above passage from Reconcilable Differences are illustrative of the benefits to the "liberty and security" of the individual employee that occur through democratic collective bargaining. But union activity is not confined to internal industrial democracy, as these statements of Professor Desmond Morton outline:

Historically, local unions have used a portion of the dues collected from their members to establish and support central labour bodies to publicize and promote those demands and aspirations of working people which could most effectively be obtained through legislative reform.²⁵⁷

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Both then and now, trade unions have promoted the interests and concerns of the workers ... by engaging in a broad range of activities including organizing, bargaining, education and political action.²⁵⁸

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Canadians have historically expected unions to ... promote the interests of their members on a broad spectrum of issues.²⁵⁹

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Recent history suggests that the necessary relationship between collective bargaining and involvement in the political process will grow even closer. The imposition of wage and price controls in

the 1970's and the 1980's stripped many unions of much of their collective bargaining responsibilities. In order to oppose effectively such legislative intrusion into their collective bargaining relationships, unions were limited to dealing directly with governments on a political level.²⁶⁰

It must be recognized that actions by organized labour at the national level usually involve only representative forms of democracy for the individual union member. Few people can act as leaders or lobbyists. It is in the collective bargaining relationship at the workplace or in the union local that more direct forms of democracy exist. The ability to exercise choice and power in these contexts may be said to strengthen the "liberty" of a person by lessening dependence on or subjection to others who make or dictate decisions. "The opportunity to participate is both the foundation of democracy and a key to the achievement of self-worth".²⁶¹

The authors of a recently published piece express perceptions similar to those put forward in the preceding paragraph. Their comments, however, were focussed on "freedom of association" under section 2(d) and did not address issues under section 7 of the Charter. Yet they appear to support the approach taken in this thesis chapter:

Understood as providing a means by which workers can maximize the control they are able to maintain over their lives, the freedom to engage in collective bargaining is analogous to and just as fundamental as the other freedoms such as thought and speech which the Charter guarantees. Enhancing the autonomy of workers as a class, collective bargaining is precisely the kind of freedom which the Charter protects. Like all of the other freedoms section 2 contains, collective bargaining furthers the deepest values of individual autonomy on which the Charter rests Laws ... which limit the opportunity of workers to participate in the rule making processes at the workplace ultimately weaken the representativeness and fairness of the larger political process which governs the wider communities in which we live. [Emphasis

added to underscore the harmony of this argument with the concepts of "liberty" and "security of the person" under section 7.]²⁶²

The relationship between the concept of self-worth and "liberty and security of the person" is infused with particular meaning in relation to the earning of one's livelihood:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. Per Dickson, C.J.C. in Alberta Labour Reference, supra, n. 1, p. 368. (Emphasis added)

The ability of an individual, bargaining collectively with others, to influence the physical, psychological, and emotional work environment is thought by some authorities to be one of the primary reasons for belonging to a union.²⁶³ One of the "dominant" academic theories in the United States is that employees will attempt to unionize only if they are dissatisfied with their conditions of employment;²⁶⁴ one management journal recently published a checklist of "Preventive Tactics" with this in mind.²⁶⁵

On his or her own, a worker may have little power to make demands or to bargain, being perhaps fearful of such consequences as loss of promotion, or loss of a position to another individual or to a "next age" business machine. These fears may be amplified for someone who does not have special skills or training, or who feels vulnerable to discrimination on ethnic, gender, age or other grounds. Personal considerations such as status in the community, family commitments or social relationships may curtail mobility.²⁶⁶ With respect to

"security of the person", it can be said that, within many employment relationships, "security ... is critical to the survival of only the employee's identity".²⁶⁷ The freedom to act upon one's aspirations and concerns can be augmented by solidarity with fellow workers. If "liberty" can be described as "the external condition which permits freedom of personal autonomy",²⁶⁸ a right to bargain collectively would appear to mesh neatly with Charter section 7.

A series of cases construing section 7 and other parts of the Charter in relation to employment have dealt with variants of a "right to earn a livelihood". It seems that the Charter does not create a distinct "right to work", or to make a living,²⁶⁹ though it may guard a right to have an opportunity to make a living.²⁷⁰ A pioneering decision was Re Mia and Medical Services Commission of British Columbia, which turned partly on Charter section 7, but relied also on section 6(2)(b):

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right ... to pursue the gaining of a livelihood in any province.

The litigation challenged the scheme for arranging payment of medical doctors in the province. For our purposes, the following statement of the court is noteworthy:

There are some rights enjoyed by our people including the right to work or practise a profession that are so fundamental that they must be protected even if they include an economic element.²⁷¹

The B.C. government, having lost the Mia case, changed the impugned rules. The new provisions were also challenged. On the trial of the "new" cause, the court held that section 7 did not apply, because "liberty" did not

extend to economic rights or to a right to work.²⁷² On appeal, the court ruled that "the geographic restrictions imposed by government on the right to practise medicine" in British Columbia could "constitute a violation of the right to liberty protected by section 7" even if section 6 were not brought into the picture. Though section 6 might be restricted to guaranteeing the right to move interprovincially, free movement within a province could be protected by "liberty" under section 7.²⁷³ In a dictum pertinent to this thesis, the court noted that the rights being asserted would affect the "freedom and quality of life of individual doctors" and not merely their "business interest".²⁷⁴

Another case that looked at rights of mobility dealt with Law Society of Alberta rules designed to keep Ontario lawyers from forming partnerships with lawyers resident in Alberta: Law Society of Alberta v. Black. The trial judge held the rules were not in violation of the Charter.²⁷⁵ On appeal, they were declared invalid.²⁷⁶

Rule 154 provided that an active member of the Law Society of Alberta who ordinarily resides in or carries on the practice of law in Alberta shall not enter into partnership or association for the joint practice of law with anyone ordinarily non-resident. Focussing on the mobility rights in Charter section 6(2)(b), the Court of Appeal held that the Rule offended because it prevented lawyers from gaining their livelihood in the usual manner, that is in partnership or in association with others. It was thus an unacceptable limitation on the ability to gain a livelihood.²⁷⁷

Rule 75B provided that no Law Society of Alberta member should be a partner in or associated for the practice of law with more than one law firm. It was held that both this and Rule 154 breached section 2(d) of the Charter,

because solicitors have the right to associate among themselves for the purpose of seeking a livelihood in the profession for which they are qualified. The Law Society could have chosen less drastic methods to regulate hypothetical conflict of interest problems, and the Rules did not stand up under Charter section 1.

In Arlington Crane,²⁷⁸ Henry, J. applied what he took to be the present law of Ontario, and related this directly to the alleged freedom "not to associate" pleaded in the case at bar:

It does not appear to me to be appropriate to extend s. 7 to encompass the liberty to carry on a business or to practise a particular profession, trade,²⁷⁹ or occupation, or to be employed in a particular job.

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I add that it follows that a person has no guaranteed constitutional right ... to choose²⁸⁰ not to be bound by a particular collective agreement.

A further judicial word on livelihood rights goes to the Supreme Court of Canada, which has yet to rule definitively on the matter:²⁸¹

It is still open to question whether the right to earn a livelihood is a value constitutionally protected under the Charter, perhaps under s. 7. But whether or not such constitutional protection exists, no one could dispute that the 'right' to earn a livelihood is an interest of fundamental importance to the individuals affected, and as such should not lightly be over-ridden.²⁸²

What the studied cases reveal is that there appears to be a trend (albeit far from conclusive) in favour of finding in the Charter some vision of a right to earn a livelihood. It will be recalled that the Alberta Labour Reference, it is suggested, left the door slightly ajar for McIntyre, J.'s

"fourth approach" to "freedom of association". On the contingency that a basic element of Canadian life were found to be fundamental for individuals, concerted exercise of that fundament would be a protected form of group activity as well.²⁸³ Perhaps activities associated with earning a livelihood, such as collective bargaining, would gain a constitutional foothold as a logical extension of a right not to be denied the chance to earn a living.

In the reported decisions to date, there is a scarcity of instances in which anyone from a less powerful economic or social group attempted to use section 7 to further occupational or other "social" rights. Litigation launched by the professions highlights the reality, one would think, that doctors and lawyers and other generally advantaged individuals do have a greater degree of "mobility" in their de facto "liberty". The Supreme Court of Canada has upheld the decision but unlike the Alberta court, left consideration of section 2(d) of the Charter to another day. There was no discussion of section 7; the judgment turned on lawyers' mobility rights under section 6(2)(b).²⁸³

As a practical matter, most people are not truly mobile, and cannot choose to be anything other than employees to earn their livelihood. If a right to bargain collectively is found to give employed individuals a fairer measure of "liberty" and "security of the person" (as those terms have been broadly drawn in this Chapter), it may be appropriate on that basis to grant constitutional reinforcement to the concept of collective bargaining. It is, moreover, open to the judiciary to extend protection to a few key tenets of collective bargaining that are embraced in common by labour relations models operating in the several jurisdictions of Canada, and which further the liberty and security rights of employees.

7. Collective Bargaining and Equality Rights

Although in the final analysis, it is unlikely to be of direct assistance in the controversy over a right to bargain collectively, one must consider the emerging jurisprudence under the Charter's main equality rights article, section 15. To a lesser extent, section 28, guaranteeing gender equality, could be put into play. A major examination of the potentially vast realm of inquiry presented by equality rights is best left for another paper (or book). The sections state:

15(1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The principal judgment focussing on equality rights did not touch upon labour relations.²⁸⁴ The central issue was whether the prerequisite of Canadian citizenship for admission to the bar of British Columbia²⁸⁵ violated section 15. It was found that the citizenship rule infringed equality rights and could not be justified under Charter section 1. Relevant to our inquiry into collective bargaining and the Charter, the Court's views on the categories protected by section 15 and on the meaning of "discrimination" need

to be examined. The Court reviewed what had become the norm in Canadian courts for determining equality under section 15, the "similarly situated" test. Based on an Aristotelian precept, this holds essentially that like things should be treated alike while things that are unlike should be treated differently, in proportion to their differences.²⁸⁶ This test was found to be seriously deficient, capable of upholding quite unfair laws:²⁸⁷

Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.²⁸⁸

Of course not every distinction or differentiation in treatment will transgress equality rights. To trigger section 15, a distinction must amount to discrimination,²⁸⁹ described as

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits will rarely be so classed.²⁹⁰

Where a breach of section 15(1) is found (and where this is not saved as an ameliorative initiative under section 15(2)), any consideration and balancing of factors which could constitutionally justify the impugned enactment would take place under Charter section 1.²⁹¹ Wilson, J. (for Dickson, C.J.C. and L'Heureux-Dube, J.) and La Forest, J., in their separate reasons, expressed substantial concurrence with McIntyre, J.'s section 15

analysis. On the question of which categories of discrimination (other than those enumerated) might be captured by section 15, the weight of the judgment was in favour of including grounds analogous to those listed, involving "irrelevant personal differences".²⁹² None of the judges appeared prepared to close the door on other possibilities, however:

I agree with [McIntyre, J.] that it is not necessary in this case to determine what limit, if any, there is on the grounds covered by s. 15 and I do not do so.²⁹³

Nevertheless, the way in which Wilson, J. leads up to the passage just quoted hints that broad categories of litigants such as "employees" or "organized labour" or "public sector workers" or "Alberta public employees" might not be successful if they tried to plead that restrictive collective bargaining legislation placed them at some comparative disadvantage reviewable under section 15. These collectivities cannot readily be analogized to groups discriminated against because of "colour", "sex", "age" or "disability". It was with these listed grounds in mind that Wilson, J. opened a window to future interpretive opportunity:

It can be anticipated that the discrete and insular minorities of to-morrow will include groups not recognized as such to-day. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection"²⁹⁴ of equality rights in the years to come.

The opening into section 15 has been narrowed further, it is asserted, by two post-Andrews decisions of the Supreme Court. In Reference Re Workers' Compensation Act, 1989 (Nfld.) ss. 32, 34 (released April 24, 1989), a unanimous court denied the complainants' appeal, because the "situation of workers and dependents here is in no way analogous to those tested in s.

15(1), as a majority in Andrews stated was required to permit recourse to s. 15(1)" (per La Forest J. at page 1 of the two page judgment). In R. v. Turpin (released May 4, 1989), the purposes of section 15 were stated as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage", as revealed by indicia "such as stereotyping, historical disadvantage or vulnerability to political and social prejudice".^{294A} Arguably, the words taken from Turpin could refer to trade unions. In any event, Madame Justice Wilson (for the Court) was careful not to prejudge what would be an acceptable ground under section 15, stating that it mandates a case by case analysis.^{294B}

It is hard, though not impossible, to picture how the concept of "discrete and insular minorities" can be applied to assist when an internally diverse group of workers, defined by their job category or type of employer, rather than by personal traits, is denied some benefit of collective bargaining. Wilson, J. does, however, speak of "flexibility". Moreover, McIntyre, J. states the following:

The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. [Section 15] has a large remedial component.²⁹⁵

This more general expression of the value of section 15, to redress disadvantage, may hold more promise for workers denied particular collective bargaining rights. This possibility might be increased if a court saw some parallel between entitlement to "security of the person in section 7" (as developed in Chapter 6, supra) and entitlement to "concern, respect and consideration" grounded in section 15.

If one may speculate, a phenomenon which may be fruitful for Charter challenge is the wholesale denial, by statute, of bargaining rights to particular classes of workers in Canadian jurisdictions. In Ontario, domestics employed in private homes²⁹⁶ and agricultural workers²⁹⁷ are excluded, for example.²⁹⁸ It was the opinion of one labour leader that "to deny collective bargaining rights to someone as powerless against his or her employer as a domestic or agricultural worker" could not be justified "by any overriding social interest or public concern",²⁹⁹ and a similar view was expressed by the Woods Report in 1968.³⁰⁰

If it could be shown, for instance, that the exclusion of domestics impacts primarily on women, assuming they predominate statistically in that work category, their lack of bargaining rights could be challenged through a combination of Charter sections 15 and 28. If, for the sake of argument, it could be shown that hunters and trappers were primarily of aboriginal origin, again section 15 might have a greater relevance. To take another theoretical example based on impressionistic observation, suppose that a majority of domestic or agricultural workers were temporary residents of Canada or new immigrants, could the listed grounds in section 15 be used in their favour? Perhaps "the status of being a migrant worker" could become one of the analogous grounds about which Justice Wilson mused.³⁰¹

For a worker in a low-income or low status job, or from a socially disadvantaged group, (or perhaps even from other societal groupings), it could prove interesting that in Andrews, McIntyre, J. compared the discrimination forbidden by section 15 to principles applied under "Human Rights Acts", observing that the list of grounds in the Charter is more open-ended.³⁰² Among the grounds now enumerated in human rights statutes in Canada (from

which further analogies could be drawn by a court construing section 15) are "social condition"³⁰³ and "source of income".³⁰⁴

The possible bases on which employees or unions could attempt to argue section 15 (assuming they could overcome the hurdle of being labelled an appropriate class) are myriad. Possible comparative sets are: "public sector-employees vs. private sector employees doing similar jobs"; "public-sector-employer vs. public sector employees"; "civil servants" vs. "Crown corporation workers" and so on.³⁰⁵ The availability of core collective bargaining rights to "essential" employees in one province or in one bargaining unit could be compared to those extended in another. The irony is that, having found that the right to strike is not protected under Charter section 2(d), the Supreme Court may in future be asked to decide whether it is fair under section 15, for one group of workers to have that right while it is denied by a particular statute to others. The courts could thereby be called upon to make the very type of complex determinations which Le Dain, J. found in the labour trilogy to be inappropriate for the judiciary under section 2(d).³⁰⁶ A cautious judge might find it prudent to take refuge behind the "analogous grounds" test mooted in Andrews, and limit section 15's ambit to only a small range of collective bargaining matters.

To conclude this Chapter, a brief survey will be conducted of instances in which courts have commented on the applicability of equality rights principles under the Charter to the realm of collective bargaining. The persuasive value of these references is reduced by the fact that they predate Andrews. In both Lavigne and Arlington Crane, the courts have thus far ruled that the impugned collective bargaining schemes and the collective contracts themselves were in the private sector and outside the Charter's reach, despite

their legislative underpinnings. Nonetheless, the deciding judges commented on how section 15 might, if called upon, apply. In Arlington Crane, an individual litigant alleged, inter alia, that a "closed shop" provision, denying him work with Arlington unless he joined a particular union, contravened section 15. Henry, J. found nothing prejudicial, "invidious" or "prejorative" in the challenged scheme or provisions that would amount to "discrimination", and indeed held that there was no distinction made between comparable classes of workers. Similarly, the appellate court in Lavigne agreed with the trial judge in that case that there was nothing discriminatory (against non-union teachers) in the province-wide scheme of bargaining being examined. Moreover, community college teachers (of which Mr. Lavigne was one) were in a unique position and not comparable to any other class of employees in Ontario.³⁰⁸

One Ontario case that found section 15 to be infringed was Re Hutton (discussed in Chapter 4.1, supra). In that decision, Justice Rosenberg found there to be two "similarly situated classes", namely certain municipal and provincial police officers. The former group enjoyed the right to collectively bargain on a number of issues foreclosed to the latter by law. Rosenberg, J. found there to be a "discriminatory distinction" violative of Charter section 15.³⁰⁹ The weight of this precedent is of course diminished by the circumstance that it relied on the "similarly situated" test later discredited in Andrews.

An underlying factor in matters pertaining to the public sector is that the employer, being the government, in addition to the advantages that might be attendant on any powerful boss, can change the rules through legislation if it does not like the current state of labour relations, or if it wishes to

pursue some perceived higher cause, such as fighting inflation.³¹⁰ Viewed baldly, this puts the civil service at a disadvantage in comparison with private sector counterparts.³¹¹ Even if this arguable imbalance is assumed, and even if the protections of section 15 are extended beyond strictly analogous grounds, there is evidence that an attempt to compare government and public employee power under section 15 would founder. In Wright v. Attorney-General of Canada, the trial judge found that a statutory priority given to the Crown over debts owed to private citizens violated section 15. The appeal court overruled, saying that the Crown was not an "individual" and so was not affected by the equality rights set out in section 15.³¹² Similar rulings had been made in matters involving a civil suit against the Crown³¹³ and jury selection.³¹⁴

A case that dealt head on with comparisons between public and private sector unions looked at federal and provincial restrictions on political activity by Ontario government employees. Concerning section 15, Eberle, J. remarked that the challenged legislation caused no violation, because the applicant union is "a union of public servants" and "any union which is not", is not "similarly situated".³¹⁵

Although the Supreme Court of Canada has not viewed curtailment of a right to bargain collectively through the lens of section 15, in the labour trilogy, Dickson and Wilson, JJ., the dissenting judges, undertook a somewhat similar type of analysis when assessing legislation in the light of Charter section 1. A critique of the approach taken by the Chief Justice suggests that he was perhaps overly deferential to the legislative choices made by the respective governments in the PSAC v. Canada and Dairy Workers legs of the trilogy.³¹⁶ If this is correct, this may not bode well for anyone hoping to

convince a court that public sector employees can challenge restrictive bargaining laws through section 15, particularly as Dickson, C.J.C. enriched his section 1 analysis in PSAC with a glance at the equality rights guarantees of the Canadian Bill of Rights.³¹⁷

In PSAC v. Canada, the union argued that the right to "equality before the law and the equal protection of the law" were violated, because the "6 and 5" anti-inflation legislation restricted collective bargaining rights of different classes of civil servants in different ways, and because the scheme applied only to the public sector. In Dickson, C.J.C.'s opinion, the government's leadership role justified its selective actions.³¹⁸ McIntyre, J. expressed agreement with Dickson, C.J.C.'s approach and found it significant that no "individuals" or "subgroups" within the public sector had been singled out.³¹⁹

Madam Justice Wilson did not join with the approach taken by her brother judges. Her thoughts on equal treatment (or lack thereof) of public sector employees are almost destined to be quoted in any cause that might claim infringement of section 15 in the realm of collective bargaining:

I would conclude that the singling out of federal public sector employees for mandatory controls offended s. 1(b) of the Canadian Bill of Rights. The discriminatory treatment of these employees was not rationally related to the alleged government objective as a means of controlling inflation and was therefore a departure from the principle of equality and universal₃₂₀ application of the law embodied in the section.

It seems to me that if both public and private sector employees are free to engage in collective bargaining, which generally speaking they are, then public sector employees should not be deprived of this freedom as a means of government getting across its message, no matter how worthwhile that message may be.³²¹

8. The Relevance of International Human Rights Law to Constitutional Questions Concerning Collective Bargaining

Those judges in the leading freedom of association cases who accorded serious persuasive value to international obligations assumed by Canada appeared more disposed to granting Charter protection both to collective bargaining and the right to strike. Four of the six judges participating in the trilogy judgments did not discuss the international law. McIntyre, J. based one of his characterizations of freedom of association partly on Collymore v. Attorney General, [1970] A.C. 538, but that was really a use of comparative law, since that case focussed on the Constitution of Trinidad and Tobago, not on international instruments.³²² It is possible to contend that the absence of commentary about international human rights law means that this source has little weight or persuasive merit. An alternative perception would hold that as a minimum, the absence of commentary by the majority of trilogy judges concerning the relevance of international law means that the question remains open.³²³ If a future bench decides that this legal resource is relevant, they may also be persuaded by Chief Justice Dickson's view that international law provides safeguards for a right to bargain collectively, and that Canada's Constitution ought to abide by this standard.³²⁴

A high proportion of Dickson, C.J.C.'s coverage of international law concentrated on the right to strike. Since it was determined by a majority of the Court writing in the trilogy that no right to strike is enshrined in the Charter, that topic will not be the subject of major attention here. As a preamble to the specific international human rights provisions which Chief Justice Dickson sets out in his text, he stresses the importance of this area

of international law generally (at pages 348-350). He states that the Charter conforms to the spirit of the international human rights developments since World War II and "incorporates many of the policies and prescriptions of the various international documents pertaining to human rights". He adopts John Claydon's forecast³²⁵ that as the Canadian judiciary approaches the general language of the Charter,

the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel.

Dickson, C.J.C. notes that Canada is a party to many treaties or other international agreements containing provisions similar or identical to those in the Charter. By becoming party to these agreements, Canada has obliged itself to promote and protect the fundamental rights and freedoms found within them. Principles of constitutional interpretation, suggests the Chief Justice, require that these international obligations be "a relevant and persuasive factor in Charter interpretation". The similarity between the "policies and provisions" of the Charter and the content of these international documents carries "considerable importance" for constitutional interpretation by Canadian courts. Dickson, C.J.C. does not believe that the judiciary is legally bound by international legal norms. On the other hand, their relevance and persuasiveness for purposes of constitutional interpretation are enhanced by the realization that these norms "arise out of Canada's international obligations under human rights conventions" (pages 349-350).

Following the lead of Chief Justice Dickson, this thesis will cite an additional work contributed (co-authored) by John Claydon.³²⁶ A concise paragraph,³²⁷ targetted at practising lawyers, nicely captures the essence of

what a number of learned authors have written about the usefulness of international instruments and adjudication in construing the Charter:³²⁸

The relevance of international human rights "law" to the interpretation of the Charter arises out of: (1) the similarity in the wording of many of the provisions of various international instruments and the Charter; (2) the fact that Canada's international human rights obligations and other international developments served not only as a necessary and persuasive context in which the Charter was introduced and adopted, but also as a direct inspiration for Charter provisions, including amendments designed to strengthen the protections provided by the Charter; (3) the necessity of interpreting Canada's domestic laws (including the Charter) to be in conformity with both customary and conventional law as long as there is no contrary intention clearly and expressly stated in the Charter - the "ambiguity rule"; and (4) the basic need to draw on the wisdom of similar systems to apply the high-level concepts of the Charter to specific fact situations.³²⁹

Focussing again on the contribution made by Chief Justice Dickson in the Alberta Labour Reference, we observe that (at pages 350-354) he sets forth articles from international human rights instruments relevant to our exploration. He notes that as of 1976 Canada is a party to two United Nations Covenants derived from the Universal Declaration of Human Rights, that were adopted unanimously by the General Assembly in 1966:³³⁰

Prior to accession the Federal Government obtained the agreement of the provinces, all of whom undertook to take measures for implementation³³¹ of the Covenants in their respective jurisdictions (page 350).

Article 8 of the International Covenant on Economic, Social and Cultural Rights (the Economic and Social Covenant) provides:

8(1) The State Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only

to the rules of the organization concerned, for the promotion of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organizations.
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.³³²
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

Upon close analysis of the subarticles dealing with strikes and other components of the collective bargaining relationship, we see the following:

- (i) the right to strike (paragraph 8(1)(d)) may be limited by referral to a country's "laws";
- (ii) the right of trade unions (as a collectivity) to federate nationally and internationally (paragraph 8(1)(b)) is unrestricted;
- (iii) the right of everyone to form and to join unions (paragraph 8(1)(a)) for the promotion and protection of economic and social interests may be restricted only in keeping with specified principles; these principles bear some resemblance to those found in section 1 of the Canadian Charter;

- (iv) the right of trade unions (as a collectivity) to "function freely" is subject to no direct limitation; it is subject only to the kinds of general restrictions referred to in (iii), supra.

Chief Justice Dickson does not conduct a dissection similar to that carried out above. It could be argued that the divergence between the internal limitation clauses applied to strike rights (Art. 8(1)(d)) and those applied to other bargaining rights (respectively, Arts. 8(1)(a), 8(1)(b) and 8(1)(c)) are significant. This argument concerning limitations is bolstered if one accepts the premise that in the labour trilogy, the Supreme Court shut strike rights out of the Charter but left the door ajar for the right to bargain collectively. International human rights law, on this analysis, has yet to be applied to collective bargaining rights by a Supreme Court majority.

A factor not addressed by Dickson, C.J.C. is the presence of two Articles in the Economic and Social Covenant that buttress the worker association rights found in Article 8.³³³ Article 4 contains a significant variant of the different limiting clauses found within Article 8:

4. The State Parties ... recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. (Emphasis added).

In the context of our inquiry, Article 5 of the Economic and Social Covenant is also worthy of note:

5(1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to

a greater extent than is provided for in the present Covenant.

(2) No restriction or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

As was noted supra, there is a companion agreement that Canada acceded to in the same year as it agreed to be bound by the Economic and Social Covenant. Returning to the reasons of Mr. Justice Dickson (at pages 352) we find citation of Article 22 of that second instrument, the International Covenant on Civil and Political Rights (the Civil and Political Covenant):

22(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals of the protection, of the rights and freedoms of others ...³³⁴

The rights given to workers acting in concert are further strengthened by Article 8(3) of the Economic and Social Covenant and Article 22(3) of the Civil and Political Covenant, which employ identical wording:

(3) Nothing in this Article shall authorize State Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

At pages 353-354 of the Alberta Labour Reference, Dickson, C.J.C. reproduces pertinent articles from the document named in the paragraph quoted immediately above, known as Convention No. 87.³³⁵ He first describes the International Labour Organization (I.L.O.) as a specialized agency of the U.N. "concerned with safeguarding fair and humane conditions of employment".³³⁶ Dickson, C.J.C. sets out eleven Articles from Convention No. 87,³³⁷ the most relevant of which are restated here:

2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations of their own choosing without previous authorization.

3(1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

3(2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

4. Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

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8(1) In exercising the rights provided in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

8(2) The law of the land shall not be such as to impair, nor shall it be applied so as to impair, the guarantees provided for in this Convention.

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10. In this Convention the term 'organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

11. Each (State Party) ... undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

Prima facie, these provisions do not add much to the rights guaranteed for workers under the two U.N. Covenants examined supra. In large measure, they describe activities of establishing organizations (which a majority of the Supreme Court in the labour trilogy appeared to find worthy of Charter protection). Details spelled out in Convention No. 87 that were not specified in the U.N. Covenants reviewed earlier are the right to "formulate programmes" (Article 30-1) and "to organise" (Article 11), although these activities could possibly be implied from the Covenant wordings.

Dickson, C.J.C. observes (at pages 354-355) that the articles of Convention No. 87 have been interpreted by various I.L.O. bodies, but that these interpretations are generally not legally binding. He does cite authority to the effect that, nevertheless, decisions of certain I.L.O. committees "comprise the cornerstone of trade union freedom and collective bargaining".³³⁸ Chief Justice Dickson found (at page 355) that the "general principle to emerge" from interpretations of Convention 87 by I.L.O. bodies

is that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits.
(Emphasis added)

Most of the ensuing discussion (at pages 355-359) undertaken by Dickson, C.J.C. concerns decisions by I.L.O. bodies focussed on restrictions of the

right to strike, and on substitutes therefor, such as compulsory arbitration. At the end of his review of international human rights authorities, he sums up the entire discussion in a manner relevant to our pursuit of jurisprudence on collective bargaining generally:

The most salient feature of the human rights documents discussed above in the context of this case is the close relationship in each of them between the concept of freedom of association and the organization and activities of labour unions. As a party to these human rights documents, Canada is cognizant of the importance of freedom of association to trade unionism, and has undertaken as a binding international obligation to protect to some extent the associational freedoms of workers within Canada. Both of the U.N. human rights Covenants contain explicit protection of the formation and activities of trade unions subject to reasonable limits. Moreover, there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is, of collective bargaining and the freedom to strike.³³⁹
(Emphasis added)

Dickson, C.J.C. applied the foregoing principles, though not by direct reference, in deciding that both the right to bargain collectively and the freedom to strike were protected by "freedom of association" under the Charter. Other judges previously had invoked international human rights law as part of their rationale for ruling that subsection 2(d) of the Charter includes both strike and collective bargaining rights. For example, some of the same international provisions reproduced by Dickson, C.J.C. in the trilogy had featured in the judgment of the Ontario Divisional Court in Broadway Manor³⁴⁰ and that of the Saskatchewan Court of Appeal in Dairy Workers.³⁴¹

Two sources of edification mentioned in Broadway Manor were not covered by Dickson, C.J.C. in the Alberta Labour Reference. It will be recalled that the Supreme Court of Canada has endorsed the use of legislative history in

Charter interpretation, though not according great weight to these travaux préparatoires.³⁴² O'Leary, J. in Broadway Manor,³⁴³ drew attention to a 1980 statement wherein the then Minister of Justice, Jean Chretien, gave the opinion "that the rights we have agreed upon in international agreements should be reflected in the laws of the Charter of Rights that we will have in Canada".³⁴⁴ Moreover, the inclusion of a distinct right to "freedom of association" was justified by the government before the Special Parliamentary Committee on the basis that the freedoms of assembly and association are expressed separately in the International Covenant of Civil and Political Rights.³⁴⁵

An additional source cited by Justice O'Leary in Broadway Manor relates to Canada's participation in a continuing multilateral relationship centered on the Helsinki Final Act of 1975, as part of the continuing Conference on Security and Cooperation in Europe (CSCE). An extract from the Concluding Document of the CSCE Madrid Conference (1983), which inter alia confirmed the 1975 Helsinki Final Act was quoted by O'Leary, J.:

The participating States will ensure the rights of workers freely to establish and join trade unions, the right of trade unions freely to exercise their activities and other rights as laid down in relevant international instruments. They note that these rights will be exercised in compliance with the law of the state and in conformity with the State's obligations under international law. They will encourage, as appropriate, direct contacts and communication among such trade unions and their representatives.³⁴⁶ (Emphasis added).

O'Leary, J. did not comment on the legal force of the Madrid Concluding Document or of the Final Act. According to a memorandum from Canada's Department of External Affairs, the Final Act is not a legally binding instrument, but "constitutes political commitments undertaken at the heads of

government level".³⁴⁷ Clearly, for O'Leary, J., it had persuasive value as an interpretive resource.

An important recent endorsement of the desirability of being guided by international human rights law in Charter interpretation is that of Mr. Justice MacGuigan, writing for the Federal Court of Appeal in International Fund for Animal Welfare v. Canada (1988), 83 N.R. 303 (hereinafter I.F.A.W. v. Canada).³⁴⁸ MacGuigan, J.A. explicitly adopts³⁴⁹ the view of Dickson, C.J.C. in the Alberta Labour Reference,³⁵⁰ that international human rights norms "provide a relevant and persuasive source for interpretation of the provisions of the Charter". I.F.A.W. v. Canada arose from the desire of animal rights activists to obtain easier access to seal hunting areas to obtain information seen as vital to their public lobbying efforts. Regulations designed to protect seal herds and sealers were in place to prevent incursions by boats or airplanes. The trial judge, relying on the delineation of freedom of expression contained in Article 19 of the International Covenant on Civil and Political Rights had found that "freedom of expression" under the Charter included the right to seek and receive information.³⁵¹ On the appeal, MacGuigan, J.A. agreed.³⁵²

A rather interesting departure of this case is that MacGuigan, J.A. strives to show the interdependency of the categories of rights embodied respectively in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. He points out that the preamble to each Covenant links it to the other Covenant, thereby recognizing that freedom from fear and want, together with civil and political freedom for everyone, are dependent on both categories of rights being fostered in tandem. MacGuigan, J. shows sensitivity to the need to

balance the competing rights of freedom of expression and of everyone (including seal harvesters) to "an adequate standard of living" as provided in Article 11(1) of the Economic and Social Covenant. On this point, he states (at page 315):

The right to a livelihood is one of the most fundamental if not the most fundamental of economic rights and may be said to be necessary to the fulfillment of a human being. In this sense, it may perhaps be thought of as attaining the status of a social right rather than a merely economic interest.

Though a right to earn a living is not spelled out in the Charter, MacGuigan, J.A. thought that the protection of it met the "high standard" necessary for the government to justify restrictions on the Charter right to "freedom of expression" under Charter section 1. His views in connection with the centrality of earning a livelihood mirror somewhat those canvassed in Chapter 6, supra, it would appear. In attempting to deflect the government's use of Charter section 1 to justify the challenged restrictions, the appellant activists in I.F.A.W. v. Canada argued that the only permissible limitations on their freedom of expression were those set out in Article 19(3) of the Civil and Political Covenant, namely "respect of the rights or reputations of others" and protection of national security, of public order, health or morals. Though the learned Justice was willing to be guided by Article 19(2) in arriving at an expansive definition of freedom of expression, he thought it inappropriate to substitute the internal restrictive clause in Article 19 for the open-ended derogation clause framed in the Charter at section 1.

There are of course detractors from the idea that international law should be looked to for enrichment of the language of the Charter. For example, certain courts have ruled that, regardless of the use made of

international human rights instruments in developing the Charter, the latter did not amount to implementing legislation for these agreements, and they might therefore not be relevant for interpreting the Charter.³⁵³ On the presumption that Canada did not accept responsibilities under the various postwar human rights accords with the intention of ignoring or violating them,³⁵⁴ and that it had the support of the provinces in this acceptance,³⁵⁵ the approach taken by Chief Justice Dickson would appear to be preferable. At face value, the international instruments reviewed in this Chapter, when read in conjunction, would seem to require that parties to these pacts (of which Canada is one) ensure the rights of workers to do the following: (a) to organise; (b) to form and join trade unions (of the workers' choice) - for the promotion and protection of the workers' economic and social interests; (c) as part of trade unions, to "function freely" subject only to limits similar in nature to those formed by Charter section 1; (d) qua trade unions, to federate with other worker groups. The opinion is offered that item (c), particularly, covers areas left unsettled in Canadian constitutional law by the trilogy. When reasoning whether and how to formalize a "right to bargain collectively", future jurisprudence is likely to ascribe respectful weight to this passage from the opinion of Chief Justice Dickson in the Alberta Labour Reference:³⁵⁶

The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation. As this Court stated in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344, interpretation of the Charter must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection". The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions

in international human rights documents which Canada has ratified. (Emphasis added)

The Chief Justice, this time writing for the majority has had occasion already to quote from the passage just cited, following it shortly thereafter with these words:

... Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of ... the proportionality inquiry [under Charter s. 1] the fact that a value has the status of an international human right, either in customary law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.^{356A}

9. Conclusion

As a result of Charter litigation to date, it appears that two foundational parts of the collective bargaining framework have been acknowledged as worthy of constitutional protection through the guarantee of "freedom of association" in section 2(d), namely the right to organize a union and the right to join a union.³⁵⁷ Largely pursuant to the Charter safeguard of freedom of expression (section 2(b)), the right to communicate demands or information on collective bargaining issues has attained constitutional status.³⁵⁸ The Charter will, it seems, embrace collective participation in bargaining activities that involve rights constitutionally enshrined for individuals or that are legal when carried out by an individual.³⁵⁹ According to a suggested rationale based on McIntyre, J.'s reasons in the Alberta Labour Reference, if "collective bargaining" or an element of it were to be

acknowledged as being fundamental to Canadian society, Charter protection might also be attracted to that overall concept or to that particular element.³⁶⁰ It would appear that the only traditional function that has thus far fallen by the way on the labour side of the equation is the right to strike.³⁶¹ That can be seen as a severe loss, however, since the strike threat could be characterized as the workers' most crucial bargaining chip.

Although labour leaders may not have been pleased with the Supreme Court's conclusion that the Charter's "freedom of association" does not harbour a right to strike, it can be claimed that collective bargaining mechanisms that benefit employees in Canada have not been endangered by constitutional jurisprudence. There remain at labour's disposal certain rights, customarily exercised and now constitutionalized, to form a union, to join a union, and to picket, as well as "freedom of assembly" (section 2(c)) and other concomitant Charter rights. The trade union movement (and through it, individual workers) can continue to bargain collectively and to work for related remedial legislation. Moreover, despite the fact that the Supreme Court trilogy found no place for a right to strike in section 2(d), the practical impact of that ruling is hard to estimate. It does not appear that governments in Canada have adopted a host of post-trilogy laws cutting off strike rights for categories of employees previously unencumbered in this manner.

From a legal standpoint, one could mount an argument that the trilogy's refusal to grant Charter security to strike rights was not as far-reaching as initially supposed. Assuming that the Supreme Court did intend to erect an across-the-board barrier to strike rights outside section 2(d), there may be ways (speculated upon in Chapter 7, *supra*) for particular groups to utilize

section 15 (re equality) to obtain strike rights, currently denied them by legislation or by official practice, which other comparable groups have not been denied.³⁶² As was mooted in Chapter 7, the likelihood of this argument succeeding seems low for large employee blocks with no widely shared traits analogous to immutable personal characteristics. For groups made up predominantly of women or of disadvantaged minorities, however, such an approach might have a chance of succeeding. It would seem all the more likely that such equality-based arguments would bear fruit if used to combat instances wherein a host of (or all) basic collective bargaining rights are denied to workers in particular job classifications, categories that happen to be populated predominantly by members of disadvantaged groups.

Aside from upholding core components of the collective bargaining sphere (organizing and picketing), the courts thus far have displayed a disinclination to dismantle or to chink away at carefully crafted schemes for managing industrial relations, including the customary collective bargaining practices now built into them by statute. The judiciary have based their reluctance on a number of grounds: deference to the wisdom of elected legislatures in matters of social policy; the view that the essential facets of bargaining procedures, even in a legislated parameter, retain the character of private sector deal-making; the opinion that a key ingredient (the Rand Formula, and in the construction industry the "closed shop") happens to "work". There is even judicial authority for the idea that unions, financed by a compulsory check-off from supporters and non-supporters alike, may properly use the resources not only to assist their bargaining unit members directly, but also for wider social/political purposes.

From the union viewpoint, it could be preliminarily contended that the practical ramifications of the trilogy judgments on the labour relations scene (except for the workers directly affected by those judgments) have not been terribly significant. Certain employers or pro-business associations might even say that the results have been disappointing, particularly concerning efforts to import a "freedom not to associate" into the Charter. From the trade union vantage, are there reasons to be fearful for the future of collective bargaining rights in Canada? Canada labour leaders interviewed for a recent book appear to believe so. The editors report that these union executive officers are convinced that the Charter "is being used by the enemies of the labour movement in pushing for individual rights to weaken collective rights".³⁶³ With respect to the trilogy, one public sector union official worried that because of it, a potential exists for governments to negotiate a collective agreement and later to renege.³⁶⁴ Most labour leaders reportedly feared that the trilogy rulings "will encourage governments to take away the limited collective bargaining rights of the public sector workers".³⁶⁵ Other matters of concern because of their potentially injurious effects on bargaining rights are efforts to cut government deficits, the privatization or shrinking of government services, and the effect of freer trade with the United States.³⁶⁶ Organized labour is also aware that the Supreme Court has yet to pronounce judgment on the existence of a "right not to associate".

Moreover, in the minds of labour advocates, there may remain a hangover from the trilogy's quite individualistic and passive view of freedom of association. To a non-lawyer, and perhaps to some trained in the law, it might not appear fully consistent with logic to hold that "freedom of

association" does not include some substantive content, allowing protection for some concerted activity as an organized group, i.e. the attempted performance or attainment of some of an association's objectives:

If freedom of association ... protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is ... legalistic, ungenerous, indeed vapid ... while ... s. 2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed.³⁶⁷
(Emphasis in original)

In the wake of the trilogy, it may be that freedom of association means not much more than "freedom of assembly", which is how one could view the outcome of the Alberta Labour Reference, given the appearance that the majority did not adopt the ideas just quoted from the reasons of the Chief Justice.³⁶⁸ One would not wish to quarrel with the notion that the Charter is geared primarily toward guarding rights of the individual. Yet this protection may sometimes best be done through a mixture of individual and collective rights, as is recognized by constitutional provisions on aboriginal rights (sections 25 and 35), multiculturalism (section 27) and so forth. Some rights such as those which adhere to or are part of collective bargaining are meaningful only when exercised by individuals acting in concert.

Unlike situations where one person's rights conflict with those of another human being, in the collective bargaining context, it must often be the case that acting on one's rights enhances the rights of one's fellows. If, as this thesis has wondered, the trilogy's ratio on interpretation of freedom of association was applicable only to the right to strike (and substitutes therefor), it may be open to a future bench to give greater

recognition to that branch of rights that depend on joint exercise to be meaningful (subject always to Charter section 1).

Reduced to a skeletal extreme, the definition of "freedom of association" arrived at by the majority in the trilogy would rarely bestow a Charter seal on any collective labour activity of a workers' association once the group is organized. Le Dain, J. in the Alberta Labour Reference notes that under a totalitarian regime, one of the things suppressed is freedom of association. This observation underscores a problem with any construct that would give "rights" of association only to the formation and maintenance of groups, and not to the content of certain group activities. Some fundamental group-based activities are more freely exercisable in a democracy, such as political pluralism and free trade unionism. The narrow view of freedom of association does not differentiate these activities from others that ordinarily take place even in dictatorships, such as those of sports and other recreational organizations that do not threaten state power.³⁶⁹ For lower status people, individuals from a cultural minority and others who are less advantaged in a society, the only way to attain a voice or a measure of secure standing is as part of a cluster of people similarly situated. For less powerful human beings, some "individual" rights are "empty vessels" except when exercised as a group right.

An important axiom to recall is that "not all associations have the same democratic effect and, therefore, are not deserving of the same constitutional protection"³⁷⁰ Nor, of course, do trade unions or the collective bargaining process always operate in a democratic or high-minded fashion.³⁷¹ On general principles, however, one could claim that the pursuit of the objects for which employees associate ought to attract some constitutional recognition that

distinguishes such activities from other pursuits that do not render a significant contribution to the democratic workings of society. Some might find it ironic that certain rights which have only recently emerged in the public consciousness, including some whose acknowledgement is perhaps long overdue, have a place reserved by name in the Charter, while the right to bargain collectively, whose importance in democratic societies has been assumed at least since the International Labour Organization was established in 1919, must still tap on the constitutional window and hope to gain judicial recognition and acceptance.

Even if constitutional recognition were to be accorded to some developed version of a "right to bargain collectively", what form might it take?³⁷² There is ample evidence in the trilogy judgments and in the constitutional litigation to date that Canadian judges might be hesitant to examine every "jot and tittle" of collective bargaining schemes for possible Charter infringement. The judiciary could, however, follow the lead of Dickson and Wilson, JJ., in the trilogy, and measure alleged Charter infractions against some general objective standards. No attempt at setting such standards is offered here, but they could presumably reflect attributes which, over a number of decades, have been central to labour relations regimes throughout Canada. This legislation generally provides

a mechanism for the designation, by majority choice, of one union as the exclusive bargaining agent of the employees; a legally enforceable duty of the employer to recognize, and bargain in good faith with, that union; and the prohibition of employer 'unfair labour practices' which might interfere with selection of, or participation in, the union of employees.³⁷³

To elaborate, the statutory schemes, with few exceptions, recognize the legitimacy of trade union activity in collective bargaining:

to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanctions, including taking a case to the public in the event of an impasse.³⁷⁴

A measuring test designed by a higher court could include any or all of the elements just outlined. Theoretically, a judge could add further base fixtures: provisions for the the imposition of a first collective agreement; stricter enforcement of "the requirement to bargain in good faith"; or even greater substance to the content of the latter prerequisite.³⁷⁵ Based on the reasoning of the dissenting judges in the trilogy, there are other instances which might draw protection from the Charter. Application of Charter principles might protect workers where bargaining rights were denied outright to a group improperly designated as "essential" service providers, where inadequate substitute procedures were in place to compensate for a lack of strike rights, or where employees were denied the right to negotiation or arbitration on matters customarily negotiable or arbitrable.

If the constitutional sands shift to open space for amendments, organized labour may then want to campaign for a direct Charter guarantee of a right to bargain collectively, as part of section 2(d). A danger for unionists is that politicians may also agree to add a freedom of non-association. An alternative approach is suggested by section 25 (concerning aboriginal rights) and section 27 (re multicultural rights). The Charter could proclaim that it shall not be interpreted in a way that erodes principal associational rights of employees.

While counselling that not every incident of collective bargaining systems is of equal importance, McIntyre, J., in the trilogy, observed that labour relations may have become "a matter of fundamental importance in our society".³⁷⁶ More than one commentator has suggested that freely functioning

collective bargaining is essential to the health and security of a democratic country.³⁷⁷ In the most recent Quebec language rights decisions, one reason indicated by the Supreme Court for attaching constitutional protection even to commercial expression was that it serves both an individual and "societal" value in a free and democratic society, allowing receivers of information "to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy".³⁷⁸ Placing a colloquial interpretation on this reasoning, the value of "well-informed shopping" has been granted some constitutional protection, partly because it has both individual and societal value. As some thoughtful commentators would advise, a right to collective bargaining may be a fundamental underpinning of a free and democratic society, likewise possessing value both for individuals and for the community. As they have done for commercial expression, should the judiciary not contemplate according a measure of Charter protection for a right to bargain collectively?

It may be that the wisest option for organized labour is to accede to the interpretation of the trilogy ascribed to by many, perhaps most, judges and academics. This asserts that collective bargaining rights were held by the Supreme Court to be outside the purview of the Charter. There are good reasons to keep the judiciary out of the picture. The current regimes of collective bargaining in Canada are the result of long struggles and political balancing. The trend in recent decades has been to govern industrial relations through specialized bodies and mechanisms and to keep judges at a distance. Furthermore, history teaches that in a crunch, judges are not predisposed to give priority to employees' interests.

One difficulty faced by those who view fair collective bargaining as basic to democracy and social justice is that recent constitutional litigation

places trade unions in a defensive position. Assertions of a putative "right not to associate" by anti-union litigants, for example, threaten even the most established labour relations linchpins. In key cases thus far, superior courts have not endorsed this concept, and one (though not the only) reason for their deference toward existing bargaining frameworks has been the view that the trilogy barred the way to application of the Charter.

The Supreme Court has yet to rule on the purported inclusion of a non-association right in Charter section 2(d), however, and it would be prudent to offer alternative arguments on the point. Labour's representatives may choose to make their primary position the view that the trilogy forecloses judicial interference with labour relations schemes through application of "freedom of association" principles, and would state that in any case collective bargains are untouchable, as being in the private realm. It is recommended, nevertheless, that a secondary alternative contention be put forth. If the court is moved to apply the Charter at all, they should be invited to find that central components of collective bargaining, as developed in Canada, are cloaked with constitutional armour.

Clearly, it would be absurd to hold that there is a right to "non-association" for an employee unless there exists a Charter-protected freedom of association for workers. In the Canadian historical, societal, and social-philosophical context, however, it would be more logical to conclude that there is both an individual and collective right to collective bargaining, along the lines argued in this thesis, one that does not entail a "right not to associate" as a necessary corollary.

Labour leaders have voiced concern that in a climate of Charter interpretation which gives paramount place to individual rights and a reduced

role to mixed collective/individual rights, in a period of reduced public services, of legislated setbacks to employee bargaining rights, and of pressures from freer trade, the best that can be hoped for is a retention of the labour relations mechanisms now prevailing. It seems important to make arguments in the nation's highest court about the value and need for collective bargaining in our democratic society. It would be ironic not to do so at a time of apparently increasing worker rights in many less democratic societies to which we rhetorically compare our Canada.

As always, the real game will be played in the public arena outside the courtroom. Politicians, voters and judges all read newspapers and watch television. One might speculate that the cause of organized labour would not be hurt by, and would benefit from, making principled (albeit alternative) arguments in both political and the judicial fora as to why collective bargaining deserves to be recognized as a fundamental right in Canada's Charter of Rights and Freedoms. During this century, industrial democracy and balanced collective bargaining rights for employers and employees have come to be seen as essential to the general welfare in a democratic country. Our constitution ought to, and perhaps does, reflect this truth.

**Is Collective Bargaining Protected by
Canada's Charter of Rights?**

by Allan McChesney, April, 1989
Revised in part November 1989

ENDNOTES

Notes to Chapter 1

1. Reference re Public Service Employees Relations Act (Alta.) [1987] 1 S.C.R. 313 (hereinafter the Alberta Labour Reference); Public Service Alliance of Canada v. The Queen in Right of Canada, [1987] 1 S.C.R. 424 (hereinafter P.S.A.C. v. Canada); Retail, Wholesale and Department Store Union Locals 544, 496, 635 and 955 v. Government of Saskatchewan, [1987] 1 S.C.R. 460 (hereinafter Dairy Workers).
- 1A. The Supreme Court did not attempt to define "collective bargaining" in the trilogy. Nor do the terse definitions stated in authoritative sources provide much illumination to the tasks undertaken in this thesis:

Collective bargaining [is] a method of fixing the terms and conditions of employment by means of bargaining between an organised body of employees and an association of employers: [J. Burke, ed., Jowitt's Dictionary of English Law (2nd ed.) (London: Sweet & Maxwell, 1977), p. 371].

Collective Bargaining

58. Collective bargaining is the process whereby an employer and a trade union seek to negotiate a collective agreement. In almost all jurisdictions, this process must be undertaken 'in good faith' and requires 'every reasonable effort to make a collective agreement': [H.W. Arthurs, D.D. Carter and H.J. Glasbeek, Labour Law and Industrial Relations in Canada (2nd ed.) (Deventer, Netherlands: Kluwer, 1984) p. 33].

Our understanding of "collective bargaining" in Canada is enhanced by the added explanatory sentence in the latter quotation. A fuller appreciation of what is at stake in the effort to assure constitutional protection for collective bargaining mechanisms in Canada is gained by quoting two other definitions found in Arthurs, Carter and Glasbeek (pp. 32-33):

Collective agreement

57. A collective agreement is a document recording the terms and conditions of employment and the rights and duties of the employer, trade union and employees in a bargaining unit. In almost all Canadian jurisdictions, it is legally enforceable only

through arbitration procedures initiated by the employer or the trade union, and is deemed to contain certain statutory provisions - a minimum term of one year, the prohibition of strikes and lockouts during that term, and a requirement for the submission to arbitration of all disputes concerning its interpretation or alleged violation.

Bargaining units

54. A bargaining unit is the constituency, defined by the labour relations board or agreed upon by the parties, within which collective bargaining occurs. The bargaining unit may embrace workers sharing a single craft (a 'craft unit') or those whose common denominator is participation in a particular operation, plant or industry (an 'industrial unit'). In some industries, bargaining is conducted in 'multi-employer' or 'industry-wide' units. In each case, the bargaining unit must be 'appropriate for collective bargaining', i.e. the workers must have a common interest in the outcome of negotiations. All workers within a bargaining unit have the right to participate in the selection of the bargaining agent, the union which will represent the bargaining unit, but once selected, the bargaining agent has the exclusive right to speak for all present and future employees in the bargaining unit.

As can be seen, no nutshell definition could present a sufficiently instructive picture of even the most central components of collective bargaining in the Canadian milieu. The paragraphs just quoted, however, are adequate for purposes of this thesis. (See also excerpts from authorities found at notes 164 and 374, and in note 165, infra.)

2. See Chapter 3.1, infra.

3. Id.

Notes to Chapter 2

4. Two important cases that did not make it to the Supreme Court were: Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home (1983), 44 O.R. (2d) 392 and Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland (1985), 14 C.R.R. 193.
5. The three judgments run 184 pages, of which roughly 3 1/2 in aggregate are taken up by the reasons of Le Dain, Beetz and La Forest, JJ.
6. There was considerable factum material, for example, covering international human rights law, a subject not even touched upon by the plurality.

7. Their shared views on this are in the reasons of Dickson, C.J.C. in the Alberta Labour Reference (supra, note 1).
8. See, generally, the works discussed at 3.1 and 3.2, infra.
9. Alberta Labour Reference (supra, note 1), 413-414.
10. A few of the authorities that have been published since the preparation of the first draft of this thesis tend to support the views expressed here (see text and notes of Chapters 3, 4 and 5).
11. This writer attended the Supreme Court of Canada hearings as an observer. In the Dairy Workers case (see note 1), representatives of Saskatchewan, Ontario, British Columbia, Manitoba, Alberta and Newfoundland, as well as Canada, took part.
12. Public Service Alliance of Canada v. The Queen in Right of Canada (1985), 11 D.L.R. (4th) 387 (Fed. C.A.).
13. Statutes of Canada, 1980-81-82, c. 122.
14. (1984), 11 D.L.R. (4th) 337.
15. Note 12, supra, at 392 per Mahoney, J.
16. Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (1985), 16 D.L.R. (4th) 359.
17. There was a partly dissenting opinion in the Alberta Labour Reference, but in it, Belzil, J.A. reached the same result as that of Kerans, J.A., writing for the majority.
18. Re Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al. v. Government of Saskatchewan (1985), 18 D.L.R. (4th) 609 (Sask. C.A.).
19. Statutes of Saskatchewan, 1983-84, c. D-1.1.
20. Cited at note 1, supra.
21. R.S.A. 1980, c. P-33, ss. 48, 49, 50, 55, 93, 94.
22. R.S.A. (1980) (Supp.), c. L-1.1, ss. 117.1, 117.2, 117.3, 117.8.
23. S.A. 1983, c. P-12.05, ss. 2(2), 3, 9, 10, 15.
24. Among the items excluded from arbitration were matters such as pensions, which normally are negotiable. One factor required to be considered at arbitration was government fiscal policies (per Dickson, C.J.C., Alberta Labour Reference (supra, note 1) 881-4).

25. Ibid., 390.
26. The reasons of McIntyre, J. are reported ibid., at pp. 392-422.
27. Ibid., 359-371.
28. Ibid., 372-386.
29. Ibid., 373.
30. Cited at note 1, supra.
31. Cited at note 13, supra.
32. P.S.A.C. v. Canada, no. 1, 452-453.
33. Id.
34. Supra, note 1, 453-454.
35. Per Dickson, C.J.C. at pages 437-439; per Wilson, J. at pages 455-458.
36. At page 438.
37. Per Dickson, C.J.C. at pages 439-451; per Wilson, J. at pages 455-458.
38. Ibid., 458.
39. S.S. 1983-84, c. D-1.1.
40. [1987] 1 S.C.R. 460, at 484.
41. At page 484-5.
42. At pages 466-475.
43. See n. 19, supra. Cited at page 475 of the judgment.
44. At pages 475-483.
45. At pages 485-496.
46. [1986] 1 S.C.R. 103.
47. Per Dickson, C.J.C. at 463:

The Act applied only to the workers in the dairy industry; it provided for a neutral arbitrator; either party could ultimately compel the other to submit to arbitration without interference from the government; and the scope of the arbitration was not legislatively restricted.

One will recall that in the Alberta Labour Reference, the Chief Justice found that the arbitration schemes imposed did not pass muster under section 1.

48. At page 463.

Notes to Chapter 3

49. As stated at Chapter 2.3(a) supra, these were Justices Le Dain, Beetz, La Forest and McIntyre.
50. OCH Canadian Limited, (1987) Focus on Canadian Employment and Equality Rights, Volume 1, No. 16, page 125; Volume 1, No. 17, pages 127-128.
51. Ken Norman, "Freedom of Association" in Your Clients and The Charter-Liberty and Equality, Canadian Bar Association Charter Program, Montreal, October 23, 1987, 53 pages; Donald D. Carter, "Canadian Labour Relations Under the Charter: Exploring the Implications" (1988) Relations Industrielles - Industrial Relations, Volume 43, No. 2, pages 305-321; Timothy J. Christian and Keith D. Ewing, "Labouring under the Canadian Constitution", (1988) The Industrial Law Journal, Volume 17, No. 2 (June), pages 73-91.
52. Alberta Labour Reference, supra, note 1, 399-420.
53. From ibid., 390.
54. Another post-trilogy article written in a popular style does not deal at all with the possibility that the Charter may hold some hope for collective bargaining rights. It in fact warns workers against resorting to the Charter for any objective: Harry Glasbeek (Professor at Osgoode Hall Law School), "Workers of the World - Avoid the Charter of Rights", Canadian Dimension, Vol. 21, No. 2 (1988), pages 12-14.
55. See note 51. Some works on employment law and practice under the Charter were unfortunately prepared a bit too early to cover the Supreme Court's "freedom of association" trilogy: George W. Adams, The Impact of the Charter on Labour Relations, Personnel Association of Toronto (1986), 40 pages; David M. Beatty, "Constitutionalizing a Labour Code: Creative Uses of Comparative Law", 1987 Comparative Labor Law Journal, Vol. 8, No. 3 (Spring) pages 211-267; David M. Beatty, Putting the Charter to Work: Designing a Constitutional Labour Code (Kingston and Montreal: McGill-Queen's University Press, 1987) 240 pages.
56. See Carter (n. 51), 306. Prof. Carter is the author of numerous publications, including Canadian Industrial Relations and the Charter - the Emerging Issues (Kingston: Industrial Relations Centre, 1987).
57. Re Lavigne and Ontario Public Service Employees Union (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 (Ont. S.C.).

58. See, for example, publications by David Beatty and by Harry Glasbeek, cited at notes 55 and 54, respectively, supra; D. Ewing, "Freedom of Association in Canada" (1987), 25 Alta. L.R. 437; D.D. Carter (cited at note 51, supra), pages 307-309; and J. Clancy, W. Roberts, D. Spencer, J. Ward, All For One - Arguments from the Labour Trial of the Century on the Real Meaning of Unionism (Toronto, O.P.S.E.U, 1988).
59. "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of Freedom Not To Associate" (1988), 19 Ottawa Law Review 1-48.
60. Ibid., 13-14 and note 43, supra.
61. Ibid., 46-48.
62. "Labouring Under the Canadian Constitution", (1988) The Industrial Law Journal, Vol. 17, No. 2 (June) pages 73-91.
63. Any other result would have been surprising, since Professor Christian acted as counsel for the Alberta Union of Public Employees in the Alberta Reference hearings before the Supreme Court of Canada.
64. Op. cit., note 62.
65. Based on reactions voiced by pro-labour individuals at the time of the trilogy's release, as well as on the articles cited in the pages immediately preceding this.
- After completion of this Chapter (3.1) of the thesis, there were encountered other examples of writers expressing a contrasting view of the trilogy's outcome. In a review of Beatty's Putting the Charter to Work, (n. 55) the reviewer states that "the labour trilogy ... finds that the rights to collective bargaining and the right to strike are not constitutionally protected": D. Eady, (1988), 46 Univ. of Toronto Faculty of Law Review, No. 1 (Winter), pages 315-321, at 320.
66. Op. cit., note 62, at pages 81-82.
67. A subject also discussed in the works cited at note 58, supra.
68. At page 21, supra.
69. Although the commentaries discussed in Chapter 3.1 did not take the same approach to the trilogy as that taken herein, they were of much assistance in examining the questions just posed.
70. Any related commentaries that postdate those found at note 51 will be referred to in Chapters 5 and 6.
71. [1987] 1 S.C.R. 313 at pages 399 and 407.

72. McIntyre, J. pointed out (at pages 399-400) that this approach had been taken in previous decisions, notably Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union (1984), 10 D.L.R. (4th) 198 (affirmed by the Supreme Court of Canada on different grounds, [1986] 2 S.C.R. 573) and the trial and first appeal stages of P.S.A.C. v. Canada (decided concurrently in the trilogy): [1984] 2 F.C. 562 (trial) and (1985), 11 D.L.R. (4th) 387; [1984] 2 F.C. 889 (appeal).
73. By Christian and Ewing, op. cit., note 51, at page 81, note 54.
74. Norman, op. cit., note 51, at page 21, with the "status quo ante" being essentially the "first" approach referred to at notes 71 and 73, supra.
75. Norman, op. cit., note 51, at page 22 and Christian and Ewing, op. cit., note 51, at page 81, explain that this is a "derivative" American right. There is no express freedom of association in the U.S. Constitution. The freedom was implied through American jurisprudence as a way for groups to exercise the rights enjoyed by them as individuals.
76. Pages 401 and 407 of the judgment.
77. McIntyre, J. refers to the opinion of Bayda, C.J.S. and also cites two American sources: T.I. Emerson, "Freedom of Association and Freedom of Expression" (1974), 74 Yale L.J. 4; Reena Raggi, "An Independent Right to Freedom of Association" (1977), 12 Harvard Civil Rights-Civil Liberties Law Review 1, at pages 15-16.
78. [1986] 3 W.W.R. 590 at page 612. The Alberta Court of Appeal held in that case that legislative restrictions against law partnerships between Alberta solicitors and non-resident lawyers violated the freedom of association.
79. At pages 402 and 404.
80. Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home (1983), 44 O.R. (2d) 392.
81. At page 402.
82. Supra, note 18, (1985), 19 D.L.R. (4th) 609. Interestingly, Bayda, C.J.S. held (at page 621) that the act of engaging in a strike does not automatically carry with it the intention to cause harm. He stated that the aim of a strike often is to rectify an "injustice" more than "to use economic power to gain positive advantages over another group". As Professor Norman put it: "The mental element behind a strike is to force an employer to agree to terms and conditions of employment. It is not normally to inflict harm". (Norman, op. cit., note 53, pages 13-14, discussing Bayda J.A.'s reasons).

83. At pages 406-410. Pages 33-35, infra, discuss the slight possibility that a fragment of the fourth approach might have been retained after McIntyre, J.'s general rejection of it.
84. See note 83, supra.
85. See note 80, supra.
86. In arriving at this basis for rejection, McIntyre, J. was aided by Peter Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in Joseph Weiler and Robin Elliot, editors, Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1986) at page 247.
87. This summary description comes from Christian and Ewing, op. cit., note 51, at page 81.
88. On this point, McIntyre, J. cites Paul Cavaluzzo, "Freedom of Association and the Right to Bargain Collectively", in Weiler and Elliot, op. cit., note 86, at pages 202-203.
89. See discussion in Part 3.1, supra.
90. At pages 409-411, Mr. Justice McIntyre disposed of the notion that freedom of association for individuals acting jointly must guarantee a right to strike, since individuals on their own may lawfully refuse to work. He gave two reasons. The first is that it is not lawful for an individual employee to cease work during the currency of a contract of employment and that he or she may be ordered to pay damages for the unlawful breach of it. (McIntyre, J. cites with approval on this point the words of Belzil, J.A., writing in the Alberta Court of Appeal in the previous stage of this litigation: Reference Re Public Service Employment Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (1985), 16 D.L.R. (4th) 359). The second reason offered is "that there is no analogy between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation":
- An employee who ceases to work does not contemplate a return to work, while employees on strike always contemplate a return to work. In recognition of this fact, the law does not regard a strike as either a breach of contract or a termination of employment (page 410).
91. Looking at the remaining example in Justice McIntyre's list, a union seeking evidence concerning environmental dangers to health at one job site or in an industry could conceivably be conducting a "scientific" pursuit incidental to collective bargaining.

92. As an illustration of this protection for group expression, McIntyre, J. referred to the Supreme Court of Canada judgment in Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 (1987), 33 D.L.R. (4th) 174, wherein the Court stated that the guarantee of freedom of expression in section 2(b) of the Charter protects peaceful picketing on the ground that there is "always some element of expression in picketing" (at page 187, per McIntyre, J.). The outcome of the case cannot be regarded as a complete Charter victory for trade unions since the Court also held that in the circumstances of the case the Charter did not apply.

The original dispute led to a court restraining order preventing the union from picketing a third party that was not allied to the principal corporate party. The court based its decision on a finding that the proposed secondary picketing would violate common law. The Supreme Court ruled that although it had the right to apply the Charter to the common law, it could not interfere in this case because the conflict concerned a dispute between private parties, with no presence of governmental action. Governmental action was defined by the Supreme Court as "action of the legislative, executive, and administrative branches of government, and not ... the actions of the judiciary themselves": D.D. Carter, op. cit., note 51, page 310.

93. McIntyre, J. acknowledges (at page 403) that although these six formulations embrace the concepts argued before the Court, other notions of freedom of association might be developed.
94. On that question, Professor Norman makes these observations (op. cit., note 51, at pages 5-6):

No Canadian institution is more in question, in the aftermath of the Charter's proclamation, than that of collective bargaining. Litigation in this area, before both courts and labour boards, has produced more decisions on freedom of association and its limitations than have all other areas of dispute about freedom of association put together. In light of this recent history, it is particularly strange that organized labour did not put forward any significant effort to influence the framers of the Charter. Weiler explains that the Canadian Labour Congress (C.L.C.) decided that its priority at the time, in the fall of 1980, was to concentrate its energies on the issue of unemployment. Thus, only a short written submission from the C.L.C. was received by the Special Committee, together with a somewhat longer brief from the British Columbia Federation of Labour. The C.L.C.'s decision to largely opt out of the framing process is criticized by Weiler as being "monumentally wrong", given the marked successes of many other special interest groups before the Special Committee.

Here, Professor Norman was referring to Joseph M. Weiler, "The Regulation of Strikes and Picketing Under the Charter", in Weiler and Elliot, op. cit., note 86, at pages 211 and 213. In addition to the

two submissions cited (from the C.L.C. and from the B.C.F.L.), research in preparation of this thesis revealed other verbal and documentary support submitted by community-based intervenants before the Committee, recommending the inclusion of collective bargaining rights in the Charter. (cited in Chapter 5.2, infra at n. 221).

95. (1986), 24 D.L.R. (4th) 536 at 553-554.
96. "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in Weiler and Elliot, op. cit., note 86, 245 at 248. The number of sharp surfaces on a legal weapon is less important than how the cutting edges are wielded. For a view more sympathetic to employees' associations than Gall's chapter reveals, see: The Canadian Charter of Rights and Freedoms: A Double-Edged Sword for Unions?, (Ottawa: N.U.P.G.E., 1986).
97. Article in Weiler and Elliot, cited at note 94, supra, at pages 226-227.
98. [1987] 1 S.C.R. 424, at 453.
99. It is submitted that McIntyre, J.'s comments also provide a measure of vindication for the analysis offered earlier of the Alberta Labour Reference in this thesis.
100. It is noteworthy that none of the authorities referred to in preparing the early drafts of this thesis (see Chapter 3) discussed or even focussed on this passage from McIntyre, J.'s reasons. Since writing the above, the author has discovered a case review note whose opinions in important respects concur with those expressed herein concerning the trilogy: A.J. Petter and P.J. Monahan, "Developments in the 1986-87 Term" (1988), 10 Supreme Court Law Review 61-144, at 96-121.
- 100A. As is indicated at note 133, infra, however, other scholars continue to take the view that the trilogy shut the door on the issue of Charter protection for collective bargaining.

Notes to Chapter 4

101. R.S.N.W.T. 1974, c. P-13 (as amended).
102. The relevant provision (subsection 42(1)(b)) used the term "Ordinance", but the judgment adopted the current practice of the Northwest Territories government, which is to refer to Ordinances as "Acts".
103. The writer has been a member of the bar for the Northwest Territories since 1981, and was formerly the Executive Director of the Legal Services Board of the Northwest Territories, and as a result is somewhat familiar with the N.W.T. court system.
104. (1985), 16 D.L.R. (4th) 359.

105. Until recently, only the intervenant had ever sought to bargain on behalf of employees of the territorial government. The Association is a component of the Public Service Alliance of Canada, who had successfully persuaded the Commissioner and Council to accept the concept of collective bargaining with its employees in 1969. The NWT government had never before faced the question of the creation of separate bargaining units (judgment of Kerans, J.A., page 688).
106. (1988), 43 D.L.R. (4th) 472, at page 478.
107. See discussion at Chapter 3.2-3.4, supra. There is a further, but less significant, item for contention. Kerans, J.A. would be correct to state that McIntyre, J. did not endorse the "fourth approach" put into play by the Alberta Court, namely that freedom of association "embraces collective activities which have attained a fundamental status in our society" (Alberta Labour Reference, page 406). Shortly thereafter, in obiter, McIntyre, J. allowed that certain "fundamental" activities which may be carried out by people in combination (such as marriage) could someday receive the protection of the Charter. Taking the most liberal prospect of McIntyre, J.'s reasons, this could mean that activities of individuals acting in concert might receive Charter protection: (1) if they constitute organizational activity, (2) are constitutionally safeguarded when done individually, (3) are carried out in conjunction with an activity that attracts a constitutional safeguard or (4) are found to be manifestations of fundamental elements of Canada's democratic society.
108. [1988] 5 W.W.R. 684, at page 695.
109. In view of his discomfort with forced statutory incorporation for a union, it is interesting that just previous to announcing this holding, Mr. Justice Kerans, discussing how section 1 might be applied in hypothetical circumstances, said that "the kind of regulation ordinarily prescribed for those who would gain the benefit of association as a body with limited legal liability for members or owners has self-evident justification" (pages 694-695).
110. (1988), 43 D.L.R. (4th) 472, at pages 476-477.
111. [1988] W.W.R. 456.
112. Ibid., at page 458.
113. Ibid., at page 463.
114. Ibid., pages 462-463.
115. Mr. Justice de Weerd explained (at page 462) that the transfer of nursing positions was to take place shortly (on a reasonable reckoning, 5 days after the hearing and 2 after the judgment was issued). For that reason, he could not, as he would have preferred,

delay his decision until after the release of the appeal judgment in P.I.P.S. v. N.W.T. (see pages 53ff., supra).

116. See Lavigne, note 57, and works at notes 58 and 59, supra.
- 116A. Since the writing of this Chapter, the Ontario Court of Appeal has reversed White, J.'s ruling, on the ground that the litigation involved "private" (i.e. non-governmental) activity outside the reach of the Charter. Lavigne and OPSEU, Ontario Court of Appeal, Jan. 30, 1989 (referred to in Chapter 5, infra).
117. "Award on Issue of Union Security in Ford Dispute", Labour Gazette (1946), 46 123.
118. Ibid., page 127.
119. One has to accept that Mr. Justice Rand did not simply construct "his" formula out of thin air. His scheme adopted practices already established in Ford plants in the United States: Rand Award, op. cit., note 117, p. 127.
120. [1987] 1 S.C.R. 313, referring back to Dickson, C.J.C.'s pronouncement in R. v. Big M Drug Mart Ltd. (1985), 18 D.L.R. (4th) 321 at 359:
- It is not necessary to reopen the meaning of freedom of religion under the Canadian Bill of Rights, because ... the Canadian Charter ... does not simply "recognize and declare" existing rights ...
121. The Queen in Right of Canada v. Beauregard, [1986] 2 S.C.R. 56 and Re McKinney and Board of Governors of University of Guelph et al. (1986), 57 O.R. (2d). The first dealt with judges' pensions and invoked the Canadian Bill of Rights. The latter, a Charter case, involved mandatory retirement.
122. Perhaps because of the inevitable delays in the publication of report services, this decision (reported in mid-June, 1988) does not cite the first P.I.P.S. v. N.W.T. judgment which preceded it. Nor do any of the Northwest Territories judgments refer to Re Hutton (See discussion of the Northwest Territories cases supra, at pages 50-63).
123. The governing legislation for municipal forces is the Police Act, R.S.O. 1980, c. 381; for the OPP it is the Public Service Act, R.S.O. 1980, c. 418. An issue under section 15 of the Charter was raised because of differentiation in treatment. Section 15 will be considered in Chapter 7.
124. (1988), 62 O.R. (2d) 673 at 691.
125. [1987] 1 S.C.R. 424 at page 453, quoted supra at note 100.

126. It would appear that McIntyre, J. somewhat understated the effect of the Act in P.S.A.C. v. Canada. By prohibiting negotiations on compensation matters during the two-year period referred to, the statute went a bit further than simply postponing the use of strikes and lock-outs. Nevertheless, McIntyre, J. may have provided further indication of incidents of collective bargaining that might be considered worthy of protection within Charter "freedom of association": (a) "the role of the trade union as the exclusive agent of the employees"; and (b) the requirement that "the employer continue to bargain and deal with unionized employees through the union".
127. Rosenberg, J.'s reasons for finding that the contested legislation was not saved under Charter section 1 are stated at pages 690-691 of (1988), 62 O.R. (2d) 673. They may be summarized as follows:
1. No legislative objective was indicated or established for the differences in bargaining rights.
 2. There are no social concerns to which the difference in treatment is related that are "pressing and substantial in a free and democratic society".
 3. There is no way of testing whether the means chosen are rational and proportional, because there is no objective.
128. Numbers 4, 5, 6 and 7 reinforce points raised earlier in this thesis.

Notes to Chapter 5

129. J.M. Weiler, "The Regulation of Strikes and Picketing Under the Charter", in Elliott and Weiler, eds., Litigating the Values of a Nation, 211-244, at pp. 226-27, cited by McIntyre, J. at p. 417 of the Alberta Labour Reference (n. 1).
130. P. Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in Elliott and Weiler, op. cit., n. 129, 245-260, at p. 247, cited by McIntyre, J. at p. 415 of the Alberta Labour Reference (n. 1).

One possible direction for change could be management-initiated moves to emulate Japanese industrial relations through a more cooperative labour-management relationship. These appear still to be rare experiments in Canada: R.J. Adams, "North American industrial relations: Divergent trends in Canada and the United States", (1989) International Labour Review, Vol. 128, No. 1, 47-64 at 50-53.

131. Arlington Crane Service v. Ontario Minister of Labour (S.C.O.) (December 22, 1988) at page 51-52. The other leading case is the appellate decision in Lavigne released by the Ontario Court of Appeal on January 30, 1989). These judgments concern primarily the purported "right not to associate". Portions relevant to our enquiry will be referred to infra.
132. Henry, J. found that Ontario's province-wide scheme of collective bargaining in the construction industry, though statutorily mandated,

did not render private sector collective bargaining a "governmental" matter subject to the Charter. In the result, the bargaining system was not eroded, as it might have been, through judicial application of the right not to associate pleaded by the applicants in the case.

133. Earlier in this thesis, a number of commentators were cited who summarized the trilogy in similar fashion. As late as December 6, 1988, an article by Professor Allan Hutchinson of Osgoode Hall Law School stated thus: "In three cases, the Supreme Court has held that the Charter does not protect the right to strike or bargain collectively". (Emphasis added). A Hutchinson, "How sacred is the right to walk the line", Globe and Mail, Dec. 6, 1988, p. A7.

The editors of a 1988 survey of union executives' opinions state that these leaders are "unhappy, although not surprised, over recent Supreme Court rulings that the protection of the freedom of association under the Charter does not extend to the right to bargain collectively or the right to strike": P. Kumar and D. Ryan, eds., Canadian Union Movement in the 1980s: Perspectives from Labour Leaders, Research and Current Issues Series No. 53 (Kingston: Industrial Relations Centre, Queen's University, 1988), p. 4.

See also The Lawyers Weekly, Vol. 8, No. 37, Feb. 10, 1989, p. 1: "A series of Supreme Court of Canada decisions in 1987 gave the labour movement further cause for concern when the top court ruled the Charter freedom of association doesn't protect union's rights to strike and bargain collectively".

134. N. Finkelstein, "The Supreme Court, The Charter and Labour Relations", in N. Finkelstein and B.M. Rogers, eds., Charter Issues in Civil Cases (Toronto: Carswell, 1988) 95-108 at 100.
135. Id.
136. Alberta Labour Reference (note 1, supra) at 360.
- 136A. Ford v. Quebec (A.G.) and Devine v. Quebec, S.C.C., Dec. 15, 1988 (language); Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 (refugee determination).
137. Alberta Labour Reference 372-386; P.S.A.C. v. Canada 439-551; Dairy Workers 475-483 (all at note 1, supra).
- 137A. P.S.A.C. v. Canada, ibid., 455-458; Dairy Workers, ibid., 485-496.
138. Alberta Labour Reference, supra, note 1, 391.
- 138A. [1986] 2 S.C.R. 713 at pp. 781-782.
- 138B. Supra, note 1 at 442.
139. Petter and Monahan, op. cit., note 100, p. 112.

139A. D. Beatty and S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988), 67 Canadian Bar Review No. 4, 574-621 at 609.

139B. Ibid., 615.

The authors do not, however, share the view of this thesis concerning the ratio of the trilogy: "In each of these cases, the court held, by a 4:2 majority that ... section 2(d) was not in any way related to the freedom of workers to strike and bargain collectively". (p. 581).

140. P. Kumar and D. Ryan, op cit., n. 133, p. 4; H. Glasbeek, "Workers of the World - Avoid the Charter of Rights", Canadian Dimension, Vol. 21, No. 2 (1988) 12-14; Shirley Carr, "Equality Rights: Labour's Perspective" (Address to Employee Relations and the Charter of Rights Conference, Toronto, May 14, 1985).

The problem of excessive individualism, particularly as demonstrated by Justice McIntyre in the trilogy is examined effectively in two recent articles by Michael MacNeil: "Courts and Liberal Ideology: An Analysis of the Application of the Charter to Some Labour Law Issues" (1989), 34 McGill Law J. 87-118; "Unions, Politics and Law in Canada" (1988), 43 Relations Industrielles 847-868.

140A. Carr, ibid., p. 7

141. W. Craig Riddell, "Canadian Labour Relations: An Overview", in W.C. Riddell, Research Coordinator, Canadian Labour Relations, Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada, Vol. 16 (Toronto: University of Toronto Press, 1986) 1-93 at 17.

142. M. Bendel, "Freedom of Association Under the Canadian Charter of Rights and Freedoms" (University of Ottawa Research Paper, 1984, 31 pages) p. 12.

143. Id. In the Alberta Labour Reference, supra, note 1 at p. 414, McIntyre, J. spoke of the delicate compromises reached between employers and organized labour: "The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving others subject to the social pressures of the day ...".

144. "The right to strike lies at the very heart of the collective bargaining process. If the right to strike is not constitutionally protected, it is difficult to understand how other aspects of collective bargaining could fall within the purview of Charter protection": A.J. Petter and P.J. Monahan, "Developments in

- Constitutional law: The 1986-87 Term" (1988), 10 Supreme Court Law Review 61-145 at 101.
145. L. Panitch and D. Swartz, From Consent to Coercion: The Assault on Trade Union Freedoms (Toronto: Garamond Press, 1985) p. 13. Others felt that the restrictive measures of the early 1980s might be temporary, though they were uncertain of this: M. Thompson and A. Ponak, "Industrial relations in Canadian public enterprises", (1984) International Labour Review, Vol. 123, No. 5, 646-663 at 660-661.
146. Witness two of the leading efforts to carve out a "right not to associate" in Canada, Arlington Crane and Lavigne, cited at note 131.
147. Kumar and Ryan, op. cit., n. 133, p. 3; Adams, op. cit., n. 130.
148. Broadway Manor (1983), 44 O.R. (2d) 392 (Ont. Div. Ct.) reversed in part at 48 O.R. (2d) 225 (O.C.A.); Dairy Workers (1985), 5 W.W.R. 97 (Sask. C.A.).
- 148A. See note 223, infra.
149. H.D. Woods, Chairman, Canadian Industrial Relations, The Report of the Task Force on Labour Relations, Privy Council Office, Ottawa, 1968, p. 138. On the same page, the Task Force recommended that the exemptions of certain employees from the benefits of statutory provisions be removed, "in order to extend access to fundamental rights to associate and to act collectively". (Emphasis added)
150. Alberta Labour Reference, supra, note 1, p. 403.
151. Ibid., 403-4.
152. Ibid., 403.
153. Ibid., 334.
154. H. Arthurs, D. Carter and H. Glasbeek, Labour Law and Industrial Relations in Canada, (Deventer, Netherlands: Kluwer, 1981) pp. 34-35; C. D'Acoust and F. Delorme, "The Origin of The Freedom of Association and of the Right to Strike in Canada" (1981), 36 Relations Industrielles 894, at 894-897; L. Panitch and D. Swartz, "Towards Permanent Exceptionalism: Coercion and Consent in Canadian Industrial Relations" (1984), 13 Journal of Canadian Labour Studies 133, at 136; C. Backhouse, "Labour Unions and Anti-Combines Policy" (1976), 14 Osgoode Hall Law Journal 113, at 138-139; C. Lipton, The Trade Union Movement of Canada, 1827-1959, (Montreal: Social Publications, 1967) 1-39.
155. Id.
156. Arthurs, Carter and Glasbeek, op. cit., note 154, 35-36; D'Acoust and Delorme, op. cit., note 154, 905-916.

157. Arthurs, Carter and Glasbeek, ibid., 36-37.
158. Id. The authors remark that the principal features of the act "remain vestigially visible in Canadian labour legislation down to the present time" (p. 36).
159. G. Phillips, Labour Relations and the Collective Bargaining Cycle (2nd ed.), (Toronto: Butterworths, 1983) 36; Arthurs, Carter and Glasbeek, 38.
160. Id.
161. Id.
162. Arthurs, Carter and Glasbeek, op. cit., note 154, 38-39; Phillips, op. cit., note 159, 36-38; Panitch and Swartz, op. cit., note 154, 137.
163. Arthurs, Carter and Glasbeek, ibid., 39; Panitch and Swartz, ibid., 141.
164. Arthurs, Carter and Glasbeek, ibid., 145. Between 1948 and the early 1970s the various Canadian jurisdictions enacted changes that inter alia (a) increased the protection of the parties against unfair labour practices; (b) extended collective bargaining rights to employees not previously covered; and (c) safeguarded employees from some of the effects of rapid technological change: Phillips, op. cit., note 159, 38.
165. W.C. Riddell, op. cit., note 141, 6 and 7. Some Crown corporations were under general labour relations legislation as early as 1944. Saskatchewan permitted collective bargaining by government employees in 1944 and made its general labour statutes applicable to the central provincial administration in 1945: J. Finkelman, "Public Sector Collective Bargaining" (1986), 41 Relations Industrielles 691-703, at 692; and Riddell, 17.

The basic legislative scheme for public-sector bargaining in Canada followed the private-sector model ... (1) A trade union is certified as the exclusive bargaining agent for an appropriate bargaining unit; (2) following selection by a majority of the employees in that unit; (3) which requires the public employer to sit down at the bargaining table and make a serious effort to arrive at a collective agreement; (4) which, once it is in existence, establishes the terms and conditions of employment for the entire unit; (5) so that disputes about the interpretation and application of the contract are to be resolved only by an adjudication procedure, rather than by mid-contract strikes; (6) with the trade union's control of the negotiating and grievance procedures subject to a duty of fair representation to all of the employees; (7) in return for which the union is entitled to

extract some form of union security arrangement covering all the members of that unit. [Weiler, note 186, infra at p. 218.]

166. Riddell, ibid., 17.
167. Historically, lawyers did not speak much of "freedom of association". Michael Bendel observed that although Canadians traditionally have enjoyed largely unrestricted associational freedoms, "the concept of freedom of association as such was a phenomenon virtually unrecognized by our Canadian law": Bendel, op. cit., note 142, 2.
168. D'Acoust and Delorme, ibid., 916. (Emphasis in original).
169. Id. (Emphasis in original).
170. Id.
171. Dairy Workers, supra, note 1.
172. Factum of the Respondents, Dairy Workers, ibid., p. 14, para. 37 and p. 23, note 62(a). In support of this unusual argument, which the Supreme Court does not explicitly comment upon in the trilogy, one might observe that at least since the time of the Black Death of 1348, the English state exerted a measure of control over wages and hours of work through legislation. Arthurs, Carter and Glasbeek, op. cit., note 154, pp. 34-35; D'Acoust and Delorme, op. cit., note 154, pp. 894-897; Panitch and Swartz, op. cit., note 154, pp. 135; Phillips, op. cit., note 159, pp. 25, 37.
173. Ibid., p. 14, para. 39.
174. Ibid., pp. 9-22.
- 174A. Harry Arthurs states categorically that courts have been singularly inventive in creating remedies to protect employers against organized labour, and have virtually never created a right that might be asserted by working people: "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter", in Labour Law Under the Charter (Kingston: Queen's Law Journal and Industrial Relations Centre, 1988) pp. 17-31 at 18-19.
175. Rowlands Case (1851), 5 Cox's Criminal Law Cases 466 (Queen's Bench, en banc), per Campbell, L.C.J. at page 489, set out at ibid., p. 12, para. 32.
176. [1942] 1 All E.R. 142 (H.L.) per Lord Wright at pp. 158-159.
177. C.P.R. v. Zambri (1962), 34 D.L.R. (2d) 654, at 656-657, per Locke, J.
178. Re Service Employees International Union and Broadway Manor Nursing

- Home (1983), 4 D.L.R. (4th) 231 (Ont. Div. Ct.) per Smith, J., at p. 258.
179. Riddell, op. cit., note 141, 7.
180. P.C. 1743, July 11, 1918, set out more fully in Cominco Ltd. (1980), 80 CLLC 16,045, 716 at 718.
181. Treaty of Versailles, in The Treaties of Peace 1919-1923, Vol. 1 (1924), page 253.
- 181A. One author, e.g., speaks of "the almost universally accepted proposition that unions and collective bargaining are necessary components of modern democratic political systems": Adams, op. cit., note 131, 49. The corollary is that "a system of democracy is fundamental for the free exercise of trade union rights": Freedom of Association - A workers' education manual (Second revised edition), ILO: Geneva, 1987, p. 93.
182. Woods, op. cit., note 149, 137-138.
183. Riddell, op. cit., note 141, 68.
- 183A. Taken from the Preamble to An Act to amend the Canada Labour Code, S.C. 1972, c. 18.
184. Woods, op. cit., note 149, 137. Almost two decades later, the Macdonald Commission recommended that all governments in Canada "provide a supportive legislative environment for the labour movement and for collective bargaining": Report of the Royal Commission on the Economic Union and Development Prospects for Canada (Supply and Services Canada, Ottawa, 1985) Volume Three, p. 447.
185. Alberta Labour Reference, supra, note 1, 334.
186. P. Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: Carswell 1980) 33.
187. Ibid., 31.
188. Ibid., 32.
189. Woods, op. cit., note 149, 96.
190. Affidavit of Professor Irving Abella, dated October 8, 1985, filed in the Lavigne litigation in the Supreme Court of Ontario, supra, note 131, at paragraph 7.
191. P. Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively", in Elliott and Weiler, op. cit., note 129, 189-210, at 203.

192. Id.
193. It is not a purpose of this paper to pinpoint which, if any, specific elements of collective bargaining may be "fundamental" in our democratic society, though this area of inquiry will not be avoided.
194. Leger v. City of Montreal et al. (Quebec Court of Appeal, June 9, 1986) noted under section 26 in Canadian Charter of Rights Annotated.
195. Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177.
196. That right of access justifies any infringement on freedom of expression or peaceful assembly that might result from an order enjoining picketing at court houses: Re B.C. Government Employees' Union and A.G.B.C. (1985), 20 D.L.R. (4th) 399 (B.C.C.A.). Affirmed October 20, 1988; [1988] S.C.J. No. 76 (S.C.C.).
197. Re Bhindi and B.C. Projectionists (1986), 29 D.L.R. (4th) 47 (B.C.C.A.).
198. Re Hsuen and Mah (1986), 31 D.L.R. (4th) 199 (B.C.S.C.).
199. (1986), 25 D.L.R. (4th) 1.
200. Section 29 reads:
- Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.
- The majority found significance in the words "or under".
201. These were held to be laws enacted "under" constitutional authority, including the plenary authority over education conferred on the provinces by section 93 of the Constitution Act (British North America Act), 1867.
202. Alberta Labour Reference, [1987] 1 S.C.R. 313, at 401 and 406, as derived from the reasons of Kerans, J.A. in Black v. Law Society of Alberta, [1986] 3 W.W.R. 590 at 612.
203. With respect to this question, the Ontario Court of Appeal in Lavigne v. OPSEU (Jan. 30, 1989) saw the trilogy this way:

"all of the judgments appear to recognize the notion that the freedom of association entrenched by the Charter is a freedom intended to allow individuals to engage in activities together and to pursue commonly held goals which cannot be achieved in isolation. Freedom of association is seen as a right which inheres in the individual, but which can only be exercised

jointly by a plurality of individuals carrying out associational activities in common cause for a common purpose". (Judgment, p. 36, per curiam).

204. Petter and Monahan, op. cit., note 100, 108-109.
205. Le Dain, J. does not specifically address the search for an individual/collective analogy when expressing general agreement with McIntyre, J. at p. 390 of the Alberta Labour Reference.
206. Cited at note 199, supra.
207. Alberta Labour Reference, supra, note 1, 364-365. The Chief Justice could have added reference to relevant sections of the Constitution Act, 1982 that are outside the Charter: s. 35 (aboriginal rights) and s. 36 (promotion of regional equality).
- 207A. MacNeil, "Courts and Liberal Ideology", op. cit., note 140, p. 92.
208. Re Lavigne and Ontario Public Service Employees Union et al. (No. 2) (1987), 41 D.L.R. (4th) 86, discussed at pages 61-65, supra.
209. Ibid., p. 100-101.
210. Arlington Crane Service Limited and Ronald Panter v. Minister of Labour and Attorney General of Ontario et al., S.C.O., Dec. 22, 1988.
211. Ibid. See, e.g., pages 52-53, 78-79, and 83 of the Judgment. A similar approach was in Re Bhindi and Attorney-General of B.C. (1986), 29 D.L.R. (4th) 47 at 56 (B.C.C.A.).
212. Judgment reported at (1986), 55 O.R. (2d) 449.
213. "Agency shop" is another way of describing the "Rand Formula": Bendel, op. cit., note 142, 14.
214. Lavigne and OPSEU, Ontario Court of Appeal, Jan. 30, 1989, p. 39-40.
215. Ibid., 40.
216. Ibid., 41.
217. Ibid., 45.
218. Reference Re Section 94(2) of the Motor Vehicle Act (1986), 24 D.L.R. (4th) 536 (S.C.C.) at 553-554, per Lamer, J.
219. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 43:67.

220. Ibid., 43:69 and 70.
221. Ibid., 43:69. Other intervenors had made recommendations in the same spirit. A senior representative of the United Church of Canada admonished that "a Charter of Rights ... cannot serve its intended purpose unless it includes a section on the rights of workers to join unions and take collective action" (Rev. Clarke MacDonald, ibid., 29:81). The President of the Vancouver Peoples' Law School advised that explicit protection was needed for union organizing, because "various doctrines of individual freedom can be used by the court to deprive workers of the right and power needed to organize" (Diane Davidson, ibid., 32:11).
222. Quoted more fully just prior to note 94, supra.

Notes to Chapter 6

223. The headings now found in the Charter, though integral to the document and relevant to its interpretation, are not determinative of a section's meaning: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357.
224. Conference discussions in 1983 mooted possible applications of section 7 to legal aid, to social assistance and to the public housing field. See also the early speculation in P. Garant, "Fundamental Freedoms and Natural Justice", in W. Tarnopolsky and G. Beaudoin, eds., The Canadian Charter of Rights and Freedoms - Commentary (Toronto: Carswell, 1982) 257-290 at 264-265 and 271-274, primarily thinking about health and medical problems.
225. Two cases that dealt with collective bargaining under section 7 were Metropolitan Stores v. Manitoba Food and Commerce Workers, [1988] 5 W.W.R. 544 and Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland (1985), 53 Nfld. & P.E.I.R. 1. In the latter, no direct rationale was offered for holding that section 7 had no application to collective bargaining (p. 24 of the report).
226. Alberta Labour Reference, supra, note 1, 365.
227. Ibid., 368.
228. Finkelstein, op. cit., note 134, 99.
229. Carr, op. cit., note 140, 9.
230. Parkdale Hotel v. Attorney-General of Canada (1986), 27 D.L.R. (4th) 19 (F.C.T.D.); Horbas v. Min. of Employment and Immigration, [1985] 2 F.C. 359 (T.D.); Smith, Kline and French Laboratories v. Attorney General of Canada (1985), 24 D.L.R. (4th) 321 (F.C.T.D.).
231. This paper will not attempt the arduous task of fathoming the nuances of the phrase "and the right not to be deprived thereof except in

accordance with the principles of fundamental justice". Nor will it delve into the meaning of "life". It will be noted that if, in the opinion of the court, a legislative or regulatory scheme is manifestly unfair, it may be said to violate the principles of fundamental justice: R. v. Morgentaler, [1988] 2 S.C.R. 30 at 72-73. Section 7 has independent, substantive effect: Re Crain (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.).

232. "In the case of s. 7, it will be recalled, the Court has been at pains to give real meaning to each word of the section so as to ensure that the rights to life, liberty and security of the person are separate, if closely related rights": Law Society of British Columbia v. Andrews, S.C.C., Feb. 2, 1989, per La Forest, J. at p. 3 of his reasons. In Singh v. M.E.I., [1987] 1 S.C.R. 177 at 205-208, Wilson, J. indicated that "security of the person" may encompass more than "physical integrity", and in Jones v. The Queen, [1986] 2 S.C.R. 284, suggested that "liberty" means more than freedom from physical restraint. In Mills v. The Queen, [1986] 1 S.C.R. 863 at 919-920, Lamer J. interpreted "security of the person" to include some safeguard for mental aspects of human integrity.
233. Reference re Section 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486 at 500 per Lamer, J.
234. Ibid., 503.
235. See, for example, Edwards Books, [1986] 2 S.C.R. 713 (S.C.C.); R. v. Pinehouse Plaza Pharmacy, [1988] 3 W.W.R. 705 (Sask. Q.B.); Whitbread v. Walley, [1988] 5 W.W.R. 313 (B.C.C.A.); R.V.P. Enterprises v. British Columbia (A-G), [1988] 4 W.W.R. 726 (B.C.C.A.), leave to appeal to S.C.C. refused Sept. 29, 1988 (hereinafter R.V.P. Enterprises); Home Orderly Services v. Manitoba (1987), 43 D.L.R. (4th) 300, leave to appeal to S.C.C. refused Jan. 26, 1988 (hereinafter Home Orderly); Re Malartic Gold Mines and Ontario Securities Commission (1986), 27 D.L.R. (4th) 112; Bernard v. Dartmouth Housing Authority (1988), 11 A.C.W.S. (3d) 209 (N.S.C.A.).

McIntyre, J. observes that with few possible exceptions, mobility rights in section 6 being one, (see after note 270, infra), the Charter does not concern itself with economic rights: "Since trade unions are not one of the groups specifically mentioned by the Charter, and are overwhelmingly, though not exclusively, concerned with the economic interests of their members, it would run counter to the overall structure of the Charter to accord by implication special constitutional rights to trade unions". Alberta Labour Reference, supra, note 1, 412. This observation, however, predates a number of "livelihood" cases discussed infra in Chapter 6.

236. Irwin Toy Ltd. v. Quebec (A.G.), S.C.C. (released April 27, 1989) p. 85.

237. See, for example, Re Groupe des Eleveurs de Volailles de l'Est de l'Ontario and Canadian Chicken Marketing Agency (1984), 14 D.L.R. (4th) 151 (F.C.T.D.); Skalbania (Trustee of) v. Wedgewood Village Estates (1988), 11 P.C.W.S. (3d) 298 (B.C.S.C.) (unless the contract involves some activity which is itself a right protected under this section).
238. R. v. Lopes (1988), 5 W.C.V. (2d) 26 (Ont. Dist. Ct.).
239. Arlington Crane, *supra*, note 131, 61.
240. *Ibid.*, 67; on the same point, see also p. 107 of the judgment.
241. Metropolitan Stores v. MFCW, *supra*, note 225.
242. Labour Relations Act, C.C.S.M., c. L10, section 75.1.
243. *Ibid.*, p. 556-558. One other ground was section 2(d) of the Charter. Ferg, J. (at p. 555) stated his view that the framers of the Charter "never contemplated that s. 2(d) would protect what are purely contractual interests, albeit specialized in this case". Justice Ferg (at 552-554) also stated the opinion (quite possibly incorrect, as this thesis has argued) that in the Supreme Court trilogy, "a majority of the court found that freedom of association does not ... include, in the case of trade unions, a guarantee of the right to bargain collectively" as well as the right to strike. Ferg, J. said this perceived ratio also applied to management in the case at bar, and found that the challenged law was not reviewable under section 2(d).
244. Devine v. Quebec (Attorney-General) and Ford v. Quebec (Attorney-General) issued by the Supreme Court December 15, 1988.
245. Smith, Kline and French Laboratories, *supra*, note 230, at 363, *per* Strayer, J.
246. Medical Treatment and the Criminal Law, Working Paper No. 26 (Ottawa: Law Reform Commission of Canada, 1980) p. 6.
247. P. Garant, *op. cit.*, note 224, 271 and 274.
248. S.C. 1960, c. 44 (R.S.C. 1970, Appendix III).
249. C. Lipton, The Trade Union Movement in Canada, 1827-1959 (Montreal: Canadian Social Publications, 1967) p. 6.
250. Affidavit of Professor Desmond Morton, sworn 2 October 1985, filed in Lavigne v. OPSEU (1986), 29 D.L.R. (4th) 321 (S.C.O.), p. 6. para. 16.
251. See pages 83-86, *supra*.
252. PSAC V. Canada, *supra*, note 1, 450.

253. Riddell, op. cit., note 141 at 80.
254. Cavalluzzo, op. cit., note 191 at 199.
255. P. Weiler, op. cit., note 186 at 213.
256. P. Weiler, ibid., 31, cited by Dickson, C.J.C. in Alberta Labour Reference, supra, note 1, 369.
257. Morton, op. cit., note 250, p. 2. para. 4.
258. Ibid., p. 2, para. 3.
259. Ibid., p. 7, para. 19.
260. Ibid., p. 7, para. 18. In Lavigne v. OPSEU, supra, note 250, at D.L.R. 387, and in Lavigne v. OPSEU (No. 2) (1987), 41 D.L.R. (4th) 86 at 116, White, J. expressed the view that political initiatives (including support of the New Democratic Party) were "legitimate and appropriate functions for a trade union", to advance the broader interests of workers. (See also the excerpt from the latter judgment, at p. 66, supra). There is evidence that political activism by the labour movement in Canada has produced beneficial results in terms both of labour legislation and general social policy: R.J. Adams, "North American industrial relations: Divergent trends in Canada and the United States" (1989), 128 International Labour Review, No. 1, 47-53 and 58-63; K.D. Ewing, "Freedom of Association in Canada" (1987), 25 Alta. Law Rev. 437-460 at 460.
261. I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988), 46 Univ. of Toronto Faculty of Law Review 7-47 at p. 9.
262. D. Beatty and S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988), 67 Can. Bar Review (No. 4), Dec. 1988, 573-621 at 599.
263. D.E. Guest and P. Deive, "Why Do Workers Belong to a Trade Union?: A Social Psychological Study in the UK Electronics Industry" (1988), 26 British Journal of Industrial Relations 178-193; D.E. Leigh and S.M. Hills, "Public Sector-Private Sector Differences in Reasons Underlying Expressed Union Preferences" (1987), 16 Journal of Collective Negotiations 1-13; Adams, supra, note 130, 48.
264. Adams, ibid., 48-49.
265. "Why Employees Vote for Unions" (1988), 11 Management Report, No. 6, June, p. 5.
266. Beatty, "Labour is not a Commodity", in B.J. Reiter and J. Swan, eds., Studies in Contract Law (Toronto: Butterworths, 1980) 313-355 at 332.

267. Ibid., 333.
268. Ibid., 343.
269. See case discussion infra in this Chapter, and Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Re Abbotsford Taxi (1985), 23 D.L.R. (4th) 365 (B.C.S.C.); Weyer v. Canada (Feb. 16, 1988) 9 A.C.W.S. (3d) 78 (F.C.A.), leave to appeal to S.C.C. refused May 16, 1988.
270. See the cases discussed infra in this Chapter, particularly Law Society of B.C. v. Andrews (S.C.C., Feb. 2, 1989).
271. (1985), 17 D.L.R. (4th) 385 at 412, per McEachern, C.J.S.C. (B.C.).
272. Wilson v. Medical Services Commission of B.C. (1987), 36 D.L.R. (4th) 31, per Lysyk, J.
273. Wilson v. Medical Commission of B.C., [1989] 2 W.W.R. 1 (B.C.C.A., per curiam). The Wilson court observed (at 25) that the Charter "is not a statute containing a number of watertight compartments", only one of them presumably holding "mobility".
274. Ibid., 19.
275. (1984) 13 D.L.R. (4th) 436.
276. (1986) 27 D.L.R. (4th) 527.
277. In similar vein, see Martin v. A.G.B.C. (1988), 13 C.R.D. 525.20-04 (S.C.B.C.).
278. Arlington Crane Service v. Ontario Ministry of Labour (S.C.O.) (December 22, 1988).
279. Ibid., 119.
280. Ibid., 118.
281. Support for a "right to earn a livelihood" comes from the Federal Court of Appeal, per MacGuigan, J.A., in International Fund for Animal Welfare v. Canada, discussed at note 348 ff. infra.
282. Law Society of B.C. v. Andrews (S.C.C.) (Feb. 2, 1989, per McIntyre, J., for the majority).
283. Black v. Law Society of Alberta, S.C.C., April 20, 1989.

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284. Law Society of British Columbia v. Andrews (S.C.C., Feb. 2, 1989). In at least two cases, the court found it unnecessary to discuss the

- meaning of section 15, though it had been argued: Devine v. Quebec (Attorney General) (S.C.C., Dec. 15, 1988) (at 29-30); Reference Re Education Act (Ontario) (1988), 40 D.L.R. (4th) 18 (at 27 and 60).
285. Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, section 42.
286. Andrews, supra, note 284. Reasons of McIntyre, J., 9-10. Though McIntyre, J. (with Lamer, J.) dissented on the question of applying Charter section 1, the majority joined with his views regarding section 15.
287. Ibid. Reasons of McIntyre, J., 10-12.
288. Ibid., 12
289. Ibid., 12-15, 26-27.
290. Ibid., 19.
291. Ibid., 27.
292. Ibid. Reasons of McIntyre, J., 18-27; Reasons of Wilson, J., 1 and 4; Reasons of La Forest, J., 2-3.
293. Ibid. Reasons of Wilson, J., 4, referring to Ibid. Reasons of McIntyre, J., 19.
294. Ibid. Reasons of Wilson, J., 4.
- 294A. Per Wilson, J. at pp. 35-36.
- 294B. Ibid., at 42.
295. Ibid. Reasons of McIntyre, J., 15.
296. See Labour Relations Act, R.S.O. 1980, c. 228, section 2(a).
297. Ibid., section 2(b).
298. A lengthier list of examples from Ontario and elsewhere is provided by J.E. Dorsey, in "Freedom of Association in Employment, Excluded Employees, and the Canadian Charter of Rights and Freedoms" (1983), 41 The Advocate 233-244 at p. 233.
299. Carr, op. cit., note 140 at 2.
300. Woods, op. cit., note 149 at 140.
301. See text at note 294, supra.
302. Andrews, supra, note 284. Reasons of McIntyre, J., 19.

303. Quebec Charter of Human Rights and Freedoms, R.S.Q. 197, c. C-12, section 10.
304. The Human Rights Code, C.C.S.M. 1987, c. H175, section 9(2)(j).
305. As an illustration of the wider complexity, note that a chart detailing legislated differences among collective bargaining mechanisms (as of 1984) within the "Crown corporation" sector shows real diversity among the 11 Canadian jurisdictions covered: "Industrial relations legislation pertaining to Canadian public enterprises", in M. Thompson and A. Ponak, "International relations in Canadian public enterprises" (1984), 123 International Labour Review 647-663 at 654-655.
306. Alberta Labour Reference, supra, note 1, 391-392.
307. Arlington Crane, supra, note 278, 120-129.
308. Lavigne and OPSEU (O.C.A.), Jan. 30, 1989, 58-64.
309. Re Hutton (1988), 62 O.R. (2d) 676 at 690-691.
310. It is acknowledged that this simplified view ignores the potential bargaining clout presented by threatening disruption of essential public services. On the other hand, governments now have an extra trump card, section 33 of the Charter (the "notwithstanding clause") which was used by the government of Saskatchewan to bolster back-to-work legislation in the dairy producers-dairy workers dispute in 1986: An Act to provide for Settlement of a Certain Labour-Management dispute between the Government of Saskatchewan and Saskatchewan Government Employees' Union, Bill. No. 144 of 1984-85-86, preamble and section 9.
311. S. Sherwin, "Rights and Collective Bargaining, Part II" (1984), 19 Valparaiso University Law Review 96-120 at 119.
312. Wright and Attorney-General of Canada (1986), 56 O.R. (2d) 636 (Killeen, D.C.J.); (1988), 62 O.R. (2d) 737 (Div. Ct.).
313. Kurolak v. Min. of Highways and Transportation (Saskatchewan) (1986), 28 D.L.R. (4th) 273.
314. R. v. Stoddard (1987), 37 C.C.C. (3d) 351 (O.C.A.).
315. Ontario Public Service Employees Union v. Ontario (Attorney-General) (1988), 65 O.R. (2d) 689 at 711.
316. Petter and Monahan, op. cit., note 100, 111-114.
317. 1960 S.C., c. 44 (R.S.C. 1970, Appendix III), section 1(b).
318. PSAC v. Canada, supra, note 1, 444-445.

319. Ibid., 454.

320. Ibid., 458.

321. Ibid., 459.

Notes to Chapter 8

322. Collymore interpreted freedom of association under the Trinidad and Tobago Constitution, finding that it "means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group". Sir Hugh Wooding, C.J., of the Court of Appeal of Trinidad and Tobago, quoted by McIntyre, J. in Alberta Labour Reference, [1987] 1 S.C.R. 313, at page 399.

323. This interpretation is not based on any authority, however,

324. The significance of international law was addressed by Dickson, C.J.C. in Alberta Labour Reference, supra, note 322 at pages 348-359.

325. "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Supreme Court Law Review 287-302, at page 293.

326. Jennie Hatfield Lyon and John E. Claydon, "International and Comparative Sources for Interpreting the Charter: A Selective Annotated Bibliographic Guide", in A Practical View of the Charter for Solicitors and Barristers (Toronto: Canadian Bar Association-Ontario, 1986), Chapter 1, 39 pages.

327. Ibid., page 1.

328. - Attorney-General of Ontario, Sources for the Interpretation of Equality Rights Under the Charter (Toronto: Government of Ontario, Ministry of the Attorney-General, 1985);
- J. Claydon, "The Application of International Human Rights Law by Canadian Courts" (1982), 30 Buffalo Law Review 727-752;
- M. Cohen and A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 Can. Bar Rev. 265-313;
- M.A. Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justification" (1985), 23 Univ. of Western Ont. L. Rev. 9;
- R.A. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources (Toronto: Carswell, 1982);
- D. Turp, "Le recours au droit international aux fins d'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel" (1984), 18 R.J. Themis 353-411.

These authorities (in addition to that cited at note 325, *supra*) were also listed by Hatfield, Lyon and Claydon (n. 326). The following sources have also been canvassed in preparation of this thesis: M. Bendel, "Freedom of Association Under the Canadian Charter of Rights and Freedoms" (Ottawa, 1984, unpublished); R. St. J. Macdonald, "The Relationship between International Law and Domestic Law in Canada", in R. St. J. Macdonald, G.L. Morris and D.M. Johnston, eds. Canadian Perspectives on International Law and Organization (Toronto: Univ. of Toronto Press, 1974). A translation of the Bendel paper is published as "La liberte d'association dans l'optique de la Charte canadienne des droits et liberties", in D. Turp and G. Beaudoin, eds., Perspectives Canadiennes et Europeennes des Droits de la Personne Canadiens - Acts des Journees Strasbourgeoises (Cowansville, Quebec: Les Editions Yvon Blais) 1986, 321-349.

329. The article supplies a table of cases (updated from tables found in Turp, *ibid.*) showing that to June, 1986, 61 post-Charter cases had considered international human rights law (pages 12-18). Many of these citations would however involve instances where an instrument cited was, unlike the Covenants, clearly not binding on Canada (e.g. the European Human Rights Convention).
330. The Universal Declaration of Human Rights (G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948)) gave rise in 1966 to the International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200 A (XIXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966)), and the International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). They came into effect in 1976 (*per* Dickson, C.J.C. at page 350).
331. The Chief Justice notes that this process of advance federal-provincial pledging is detailed in International Covenant on Economic, Social and Cultural Rights: Report of Canada on Articles 10 to 12 (Prepared by the Department of the Secretary of State) (1982) at pages 1-8. Since 1976, there have been regular meetings of the Federal-Provincial-Territorial Committee of Officials Responsible for Human Rights, part of whose responsibility is to promote implementation of the International Covenants. This researcher attended these gatherings during 1983 to 1985, as well as related ministerial and working group meetings.
332. The published law report carries a minor misquotation, reading "of public order" rather than "or public order" (page 351).
333. A centrally important implementation clause found in the Economic and Social Covenant must be commented upon. Under Article 2(1), each party undertakes to take steps "to the maximum of its available resources" to achieve progressively "the full realization" of the Covenant rights, by legislative and other means. This call for progressive implementation is less forceful than a requirement that national situations of State Parties conform immediately. This

argument is arguably less persuasive if a State Party takes away collective bargaining rights that are already in place.

334. The Civil and Political Covenant, with a few differences that are not important for present purposes, contains general promissory and limiting provisions similar to those discussed supra re the Economic and Social Covenant. See Articles 2, 3, 4 and 5 of the Civil and Political Covenant.
335. Convention on Freedom of Association and Protection of the Right to Organize (1948). Ratified by Canada in 1972. Kalmen Kaplansky, Canada and the International Labour Organization, Ottawa: Labour Canada, 1981, Appendix I, p. 144.
336. Comprehensive analysis of the origins and operation of the I.L.O., particularly as these pertain to freedom of association, is available from the authorities listed below. Those that focus on Canada and the I.L.O. are indicated (*):

*M. Bendel, "The International Protection of Trade Union Rights: A Canadian Case Study" (1981), 13 Ottawa Law Review 169-180.

*P.J. Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively", in Weiler and Elliot, eds., Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1986).

I.L.O., Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (Geneva: I.L.O., 1983)

I.L.O., Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O. (Geneva: I.L.O., 1985).

*K. Kaplansky, Canada and the International Labour Organization (Ottawa-Hull: Labour Canada, 1981).

V. Leary, The International Labour Conventions and National Law (The Hague: Martinus Nijhoff, 1982).

Each of these resources was examined in preparation of this thesis.

337. His reasons state that Convention No. 87 came into force in 1972, the same year that it was ratified by Canada.
338. Quoting M. Forde, "The European Convention on Human Rights and Labor Law" (1983), 31 Am. J. Comp. L. 301 at 302, referring to the Committee on Freedom of Association (that examines complaints of violations of trade union rights) and the Committee of Experts (that assesses government reports on the application of I.L.O. standards in member states).

339. [1987] 1 S.C.R. 313 at 358-359.
340. Re Service Employees' International Union and Broadway Manor Nursing Home (1983), 44 O.R. (2d) 392.
341. Re Retail, Wholesale and Department Store Union (Dairy Workers) (1985), 19 D.L.R. (4th) 609.
342. Per Lamer, J. in Reference re Section 94(2) of The Motor Vehicle Act (1986), 24 D.L.R. (4th) 536 at 553-554.
343. Supra, note 340, p. 439.
344. Proceedings of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (November 12, 1980) 3:28.
345. R. Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid" [1982] UBC Law Review (Charter Edition) 11-57 at 25; Cavalluzzo, op. cit., note 191, p. 197.
346. Broadway Manor, supra, note 182, 441. The Concluding Document to the Vienna CSCE round, finalized in January 1989, which contains considerable amplification of the human rights aspects of the Helsinki Final Act, contains no further elaboration on the workers' rights enunciated in the Madrid document. When asked (by this researcher) why collective bargaining rights had not been enhanced in some way, Ambassador Bauer, head of the Canadian delegation, stated that western countries had not made an issue of it this time around, because it was felt that they could not achieve much more in this regard than had already been formulated in the Madrid text. He added that, in retrospect, this absence of new initiatives might not have been the correct course, and the relevant provisions should have been perhaps refined more. (Conversation at public consultation on the Helsinki-CSCE Process, Department of External Affairs, Lester B. Pearson Building, Ottawa, April 3, 1989.)
347. "Background Paper - An Overview of the CSCE Process", Department of External Affairs, November 1986, page 1 (of 7).
348. I.F.A.W. v. Canada (1988), 83 N.R. 303.
349. Ibid., 12.
350. [1987] 1 S.C.R. 313 at 349.
351. [1987] 1 F.C. 244.
352. (1988), 83 N.R. 303 at 314.

353. PSAC v. Canada (1984), 11 D.L.R. (4th) 337 at 354 (F.C.T.D.); Re Mitchell and The Queen (1983), 150 D.L.R. (3d) 444 (O.H.C.J.).
354. See the contemplation of this assumption by David Matas, "Domestic Implementation of International Human Rights Agreements" (1984), 4 Canadian Human Rights Yearbook 98-117 at 93.
355. Regard the reminder by Professor Bendel (n. 336), 196 that before ratifying I.L.O. Convention No. 87, Ottawa received the unanimous approval of the provinces. See also confirmation that ratification of the 1976 International Covenants on human rights took place in a process of full consultation with the provincial governments: Noel Kinsella, Chairperson, New Brunswick Human Rights Commission, "The Domestic Impact of the International Covenants on Civil and Political Rights in Canada", Fredericton, N.B.: Conference paper, unpublished, 63 pages (1987) at pp. 6-18.
356. [1987] 1 S.C.R. 313 at 349.
- 356A. Davidson v. Slight Communications Inc., S.C.C. (released May 4, 1989) at pp. 14-15. The judgment cites the International Covenant on Economic, Social and Cultural Rights, supra, note 330, in rendering a decision on wrongful dismissal.

Notes to Chapter 9

357. See discussion in Chapters 1-4, supra, particularly concerning the Supreme Court trilogy of judgments listed at note 1.
358. Dolphin Delivery, [1986] 2 S.C.R. 573; B.C. Government Employees' Union v. B.C. (Attorney-General), S.C.C., Oct. 20, 1988.
359. See discussion in Chapters 2-5, supra.
360. Id., particularly Chapter 5.
361. See discussion in Chapter 1.
362. The targets of restrictive legislation such as that reviewed in the trilogy, public sector workers, could use arguments such as the following:

"Employees in the public sector are in need of the same sort of collective bargaining power as are employees in the private sector. Confronted with the frequently unrealistic promises which politicians often make in their campaigns, the case can be made that public service workers need even greater job protection than private sector workers, since political forces may be even more erratic and inconsistent than those of the marketplace; it is unfair to demand that workers have to bear the burden of rash political slogans without having access to collective bargaining".

- S. Sherwin, op. cit., note 311, p. 119.
363. P. Kumar and D. Ryan, eds., Canadian Union Movement in the 1980s: Perspectives from Union Leaders (Kingston: Industrial Relations Centre, Queen's University) 188, 4-5.
364. Ibid., 4.
365. Id.
366. Id. and Update (newsletter of the National Union of Provincial Government Employees), Vol. 6, No. 7, April 5, 1989, p. 1.
367. Alberta Labour Reference, supra, note 1, 362-363, per Dickson, C.J.C.
368. Based on arguments found in "Written Submission of the Alberta Union of Provincial Employees", filed at the Alberta Court of Appeal level of the Alberta Labour Reference, 1984, pp. 7-9.
369. As one labour leader reportedly comments, "It appears that for the Supreme Court of Canada, a union is no different than a bowling league or a bingo club": Kumar and Ryan, op. cit., note 363, p. 4.
370. Cavalluzzo, op. cit., note 336, p. 203.
371. It might be added that unions are not always truly representative of each individual member. Nor do they always champion her or his personal liberty, security or aspirations.
372. One wonders if any significance should be deduced from this phraseology chosen by Dickson, C.J.C. in linking picketing with collective bargaining: "Picketing is a crucial form of collective action ... It is an essential component of a labour relations regime founded on the right to bargain collectively and to take collective action". (Emphasis added): B.C.G.E.U. v. B.C. (A.G.), S.C.C., Oct. 20, 1988, Reasons of Dickson, C.J.C. at 14.
373. Arthurs, Carter and Glasbeek, op. cit., note 154, at p. 145. Additional guidance for defining what "collective bargaining" means in Canada can be received from passage quoted from Paul Weiler in note 165, supra.
374. H.D. Woods, Chairman, Canadian Industrial Relations, The Report of the Task Force on Labour Relations (Ottawa Privy Council Office, 1968), p. 138.
375. On these matters, though not in a constitutional context, see: Riddell (n. 141), 8; M. Bendel, "A Rational Process of Persuasion: Good Faith Bargaining in Ontario" (1980) U.T.L.J. 1-45; B.A. Langille and P. Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988),

13 Queen's L.J. 62-102; A. Forrest, "Bargaining Units and Bargaining Power" (1986), 4 Relations Industrielles 840-850.

376. Alberta Labour Reference, supra, note 1, p. 413.
377. "This exercise of freedom of association serves more than the individual interest, advances more than the individual cause; it promotes general social goals. Of particular importance is the indispensable role played by freedom of association in the functioning of democracy" (ibid., per Dickson, C.J.C., at 396). "States which suppress the rights associated with collective bargaining inevitably go on to suppress other human rights": "Brief to the Joint Committee on the Constitution of Canada - By the United Church of Canada" Ottawa: December, 1980 (Appendix CCC-7 to Proceedings, op. cit., note 344 at 29A:18.
378. Ford v. Quebec (Attorney General), S.C.C., Dec. 15, 1988, pages 58-59 of the Court's joint reasons.

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