

**“Lest You Undermine Our Struggle”:
Sympathetic Action and the *Canadian Charter of Rights and Freedoms***

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By

Keir J.M. Vallance

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ABSTRACT

In this thesis I address the question of sympathetic action - action by one group of workers designed to aid another group of workers in their struggle with an employer, manifested most obviously through refusals by workers to cross a picket line - through the lens of the *Canadian Charter of Rights and Freedoms*. As the law currently stands in Canada, undertaking sympathetic action collectively is invariably illegal as it is considered an illegal "strike" under Canadian labour legislation. Further, workers who undertake sympathetic action - whether collectively or individually - can be subject to discipline or discharge by their employer. I argue that workers who undertake sympathetic action can have numerous motivations, ranging from economic self-interest to deeply-held political or moral beliefs (the latter manifested through the concept of "solidarity"), and that when those motivations include expressive or conscientious interests, sympathetic action should be entitled to protection by the fundamental freedoms of conscience, expression, and association found in section 2 of the *Charter*. I further argue that each of these freedoms represents a different aspect of the inherent dignity and worth of an individual, and that a right to sympathetic action promotes both those freedoms and *Charter* values. Finally, I argue that a constitutional right to sympathetic action is a free-standing right that can exist even in the absence of a constitutional right to strike.

This thesis reviews the current and historical state of Canadian law (in both the statutory labour relations regimes and in common law) regarding sympathetic action, the potential application of the *Charter* freedoms of conscience, expression, and association to sympathetic action, and finally options for reform that reduce or eliminate restrictions on sympathetic action and therefore make our labour relations system more in keeping with *Charter* values.

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INTRODUCTION

One of the great strengths of the trade union movement is the spirit of solidarity. By standing together as a collective whole, trade unionists are able to aspire to improved wages and working conditions unattainable if each individual member were left to his or her own devices. Solidarity is made manifest when one group of workers is on strike. Fellow unionists and other sympathetic members of the public are made aware of the strike by the presence of picketers. Picketing sends a strong and automatic signal: do not cross the line lest you undermine our struggle...

Chief Justice Brian Dickson¹

*This Government had an idea, and Parliament made it law.
Seems like it's illegal to fight for the Union any more.
So which side are you on, boys? Which side are you on?
Which side are you on, boys? Which side are you on?*

Billy Bragg²

In labour relations, *sympathetic action* is at its most basic "action by one group of workers designed to aid another group in their struggle with an employer"³. It is a broad term that manifests in many ways. It can include, *inter alia*, workers refusing to cross a picket line or "locked gate"; refusing to handle goods from a struck workplace; or refusing to enable their own employer to increase production to make up for shortfalls due to another workplace being struck. It is an expression of solidarity among workers, and is a key plank in the foundation upon which organized labour's early successes were built.

¹ *BCGEU v. British Columbia (Attorney-General)* ("BCGEU"), 1988 CanLII 3 at para. 28.

² "Which Side Are You On". *Life's a Riot/Between the Wars* (1985, CD Presents USA).

³ Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary* (6th Ed.) (Kingston: IRC Press, 1998) at 452.

Under the current Canadian model of labour law, however, sympathetic action is almost always illegal. It generally qualifies as a "strike"⁴, whether it arises in response to a strike (or lockout) or not; but while it is therefore subject to all of the restrictions on strike action present in Canadian labour law, it does not have the corresponding freedoms. Sympathetic action cannot be authorized by strike vote, for instance, nor are sympathy strikers given the protections afforded strikers in an "ordinary" strike. Indeed, unions and workers who engage in sympathetic action can injunctions, fines, or sanctions under labour relations legislation, as they can with any illegal strike.⁵ Individual workers are vulnerable to discipline or dismissal. Both unions and workers may be vulnerable to being sued for damages pursuant to the so-called "industrial torts".⁶

I contend, however, that the prohibition on sympathetic action in Canadian labour law infringes upon the fundamental rights and freedoms guaranteed in the *Canadian Charter of Rights and Freedoms*⁷ and, specifically, the freedoms of conscience, expression, and association that are protected under sections 2(a), (b), and (d) respectively of the *Charter*. I will argue that there is a right to undertake sympathetic action on the part of unions and workers represented by unions but also on the part of individual, non-unionized, employees.⁸ And I will argue that the right to take sympathetic action is not inherently tied to the right to strike in itself, and that the freedoms of expression and conscience, at least, protect the right to sympathetic action even in

⁴ *Local 273, International Longshoremen's Association et. al. v. Maritime Employers' Association et. al.*, [1979] 1 S.C.R. 120; *Grain Workers' Union, Local 333 et. al. v. British Columbia Maritime Employers Association et. al.*, 2009 FCA 201 (CanLII) ("*Grain Workers*"), leave to appeal denied 2009 CanLII 71475 (S.C.C.).

⁵ A union can even face penalties for not taking an active role, or not an active enough role, in preventing or ending an illegal strike. E.g. *Westroc Inc. v. National Automobile Aerospace Transportation and General Workers Union of Canada (CAW Canada)*, [2002] CanLII 41383 (Ont. LRB).

⁶ See e.g. Harry Arthurs, "Tort Liability for Strikes in Canada" (1960), 38 Can. Bar Rev. 346.

⁷ Part I of the *Constitution Act, 1982*, being Schedule B to *The Canada Act, 1982* (U.K.) (the "*Charter*").

⁸ While "sympathetic action" tends to refer to *collective* action by workers, for the purposes of this paper I will also use the term to reflect *individual* action in support of other workers.

the absence of a right to strike. For the sake of convenience I will use the term "industrial action" to encompass both "true" strikes and sympathetic action.

Theoretical Approach

Before turning to the law, it may be helpful to review the theoretical approach towards labour rights which underlie this paper. While I do not view the right to sympathetic action as inherently tied to the right to strike *stricto sensu*, the rationales for protecting sympathetic action are similar to those for protecting the right to strike. The right to undertake industrial action (whether against one own's employer or in sympathy with other workers striking against theirs) could, broadly speaking, be seen as a *socio-economic* right, a *political* right, or a *civil* right (or civil liberty).⁹ Each approach brings its own set of assumptions and justifications. The socio-economic perspective emphasizes the importance of industrial action as "an important factor in the maintenance of fair wages and reasonable working conditions...This is premised on the understanding that there is an imbalance in bargaining power between an employer and workers, such that in the absence of a right to strike 'collective bargaining would amount to collective begging'."¹⁰ The political perspective views the right to industrial action as an important part of democracy both in the workplace (the concept of 'industrial democracy') as well as in society in general. The imbalance of power between employers and workers remains an important presumption but the "political" right centres around protecting and promoting the participation of workers in decision-making and politics.¹¹ Finally, the civil liberty perspective recognizes "the difference in status between 'socio-economic' rights and 'civil liberties' under certain national

⁹ See Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), ch. 3.

¹⁰ *ibid.* at 49-50.

¹¹ *ibid.* at 56ff.

constitutions and international human rights instruments" and attempts to "forge a link between the right to strike and more commonly recognized civil liberties, the prime example being freedom of association."¹² This was the approach taken by the dissent at the Supreme Court of Canada in the so-called *Labour Trilogy*¹³ in 1987 and by the Saskatchewan Court of Queen's Bench in *Saskatchewan Federation of Labour v. Saskatchewan*¹⁴ explicitly recognizing the right to strike.

The argument herein is based upon the *Charter* and approaches the right to industrial action as a fundamental right. As such, it approaches the right to strike primarily from a "civil liberty" perspective. However, it is impossible to separate the *Charter* argument from the socio-economic or political perspectives. The socio-economic and political value of industrial action are necessary considerations when determining if limitations on the right to industrial action are reasonable and justified. Furthermore, the political value is important when considering whether one fundamental freedom in particular - freedom of expression - applies to industrial action at all.

¹² *ibid.* at 65.

¹³ *Reference re Public Service Employees Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *Public Service Alliance v. The Queen*, [1987] 1 S.C.R. 424 ("*PSAC*"); *R.W.D.S.U., Local 544 v. Government of Saskatchewan*, [1987] 1 S.C.R. 460 ("*Dairy Workers*"). Harry Arthurs has succinctly described the results of the Labour Trilogy as "management three, labour nil": "*Labour and the 'Real' Constitution*", (2007) 48 C. De D. 43 at para. 8.

¹⁴ *Saskatchewan Federation of Labour v. Saskatchewan*, 2012 SKQB 62 ("*Saskatchewan Federation of Labour*"), rev'd 2013 SKCA 43. While the portion of *Saskatchewan Federation of Labour* that dealt with the right to strike was overturned on appeal, the methodology and approach taken in the lower court were not dealt with specifically. For other examples of the "civil liberties" approach to the right to strike, see also *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2009 BCCA 39 ("*BCTF*"), leave to appeal denied 2009 CanLII 44624 (S.C.C.), where the B.C. Court of Appeal held that the right to engage in protest strikes was protected by section 2(b) of the *Charter*; and the dissent in *Grain Workers*, *supra* note 4, which held that the right to engage in sympathetic action was protected under s. 2(d) - though the prohibition of sympathetic action was found in *Grain Workers* to be reasonable under section 1 of the *Charter*.

The Right to Sympathetic Action as an Individual Right

Based as they are upon the *Charter*, the arguments herein also accept that a right to sympathetic action is an individual, rather than a collective, right.¹⁵ Therefore, when a worker chooses to engage in sympathetic action alone, that is an expression of an individual right to do so - whether for conscientious or expressive reasons. When doing so in association with other workers, however, the right is an *individual* right exercised *collectively* - freedom of association remains an individual right.¹⁶ For the purposes of this thesis I will not challenge this conception of *Charter* rights. It should be noted, however, that *individual* sympathetic action does not run afoul of statute (though employer retaliation against a worker doing so is a distinct possibility). Only *collective* sympathetic action does.

Nonetheless, to view sympathetic action through the lens of individual rights can present problems. In any given sympathetic action situation, workers will undertake sympathetic action (or choose not to) for a variety of reasons. It is potentially unwieldy to ask the Courts or labour arbitrators to inquire individually about every striker's motive in a given strike situation.¹⁷

When undertaken collectively, one may also raise the further criticism that an emphasis on "personal philosophy" may "make it too easy to escape the statutory peace obligation."¹⁸ These same criticisms, however, may be levied at the Canadian courts' treatment of religion, and the courts have not shied away from taking individual applicants' beliefs into account in

¹⁵ For recent discussion of collective rights, see e.g. Dwight Newman, "Collective Interests and Collective Rights" (2004) 49 Am. J. Juris. 127, and *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

¹⁶ See a more detailed discussion of freedom of association as an individual right *infra*, p. 104 herein.

¹⁷ That said, if unionized workers are disciplined during a strike for respecting a picket line, it seems likely that, in any grievances brought by the Union regarding that discipline, an arbitrator would be called upon to do just that in any event, even absent *Charter* argument.

¹⁸ Geoffrey England, "Statutory Definition of 'Strike': Whether Honouring Picket Lines Constitutes a 'Strike'" (1979), 11 Ottawa L. Rev. 771 at 788.

situations concerning statutory restrictions or prohibition on religious practices.¹⁹ As one commentator has noted, "there seems to be no reason in principle why a genuine and honest belief in union solidarity should not constitute evidence of individual decision-making so long as the employee's testimony is credible."²⁰ The potential difficulties should not preclude judicial oversight of labour relations legislation, nor should they prevent an evolution of the common law to conform to *Charter* values.

In the end result, as the Supreme Court noted in *Edwards Books*, "[b]y its nature, legislation must, to some degree, cut across individual circumstances in order to establish general rules."²¹ However, as the law currently stands, workers are unable to engage in sympathetic action *at all*. If undertaken individually, workers are subject to penalties and discipline from their employers. If undertaken collectively, statutory penalties may be invoked. The general rules amount to a prohibition. It is, I suggest, more desirable that when developing general rules, laws err on the side of *allowing* the exercise of *Charter* rights than restricting them.

Ideological Approaches to Labour Relations

The argument herein also approaches the question of sympathetic action from a particular ideology; as Professor Geoffrey England noted, "[a]ny evaluation of...legislation must be coloured by the ideological perspective of the evaluator."²² This is perhaps especially so in the realm of labour relations and, in particular, the politically charged subject of industrial action. The various ideological approaches to labour relations can be divided (albeit broadly) into five

¹⁹ E.g. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (objections to mandatory photo identification); *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 ("*Multani*") (the right to carry a *kirpan* - a ceremonial knife - at school by a Sikh student); *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713 ("*Edwards Books*") (the right for retailers who observed Saturday Sabbath to remain open on Sunday).

²⁰ England, "Statutory Definition of 'Strike'", *supra* note 18 at 788-789.

²¹ *Edwards Books*, *supra* note 19 at para. 137.

²² Geoffrey England, "Evaluating the Merits of the 2008 Reforms to Collective Bargaining Law in Saskatchewan" (2008), 71 Sask. L.R. 307 ["Evaluating the Merits"] at 309.

categories:²³ the *neoconservative*, which emphasizes the maximization of economic efficiency, provides little role for industrial conflict, and which downplays or dismisses the inequality of bargaining power between employers and workers; the *managerialist*, which focuses on managerial policies and practices towards workers and is primarily concerned with maximizing worker motivation and productivity; the *orthodox pluralist*, which "reflects the traditional philosophy underlying labour law in North America" and whose primary concern is to "find a balance between the need for efficiency in the economy with the need for equity and fairness in employment relations";²⁴ the *liberal-reformist*, which is concerned with "reducing or eliminating inequalities and injustices in the treatment afforded workers" and views the employment relationship as an "asymmetrical or imbalanced one in which management is in a dominant position by virtue of its authority";²⁵ and the *radical*, which maintains that the interests of labour and capital are diametrically opposed, that unions are of only limited effectiveness if they attempt to work within a capitalist system,²⁶ and that legislation that enhances employee rights is problematic because it institutionalizes industrial conflict and enshrines the superior position of employers.²⁷

For the most part, this paper sits most comfortably in the liberal-reformist category. Its emphasis on industrial action necessarily means that conflict is seen as central to labour relations; its thesis that industrial action is constitutionally protected inherently recognizes the value of collective action and the inequality of power within the workplace, as well as the strike as valuable in itself. As such its approach is hostile to the neoconservative and managerial

²³ John Godard, *Industrial Relations, the Economy, and Society* (2d ed.) (North York: Captus Press, 2000) at 11ff.

²⁴ *ibid.* at 16.

²⁵ *ibid.* at 17.

²⁶ *ibid.* at 18-19.

²⁷ England, "Evaluating the Merits", *supra* note 22 at 307.

perspectives. Although the balancing of interests between employers and workers is an important consideration (especially regarding section 1 analysis), a focus on fundamental rights cannot have balance as its primary focus and therefore is not suited for orthodox pluralism. That said, this paper recognizes the legitimacy of the *Charter* and of the courts in matters of labour relations, and does not challenge the assumptions of market capitalism to the extent of the radical perspective.

Nonetheless this paper accepts that the employer, in the vast majority of cases, has bargaining power superior to that of the individual employee. Both labour standards and labour relations legislation have as a primary goal an equalization of the power imbalance inherent in the employment relationship, and a reflection of a post-World War II consensus that workers have what Professor Harry Arthurs has, in his Report on labour standards, termed a "right to decency":

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent."...

[T]his first principle [i.e. decency] is the pre-eminent principle. In the event of conflict, it trumps the other principles...it is of the essence not only of labour standards legislation, but of Canada's entire social, economic and political development. ...²⁸

Similarly, in his famous dissent in the *Alberta Reference* Dickson C.J. noted the importance of collective bargaining in promoting important values that underlie the *Charter*:

Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*...all of these

²⁸ Commission on the Review of Federal Labour Standards, *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Privy Council Office, 2006) (the "Arthurs Report") at p. 47. This sentiment had earlier been recognized, if not in those terms, by the Supreme Court in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, where the Court held that employment standards legislation is to be interpreted in a "broad and generous manner" (para. 36); and in that case (at para. 40) and in *Machtiger v. H.O.J. Industries Ltd.*, [1992] 1 S.C.R. 986 where it was held that the object of employment standards legislation was "to protect the interests of as many employees as possible."

values are complemented and, indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*...the right to bargain collectively with an employer enhances the human dignity, liberty, and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work...²⁹

At the core of this paper's constitutional inquiry are the fundamental questions: Does the current status of sympathetic action promote or interfere with workers' right to decency? Does it promote the *Charter* values identified by Chief Justice Dickson?

Criticisms of Charter Discourse in Labour Rights

There are of course ample criticisms of viewing industrial action through the lens of *Charter* rights and freedoms. There has been and is significant hostility within the labour relations community to a rights- or *Charter*-based analysis of labour law. Such hostility is perfectly understandable, whether it is based on distrust of the judiciary³⁰ after a “century of bruising encounters with judges determined to manipulate the common law and legislation to extinguish rights of workers”,³¹ scepticism over the efficacy or practicality of constitutional litigation as a means of protecting labour rights;³² or a rejection of rights-based rhetoric or legalism in labour relations generally.³³

²⁹ *Alberta Reference*, *supra* note 13 at paras. 81-82.

³⁰ E.g. Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada” (2008), 61 *Labour/Le Travail* 151; Judy Fudge, “Labour, Courts, and the Cunning of History” (2010), 16 *Just Labour* 1; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishing, Inc., 1994), Ch. 5; Harry Arthurs, “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) 17.

³¹ Sandra Freedman, “Scepticism Under Scrutiny: Labour Law and Human Rights” in Tom Campbell *et. al.* (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2002) 197.

³² E.g. Bryan Palmer, “What’s Law Got to Do With It?: Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority” (2003), 41 *Osgoode Hall L.J.* 465; Harry Arthurs, “The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems” (2010), 19 *Social & Legal Studies* 43, and “Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging” (2010), 15(2) *C.L.E.L.J.* 373; Bob Hepple, “The Right to Strike in an International Context” (2010), 15(2) *C.L.E.L.J.* 133; Harry Arthurs and Brent Arnold, “Does the Charter Matter?” (2005), 11 *Rev. Const. St.* 37; Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support case in Canada and Beyond” (2008), 37 *Indus. L.J.* 25; Paul J.J. Cavaluzzo, “Freedom of Association – its Effect upon Collective Bargaining and Trade Unions” in *Labour Law Under the Charter*, *supra* note 30 at 267

The criticisms of *Charter* discourse in the labour relations sphere are part of an ongoing debate among those sympathetic to unions since the advent of the *Charter* - one between, in Brian Etherington's terms, *Charter* "romantics," "realists," and "pragmatists."³⁴ That said, it must be noted that there are also those who have seen *Charter* rights (and the use of the language of human rights generally) as a welcome addition to the labour field³⁵ and caution that exclusion from constitutional discourse leaves labour vulnerable to government action.³⁶

Nonetheless, with each of the concerns mentioned above comes a fear that opening the existing system of labour relations to criticism can create opportunities to weaken those rights currently enjoyed by labour. *Charter* arguments can cut both ways. But despite the problems inherent to constitutional litigation in the labour field, to simply cede the field to labour's opponents is, in my view, unwise. Regardless of whether labour attempts to use the *Charter* in its favour, those opposed to the interests of unions can be relied upon to use the *Charter* against

["Freedom of Association"]; Charles W. Smith, "Labour, Courts and the Erosion of Workers' Rights in Canada" in Stephanie Ross and Larry Savage (eds.), *Rethinking the Politics of Labour in Canada* (Winnipeg: Fernwood Publishing, 2012) 184.

³³ E.g. Palmer, *ibid.*; Eric Tucker, "Labor's Many Constitutions (And Capital's Too)" (2012), 33 Comp. Lab. L. & Pol'y J. 355; Harry Arthurs, "Labour Law Without the State?" (1996), 46 U. of T. L.J. 1 and "The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration" (1999), 7 C.L.E.L.J. 45; Larry Savage, "Labour Rights as Human Rights? A Response to Roy Adams" (2008), 12 Just Labour 68; Allan Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988), 38 U. Of T. Law Journal 278.

³⁴ Brian Etherington, "An Assessment of Judicial Review of Labour Laws Under the Charter: of Realists, Romantics and Pragmatists" (1992), 24 Ottawa L. Rev. 685.

³⁵ E.g. Roy Adams, "The Revolutionary Potential of *Dunmore*" (2003), 10 C.L.E.L.J. 117, "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" (2008), 12 Just Labour 48, and *Labour Left Out: Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Canadian Centre for Policy Alternatives, 2005); Ken Norman, "What's Right is Right: The Supreme Court Gets It" (2008), 12 Just Labour 16 and "Ficus Elastica" (2010), online at http://blogs.usask.ca/foa2010/2010/03/ficus_elastica.html (last visited April 29, 2013); Bradley Walchuk, "The Best of Both Worlds: A Pragmatic Approach to the Construction of Labour Rights as Human Rights", 14 Just Labour 75 at 78; Guy Davidov, "Judicial Development of Labour Rights – Contextually" (2010), 15(2) C.L.E.L.J. 235; David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill Queen's University Press, 1987); Canadian Foundation for Labour Rights website, www.labourrights.ca.

³⁶ E.g. David Beatty, "Labouring Outside the *Charter*" (1991), 29 Osgoode Hall L.J. 839; Alan Hyde, "Exclusion is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven To Be a Bad Deal for American Trade Unions and Constitutional Law" (2010), 15(2) C.L.E.L.J. 251.

labour.³⁷ Even if *Charter* litigation does not have much power to improve the lot of unions and workers, it seems clear that discounting the *Charter* has the possibility of *worsening* their lot, allowing governments to run roughshod over labour rights without oversight, and granting anti-union groups free reign in the judicial arena. It is important to make those unfriendly to labour aware that there is risk in acting too cavalierly in stripping away the rights unions have fought hard to win.

Further, while this thesis accepts (for the purposes of the arguments herein) the legitimacy and value of *Charter* discourse in the labour field, this acceptance (and hence my response to the criticisms mentioned above) is mostly pragmatic. The *Charter* is a *fait accompli*; perhaps the courts are not the ideal arbiters of labour policy, but “the *Charter*, especially in s. 1, makes it plain that, for better or worse, the courts are expected to deliberate on the pith and substance of legislative policy choices.”³⁸

Charter arguments for labour rights are part of a broader conversation within society about the role of unions and the value of labour relations. They are not the only, or even the best, argument to make; but they will, hopefully, provide a basis for political or moral arguments in the broader political sphere even if they do not result directly in victories in court. And as has been noted in the American context “the complete exclusion of labour activity from the Constitution has been tried in the United States, and it has failed. It does not improve constitutional law to be walled off from problems raised by labour activity.”³⁹ Similarly “a

³⁷ The National Citizens' Coalition, a conservative lobby group, for instance, funded the applicant's challenge against a union's ability to use dues in political action: *Lavigne v. OPSEU*, 1991 CanLii 68 (S.C.C.). The Open Shop Contractors' Association, a group dedicated to dismantling the union, and even agency, shop system in Canada, was an intervenor in *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209.

³⁸ Geoffrey England, "Some Thoughts on Constitutionalizing the Right to Strike" in *Labour Law Under the Charter*, *supra* note 30, 168 ["Constitutionalizing the Right to Strike"] at 176.

³⁹ Alan Hyde, "Exclusion is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven to be a Bad Deal for American Trade Unions and Constitutional Law" (2010), 15(2) C.L.E.L.J. 251.

judicial endorsement of a fundamental right – especially in a politically charged context – can, arguably, exert considerable influence on political and legal culture which, in turn, can influence the development of enforceable legal norms.”⁴⁰

The *Charter* should not (and cannot) replace advocacy and organizing on the part of the labour movement in promoting the rights of unions and their members. Nonetheless, in 2007 the Supreme Court fully embraced collective bargaining as a constitutional right⁴¹ after just as fully rejecting that position twenty years earlier in the *Labour Trilogy*, and constitutional argument now appears to be a much more viable tool to promote the rights of labour than it did prior to *B.C. Health Services*. The *Charter* can be part of a “muti-faceted fight back campaign to protect and promote the rights of working people;” a strategy for labour that “employ[s] rights-based arguments and use[s] the *Charter* and international labour accords to its advantage, while simultaneously recognizing the limitations inherent in this strategy.”⁴²

Thesis Structure

In approaching the question of sympathetic action, I have divided this paper into three Parts.

In Part I, I review the status and history of sympathetic action in Canadian law. I analyze the characterization of sympathetic action as a "strike" and the reasons for and assumptions inherent in the now-universal prohibition on sympathetic action. I also review the status of sympathetic action under the common law as it relates to the non-unionized worker.

⁴⁰ James Gray Pope, “The Right to Strike Under the United States Constitution: Theory, Practice, and Possible Implications for Canada” (2009), found online at http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (last visited July 31, 2013).

⁴¹ *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27 (“*B.C. Health Services*”).

⁴² Walchuk, *supra* note 35 at 87.

In Part II, I apply three *Charter* freedoms - conscience, expression, and association - to sympathetic action. I will argue that these three freedoms all protect a right to sympathetic action in different ways - in particular, the freedom of conscience will most clearly apply to the non-unionized worker - and that each freedom brings with it a different set of justifications for the right to industrial action. I examine whether the prohibition on sympathetic action under labour legislation can be saved under section 1 of the *Charter* and consider the balance of various private and public interests as part of this assessment. I conclude that a legislative blanket prohibition on sympathetic action is unconstitutional and that it is not justifiable under section 1.

In Part II, I also examine those same freedoms as they apply to the non-unionized worker. I argue that the Canadian common law, which treats sympathetic action by a worker as a breach of that worker's contract of employment, is not consistent with *Charter* values and that it must change to conform with those values.

In Part III I put forward suggestions for reform. Because (or so I argue) the current limitations on sympathetic action cannot be saved under section 1 of the *Charter*, reform is necessary to labour relations legislation. I do not argue that there is an *unrestricted* right to sympathetic action, and therefore I examine options for a *regulated* right. I also suggest changes to the common law - either through changes to the common law itself or through legislative reform - to reflect *Charter* values.

PART I

SYMPATHETIC ACTION IN CANADIAN LAW

Canadian Legal Regimes

In Canada, broadly speaking, there are "three closely interrelated regimes that regulate the employer-employee relationship."⁴³ The first, the common law of employment, is based on the notion of the employment relationship as a contract negotiated between free and equal contracting parties and enforceable in the courts. The second, collective bargaining, accepts that the employee is usually the weaker party in any negotiation of an employment contract, and that the individual contract of employment is not a satisfactory regulatory mechanism. The individual employment contract is therefore replaced by collective negotiation between bargaining agents (unions or groups of unions) and employers or groups of employers. The third regime, direct statutory regulation, has historically been subordinate to the other two regimes. It includes employment standards and health and safety regulation, and its purpose was generally viewed as to provide basic protections to those workers who either could not obtain the protections of collective bargaining, or whose bargaining power (collective or individual) was not sufficient to win acceptable terms and conditions of employment.⁴⁴

The vast majority of Canadian employees operate under the common law of employment. They are neither union members nor bound by a collective agreement. Nationally, approximately thirty percent of Canadian workers were covered by a collective agreement in 2011, and therefore operated under the collective bargaining regime, but the national average is

⁴³ *Labour and Employment Law*, *supra* note 3 at 1. These regimes notably deal with "employees". Excluded from these regimes are workers who are true "independent contractors" and whose contractual relationship is based on the principles of commercial contracts generally rather than the principles underlying contracts of employment. While independent contractors may certainly take action in support of a union (for instance a consultant or lawyer who refuses to cross a picket line), this paper deals solely with sympathetic action taken by workers who are "employees", whether they be party to an individual contract of employment or covered by a collective agreement.

⁴⁴ *ibid.*

misleading. While three in four workers in the public sector were unionized, the unionization rate for workers in the private sector was less than one in five.⁴⁵

The common law contract of employment predates statutory recognition of collective bargaining. The common law regime and the collective bargaining regime have very different underlying principles. Government gradually became a "party to the employment relationship," by introducing labour standards legislation (part of the third regime described above) and labour relations legislation, as a response to "the hardships created by unemployment, underemployment, sweated labour, low wages, long hours, brutal supervision and unsafe and unhealthy working conditions."⁴⁶ However under both the common law and collective bargaining regimes as they currently stand, sympathetic action remains illegal. (Nor has the direct regulation regime altered this fact.⁴⁷) While restrictions on *strikes* over the past century-and-a-half were gradually relaxed⁴⁸ (admittedly with an increase in restrictions on strike activity since the 1980s⁴⁹) sympathetic action was in most Canadian jurisdictions illegal and remains so today.

Canadian labour law favours a "pluralist" approach to labour relations. The role of the state under such an approach is to maintain "a balance of power between labour and management."⁵⁰ The state, in theory, remains neutral between the interests of unions and

⁴⁵ Sharanjit Uppal, "Unionization 2011", report for Statistics Canada, online: <http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11579-eng.pdf> (last visited November 3, 2012).

⁴⁶ *ibid* at 13.

⁴⁷ See below, however, regarding the potential impact of fundamental labour rights in human rights legislation.

⁴⁸ For a summary of the evolution of strike regulation in Canada, see Judy Fudge and Eric Tucker, "The Freedom to Strike In Canada: A Brief Legal History" (2010), 15(2) C.L.E.L.J. 333.

⁴⁹ See e.g. Leo Panitch and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* (Aurora: Garamond Press, 2003) at p. 25 (where the increase in back-to-work legislation is characterized as "permanent exceptionalism") and p. 54; Charlotte Yates, "In Defence of the Right to Strike" (2009), 59 U.N.B.L.J. 128.

⁵⁰ Godard, *supra* note 23 at 283. See also *Labour and Employment Law*, *supra* note 3 at 421ff.

employers. Its role is to adjudicate and mediate disputes, so that the parties can meet on relatively equal terms and pursue their respective interests with minimum conflict.⁵¹ The freedom of contract between the union and the employer is a central consideration;⁵² while there is government intervention, the system remains an "essentially capitalistic although mixed enterprise economy."⁵³ As a result, those who support the pluralist approach tend to view industrial action as valuable only as a tool - not a "fundamental, inalienable, personal right," but justified "because of its instrumental role in our larger industrial relations system."⁵⁴

While the strike has been described as "an indispensable part of the Canadian industrial relations system"⁵⁵, some scholars of labour relations, critical of the Canadian model of strike regulation and dubious about the power of the strike therein, have referred dismissively to the "(non)-right to strike"⁵⁶, or to strikes in Canada as a "velvet fist in an iron glove."⁵⁷ Yet despite being essential or ineffectual (or both), strikes inspire strong emotion, and similarly inflammatory language. The strike has been described as "economic warfare";⁵⁸ it is a "blunt instrument"⁵⁹. Governments treat it "like a bomb waiting to go off."⁶⁰ It can "cause chaos" and "is too powerful an instrument to go unrestrained."⁶¹ It may even have "a revolutionary

⁵¹ *ibid.*

⁵² Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 64.

⁵³ *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (the "Woods Report") (Ottawa: Privy Council office, 1968) at 12.

⁵⁴ Weiler, *supra* note 52 at 66.

⁵⁵ *ibid.* at 408.

⁵⁶ Larry Haiven, "PC 1003 and the (Non) Right to Strike: A Sorry Legacy" in Cy Gonick, Paul Phillips, and Jesse Vorst (eds.), *Labour Gains, Labour Pains: 50 Years of PC 1003* (Winnipeg: Fernwood Publishing, 1995) 215.

⁵⁷ Daniel Drache and Harry Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Toronto: James Lorimer & Company, 1992), Ch. 6.

⁵⁸ There are innumerable examples of this turn of phrase. See, for example, *Toromont Cat v. International Union of Operating Engineers, Local 904*, 2008 NLTD 22 (CanLII) at para. 30; *Canadian National Railway Company*, 2007 CanLII 72581 (CIRB) at para. 83.

⁵⁹ *Potash Corporation of Saskatchewan Mining Ltd. v. Todd* [1987] 2 W.W.R. 481 (Sask. C.A.) at 526.

⁶⁰ Weiler, *supra* note 52 at 60.

⁶¹ A.W.R. Carrothers *et al.*, *Collective Bargaining Law in Canada* (2nd Ed.) (Toronto: Butterworths, 1986) at 70.

flavour...[that] is anathema to the authorities, even if they are by no means totalitarian”⁶². The Anglo-Canadian judiciary has long been willing and eager to use its imagination in finding ways to stymie trade unions in general and strikes specifically.⁶³ Governments have "accepted strikes only grudgingly, with considerable ambivalence," and "[a] primary factor driving the evolution of Canadian labour law has been a desire to limit what are seen to be the detrimental effects of strikes."⁶⁴

Strict limits on sympathetic action are an important part of this Canadian pluralist approach to labour relations. A strike – even a particularly vicious and chaotic one – at a single workplace can inspire fear and uncertainty in the local community, and potentially invite government involvement either through the police or through the Courts via the injunction. Its impact will nonetheless be, for the most part, local – the “chaos” or “revolutionary flavour” relatively limited. But the impact of a strike is magnified if *other* workers and unions refuse to cross the picket line or take other sympathetic action. Of course it would be further magnified if fellow workers engaged in full sympathy strikes that would affect a number of workplaces and possibly a number of jurisdictions. Therefore as mentioned previously, workers and unions who undertake sympathetic action are vulnerable to fines and penalties under labour relations legislation, and to retaliation from employers for breach of contract.

Sympathetic Action as a "Strike"

At common law any sympathetic action short of cessation of labour will not be considered a strike; certainly in the English context, it has been argued that anything short of

⁶² Jean-Michel Servais, “The ILO Law and the Freedom to Strike” (2010), 15(2) C.L.E.L.J. 147 at 147.

⁶³ See, e.g., Arthurs, “The Right to Golf”, *supra* note 30 at 17 and “Tort Liability for Strikes in Canada” *supra* note 6; Beth Bilson, “Enter Stage Right: Players and Roles in a Post-B.C. Health Services World” (2009), 59 UNB L.J. 67; Fudge and Tucker, “A History of the Freedom to Strike”, *supra* note 48.

⁶⁴ *Labour and Employment Law*, *supra* note 3 at 421.

actual stoppage of work is not a strike.⁶⁵ Nonetheless the modern Canadian labour relations regime will view almost any sympathetic action, if taken collectively, as a "strike",⁶⁶ and this can apply to collective action whether taken by workers certified under the relevant labour relations legislation or not. "Because the timing of strikes is strictly regulated...[sympathetic] action is likely both to constitute a strike and to be untimely."⁶⁷ Among the industrialized market economies, Canadian restrictions on sympathetic action are among the most expansive:

In many countries solidarity strikes (sympathy strikes) are at risk if they are about non-economic matters, but they enjoy equal protection to that of other strikes as long as they are based on economic matters...At the other end of the spectrum are countries like Canada, New Zealand, Japan, Switzerland, and Britain, where almost every sympathy strike, that has as its objective, putting pressure on a secondary employer, is considered unlawful.⁶⁸

Workers who are certified are prohibited from striking during the term of their collective agreement by the so-called "peace obligation"⁶⁹ – the absolute ban on strike activity by workers or their union (as well as a bar on lockouts by their employer⁷⁰) during the term of their collective agreement. Every labour relations statute of general application in Canada contains some version of the peace obligation,⁷¹ allowing strikes to take place only during "carefully

⁶⁵ See, e.g., Richard Hyman, *Strikes*, 2nd Ed. (London: Fontana, 1977) at 17; Otto Kahn-Freund, *Labour and the Law*, 2nd Ed., (London: Stevens & Sons, 1977) at 227; Otto Kahn-Freund and Bob Hepple, *The Law of Strikes*, (London: Fabian Society, 1972) at 4; *Royal Commission on Trade Unions and Employers' Associations 1965-1968* (London: Her Majesty's Stationery Office, 1968, reprinted 1975) (the "Donovan Report") at 242.

⁶⁶ George W. Adams, *Canadian Labour Law* (2nd Ed.) (Aurora: Canada Law Book, 2006-) at 11-5ff.

⁶⁷ *Labour and Employment Law*, *supra* note 3 at 452.

⁶⁸ A.T.M. Jacobs, "The Law of Strikes and Lockouts" in Roger Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (The Hague: Kluwer Law International, 2004) 549 at 560-561.

⁶⁹ Geoffrey England, "Some Thoughts on the Peace Obligation" (1980), 12:52 *Ottawa Law Rev.* 521 at 521.

⁷⁰ Canadian labour relations legislation usually sets up a symmetry between strike and lockout provisions, but this symmetry is illusory and it would be a mistake to view strikes and lockouts as equivalent. The countervailing power of the employer is not the lockout, but its right to manage the workplace, and its ability to "take a strike", rather than its right to lock out its workers. See Geoffrey England, "Constitutionalizing the Right to Strike", *supra* note 38 at 177.

⁷¹ British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 57; Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 71-74; Saskatchewan *Trade Union Act*, R.S.S. 1978, c. T-17, s. 44; Manitoba *Labour Relations Act*, C.C.S.M. c. L10, ss. 89 and 91; Ontario *Labour Relations Act*, S.O. 1995, c. 1, s. 79; Québec *Labour Code*, R.S.Q. c. C-27, s. 107 and 108; New Brunswick *Industrial Relations Act*, R.S.N.B. c. I-4, s. 53; Nova Scotia *Trade Union Act*, R.S.N.S. 1989,

regulated periodic bouts of bargaining for a collective agreement.”⁷² Those labour relations statutes of more specific application (or more specific provisions within the general legislation), especially those dealing with public sector workers,⁷³ usually have more stringent provisions against strike activity, either limiting the extent of strike action⁷⁴ or outlawing strikes entirely.⁷⁵ Disputes under a collective agreement are resolved via referral to a neutral arbitrator rather than through economic tests of power. Union members engaged in a legal strike receive a number of statutory protections, insofar as they are protected from employer retaliation⁷⁶ and the employer has certain further obligations, such as to maintain payments to benefit and pension plans⁷⁷ and to allow the workers to return to their previous jobs once the strike is over.⁷⁸

c. 475, s. 47; Prince Edward Island *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 36; Newfoundland *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 99; *Canada Labour Code*, R.S. 1985, c. L-2, s. 88.1.

⁷² Brian Langille, “What is a Strike?”, (2010), 15(2) C.L.E.L.J. 355 at 361.

⁷³ Legislation dealing with particular industries within the private sector may impose additional limits or erect additional procedural hurdles that a union must respect prior to taking strike action, however. This is particularly evident in the construction industry, which is often treated differently in labour relations legislation. See, for example, *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. 29-11, s. 22, requiring that conciliation take place prior to a strike or lockout commencing; Ontario *Labour Relations Act*, *supra* note 71, s. 150.3, prohibiting strikes and lockouts in the residential construction industry after June 15 of any given year; Alberta *Labour Relations Code*, *supra* note 71, s. 185 setting out special requirements for strike votes in the construction industry.

⁷⁴ For example, a number of statutes and statutory provisions set out that minimum staffing levels must be maintained by public service workers in the event of a strike; see *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2; *The Crown Employees Collective Bargaining Act*, S.O. 1993, c. 38; *The Government Essential Services Act*, S.M. 1996, c. 23. Others extend the notice period required prior to a strike or lockout for particular public employees, e.g. *The Police Act, 1990*, S.S. 1990-91, c. P15-01, s. 85 (120 hours notice required for police); Québec *Labour Code*, *supra* note 3, s. 111.0.23 (seven clear days notice required for public service employees).

⁷⁵ Such provisions generally remove the strike and lockout from the collective bargaining process and instead mandate arbitration to resolve bargaining disputes. E.g. *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14, s. 11 (hospitals); Nova Scotia *Trade Union Act*, *supra* note 71, s. 52A (police) and 52AA (firefighters); Québec *Labour Code*, *supra* note 71, s. 105 (police and firefighters).

⁷⁶ E.g., Saskatchewan *Trade Union Act*, *supra* note 71, s. 11(1)(l); Nova Scotia *Trade Union Act*, *supra* note 71, s. 53(3)(a).

⁷⁷ E.g., British Columbia *Labour Code*, *supra* note 71, s. 62; Saskatchewan *Trade Union Act*, *supra* note 71, s. 47.

⁷⁸ E.g. Saskatchewan *Trade Union Act*, *supra* note 71, s. 2(f)(iii) “‘Employee’...includes on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere...” and s. 46(1), “Following the conclusion of a strike or lock-out, where an employer and a trade union have not reached an agreement for reinstating striking or locked-out employees, the employer shall reinstate striking or locked-out employees in accordance with this section.” See also Ontario *Labour Relations Act*, *supra* note 71, s. 80.

Therefore sympathetic action, including refusals to cross another union's picket line,⁷⁹ boycotts and refusal to handle "hot cargo" from struck employers,⁸⁰ and of course "true" strikes, in sympathy of other unions are all also subject to the peace obligation. As Geoffrey England notes:

[T]he scope of unions to take sympathetic action in support of striking or locked out workers is very narrow under Canadian law. In view of the emergence of large, multi-plant companies which can shift operations between plants to counter union pressure, the value of sympathetic action to unions is obvious. Yet, the combination of the statutory "no-strike" ban during the collective agreement, the expansive definitions of "strike" as including action taken in support of other workers' disputes and the practice of certifying relatively narrowly drawn bargaining units renders this very potent weapon almost always illegal. Moreover, the law in most jurisdictions does not allow the union's pickets and "hot cargo" edicts to reach these secondary workers whose support it needs....[T]he rationale for laws restricting so-called "secondary" action has nothing to do with neutrality, quarantine or the rule of law, but is really concerned with keeping trade union power within "acceptable" boundaries (acceptable to the capitalist state, that is)...⁸¹

While sympathetic action will currently be considered a "strike" under the laws of all Canadian jurisdictions, this has not always been the case. Saskatchewan, for example, did not have a definition of "strike" at all in its legislation until 1983.⁸² As a result, prior to the 1983 statutory amendment, the common law definition of strike governed,⁸³ and it was not a "strike" if workers in Saskatchewan refused to cross a picket line.⁸⁴ In British Columbia prior to 1984, if

⁷⁹ *Grain Workers*, *supra* note 4; *Local 273, International Longshoremen's Association et. al. v. Maritime Employers' Association et. al.*, *supra* note 4. However individual refusals to cross a picket line may not constitute a "strike". See, for example, *Unilux Boiler Corp. v. United Steelworkers of America, Local 3950*, 2005 CanLII 20765 (Ont. L.R.B.).

⁸⁰ See, for example, *Re Kingston Whig-Standard and Communication Workers of America, Loc. 204* (1995), 51 L.A.C. (4th) 137 (H.D. Brown), in which a "hot cargo clause" in a collective agreement was found to be contrary to the ban on mid-contract strikes in the Ontario *Labour Relations Act*. See also, however, *East Kootenay Newspapers Ltd. v. Vancouver Printing Pressmen, Assistants and Offset Workers' Union, Local 25 et. al.*, [1987] B.C.L.R.B.D. No. 113, where a refusal to handle advertisements from a company subject to a "hot" declaration was ruled not to be an illegal strike due to a clause in the collective agreement that allowed workers to refuse struck work, to refuse to cross a picket line, and/or to refuse to handle "hot" goods.

⁸¹ Geoffrey England, "Constitutionalizing the Right to Strike", *supra* note 38 at 201.

⁸² *Saskatchewan Trade Union Act*, as amended S.S. 1983, c.81, s.3

⁸³ *Re Dominion Bridge Co. and U.S.W.A., Local 5917*, 15 L.A.C. (2d) 295 (Vancise).

⁸⁴ *Re Wascana Hospital and SGEU*, [1983] Jan. Sask. Labour Rep. 41.

workers refused to cross a picket line out of a feeling of solidarity for the striking workers, that would not be a "strike" under the B.C. legislation.⁸⁵ The New Brunswick Supreme Court has held in one case that it was not a "strike" when workers refused to cross picket lines,⁸⁶ but that case dealt with a "common employer" situation and, notably, does not appear to have been followed in subsequent cases in that province.⁸⁷

However, a broad definition of "strike" that will include most if not all sympathetic action, whether work actually ceases or not, is now essentially uniform across Canada. The definition of a "strike" in the *Canada Labour Code* is representative of Canadian labour legislation:

"Strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict and limit output.⁸⁸

Such a broad definition has been described as "objective"⁸⁹ or "effects-based"⁹⁰ in that the *purpose* of the activity is not relevant, only that it be done collectively ("in combination, in concert or in accordance with a common understanding") and that it limit production ("designed to restrict and limit output"). Six provinces have similar statutory language.⁹¹ Québec differs in that its strike definition refers to a "cessation" of work rather than to the broader "restriction of

⁸⁵ *MacMillan, Bloedel Packaging Limited v. Pulp, Paper & Woodworkers of Canada, Local 5 et. al.*, [1975] B.C.L.R.B.D. No. 92 (QL) at 4.

⁸⁶ *Furness Withy & Co. Ltd. v. Local 273, Int'l Longshoremen's Ass'n*, [1973] N.B.J. No. 211 (N.B.S.C.(Q.B.))(QL).

⁸⁷ Adams, *Canadian Labour Law*, *supra* note 66 at 11-6.

⁸⁸ *Canada Labour Code*, *supra* note 71 at s. 2.

⁸⁹ Langille, "What is a Strike?", *supra* note 72 at 355; England, "Peace Obligation", *supra* note 69 at 537.

⁹⁰ *BCTF*, *supra* note 14 at para. 3.

⁹¹ While the actual wordings differ, the provisions are similar enough – insofar as they have no "subjective" element – that they are not reproduced here. British Columbia *Labour Relations Code*, s. 1(1); Saskatchewan *Trade Union Act*, s. 2; Ontario *Labour Relations Act*, s. 1; New Brunswick *Industrial Relations Act*, s. 2; P.E.I. *Labour Act*, s. 7(1)(l); Newfoundland and Labrador *Labour Relations Act*, s. 2(1)(v) (all *supra*, note 71).

production” definition, but it is similar in that the motivation for the strike is irrelevant.⁹² Alberta,⁹³ Manitoba,⁹⁴ and Nova Scotia⁹⁵ differ from the Canadian norm in that they have a “subjective” element in their statutory language, in that to be considered a “strike” industrial action must have the purpose of compelling an employer to agree to terms and conditions of employment. The purpose component, however, does not bar sympathetic action from being a “strike”.⁹⁶

British Columbia’s labour legislation prior to 1984 differentiated between strikes for collective bargaining purposes (which were forbidden during the term of a collective agreement) and those for other purposes, such as political protest strikes (which were permitted). This was by virtue of the definition of “strike”, which required that a “strike” under the *Labour Code* be for the purpose of “compelling” an “employer” – whether the workers’ own or another – to

⁹² Québec *Labour Code*, *supra* note 71, s. 1(g): “strike: the concerted cessation of work by a group of employees”. However the Code includes a restriction on other, lesser, forms of industrial action as well, just not within the definition of “strike”: “No association of employees or person acting in the interests of such an association or of a group of employees shall order, encourage or support a slackening of work designed to limit production.” (s. 108)

⁹³ Alberta *Labour Relations Code*, *supra* note 71, s. 1(v): “strike” includes (i) a cessation of work, (ii) a refusal to work, or (iii) a refusal to continue to work, by 2 or more employees acting in combination or in concert or in accordance with a common understanding *for the purpose of compelling their employer or an employers’ organization to agree to terms or conditions of employment or to aid other employees to compel their employer or an employers’ organization to accept terms or conditions of employment.*” [Emphasis added.]

⁹⁴ Manitoba *Labour Relations Act*, *supra* note 71, s. 1: “strike” includes (a) a cessation of work, or (b) a refusal to work, or (c) a refusal to continue to work, or (d) a refusal to continue the standard cycle or normal pattern of operation in a place of employment, or (e) a slow down of work, or (f) an activity in relation to their work that is designed to restrict or limit output, by or on the part of employees in combination or in concert or in accordance with a common understanding *for the purpose of compelling their employer to agree to terms or conditions of employment or to aid other employees in compelling the employer of those other employees to agree to terms or conditions of employment* [Emphasis added]

⁹⁵ Nova Scotia *Trade Union Act*, *supra* note 71, s. 2(1)(v): “strike” includes a cessation of work, or refusal to work or continue to work, by employees, in combination or in concert or in accordance with a common understanding, *for the purpose of compelling their employer to agree to terms or conditions of employment or to aid other employees in compelling their employer to agree to terms or conditions of employment.*” [emphasis added]

⁹⁶ Note also that even the “objective” strike definition may have an inherently subjective component. For instance, while McKeigan C.J.N.S. noted in *Robb Engineering v. U.S.W.A. Loc. 4122*, [1978] N.S.J. No. 504 (QL) (N.S.C.A.) that “four men deciding together to go fishing would not be striking” (at paragraph 33). Brian Langille has argued that “...on an objective definition, it would have to be a strike. Therefore, we do not have an objective definition” and that “there are many concerted cessations [of work] which are not strikes”: Langille, “What is a Strike”, *supra* note 72 at 359.

“agree to terms or conditions of employment”.⁹⁷ As a result the B.C. Labour Relations Board held that, for example, strikes in support of a “national day of protest” were not “strikes” under the *Code*.⁹⁸ This definition was amended in 1984, in reaction to protest strikes in 1983 against the Social Credit government’s amendments to labour legislation, to conform to the current “effects-based” definition.⁹⁹

In Nova Scotia, however, while on the face of it the legislation still contains a “purpose” requirement for activity to be considered a “strike” - legislative language very similar to that in British Columbia, pre-1984 – the Nova Scotia courts have rejected the pre-1984 British Columbia approach, and have interpreted the definition of “strike” in the Nova Scotia Act to be in fact “effects-based”, and have therefore found that “strikes” include the range of lesser industrial action mentioned above.¹⁰⁰ This is because the statutory language is not exhaustive and refers to a “strike” *including* activities intended to compel an employer to agree to terms and conditions of employment, which suggests that activities with a different purpose - including sympathetic action - are also included.

Manitoba and Alberta do not appear to have interpreted their strike definitions in the same way as has Nova Scotia. In those two provinces, therefore, a “purposive” definition seems to still govern. However, the Alberta Board has held that refusing to cross a picket line is, *prima facie*, an attempt to compel an employer to agree to the strikers’ demands:

We find ourselves less reluctant to infer an intention, among those who choose to honour a picket line, to compel an employer to agree to terms and conditions of employment. This inference will not always arise. There may be facts which suggest that other motives, such as personal safety, are more credible. However, when a group of

⁹⁷ *The Labour Code*, R.S.B.C. 1979, c. 212, s. 1.

⁹⁸ *B.C. Hydro v. I.B.E.W.* (1976), 77 C.L.L.C. No. 16,066.

⁹⁹ *The Labour Code Amendment Act, 1984*, S.B.C. 1984, c. 24, s. 1.

¹⁰⁰ *Robb Engineering*, *supra* note 96.

employees refuse to cross a picket line we generally infer that they do so in the belief that their support for the picketing will, directly or indirectly, put pressure on the employer in the dispute to settle with the striking employees. Solidarity is not blind. Employees picket and other employees honour the picket line because they believe it will generate a settlement of the primary dispute. Sometimes there is a feeling of reciprocity involved. If I honour your line, hopefully you will honour mine. It is the Board's view that such an intent is sufficient to bring the action within the subjective purpose required by s. 1(1)(u). In the absence of circumstances to suggest another intent, the Board will, if a stoppage as a result of a picket line is established, infer such an intention. [Emphasis added.]¹⁰¹

Therefore under the Alberta statute, while industrial action generally may have a purpose requirement, it seems that in cases of sympathetic action the Board will infer the purpose necessary to find that the action is an illegal strike.

Even workers who are not represented by a certified bargaining unit may contravene labour relations legislation if they collectively take action in support of other strikers or in support of or opposition to a given policy or cause. Under the Ontario *Labour Relations Act*, for instance, employees are not permitted to strike when no collective agreement is in operation unless a conciliation officer or mediator has been appointed by the Minister.¹⁰² However the *Act* does not provide for the appointment of a conciliation officer or mediator unless a trade union has been certified; hence, a strike by non-unionized employees will always be illegal.¹⁰³

For a further example, see s. 11(2)(d) of the Saskatchewan *Trade Union Act*:

It shall be an unfair labour practice for any employee, trade union or any other person...

...

...to declare, authorize or take part in a strike unless a strike vote is taken by secret ballot among the employees who are:

(i) in the appropriate unit concerned; and

¹⁰¹ *McGavin Foods Ltd. v. R.W.D.S.U., Loc. 980*, [1988] Alta. L.R.B.R. 270 at 18. See also *Combustion Engineering Canada Inc. v. International Brotherhood of Boilermakers and Welders, Local 146 et. al.*, [1987] Alta. L.R.B.R. 443 (QL) at 10.

¹⁰² Ontario *Labour Relations Act*, *supra* note 71 at s. 79(2).

¹⁰³ Peter Barnacle, Roderick Wood, Geoffrey England and Innis Christie, *Employment Law in Canada* (4th Ed.) (Markham: LexisNexis Canada, 2005) at 11-10.

(ii) affected by the collective bargaining;

and unless a majority of the employees voting vote in favour of a strike, but no strike vote by secret ballot need be taken among employees in an appropriate unit consisting of two employees or fewer...

What is not explicitly set out in the Saskatchewan *Act* is that if the employees are not represented by a certified bargaining agent, there cannot be an "appropriate unit" for the purposes of the *Act*; and therefore any strike activity (in sympathy with other workers or otherwise) by workers who are not certified may also contravene the statute.

Exceptions in Labour Relations Legislation

Some jurisdictions do allow for legal sympathetic action under their labour relations statutes. Two types of sympathetic action – refusal to cross a picket line, and refusal to handle “hot cargo” – have been the subject of significant consideration across Canada. Each has been subject to statutory provisions and contained within many collective agreements due to its centrality to sympathetic action and to union solidarity.

British Columbia, for instance, appears to exempt from the definition of “strike” a refusal to cross a legal picket line:

[a strike] does not include...a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted under this Code¹⁰⁴

The section does not appear to have been considered in its present form, however.¹⁰⁵

Prior to the current strike definition, refusal to cross a picket line – like any strike action –

¹⁰⁴ *The Labour Relations Code*, *supra* note 71 at s. 1(1).

¹⁰⁵ In *Re Labatt Brewing Co. Ltd.*, [2003] B.C.L.R.B.D. No. 228 (QL), the employer brought an application before the B.C. Labour Relations Board to forestall expected refusal by members of the Brewery, Winery and Distillery Workers' Union to cross an anticipated picket line – at the B.C. worksite – by striking workers from the employer's Montreal operation. This required the Board to consider whether such refusal constituted an illegal strike, in light of the statutory exemption. It also required the Board to consider whether to uphold a provision in the collective agreement that gave workers the right not to cross a picket line. The Board, however, (rather unhelpfully, from my perspective) upheld the Union's preliminary objection that the application was premature, and did not rule on the substantive issues.

required a subjective component: to compel an employer to agree to terms or conditions of employment, as discussed *supra*. This meant that if employees refused to cross a picket line out of a feeling of solidarity, rather than explicitly to compel the struck employer into capitulating, that would not be a “strike”. As the B.C. Labour Relations Board stated:

[O]ne cannot automatically transfer the motivation of the picketers to those who encounter the pickets and react to them. The latter rarely arrive at a collective decision to respect the picket line, inform themselves about the labour dispute, and act for the specific purpose of compelling that employer to a settlement. In the typical case, the individual employee automatically and instinctively refuses to cross the picket line, simply because it is there.¹⁰⁶

Notably, a belief in union solidarity in *MacMillan Bloedel, supra*, meant that the refusal to cross a picket line was not an illegal strike, because it was neither concerted nor for the purpose of compelling an employer to a settlement. Indeed, it is inherent in the statutory definition of "strike" in all jurisdictions that the activity be in concert or pursuant to a common understanding; if it can be shown that a group of employees refused to cross without a common understanding (i.e. each worker chose individually not to cross the picket line), there will be no strike.¹⁰⁷ However, the B.C. approach is in marked contrast to the *Longshoremen's Case, supra*, where union solidarity was the very basis for ruling that refusal to cross a picket line was an illegal strike. It should be noted, however, that *MacMillan Bloedel* pre-dated *Longshoremen*. In any event the newer definition of “strike” in the B.C. *Code* removes the subjective element, and as noted, does not appear to have been substantively considered in this regard.

The B.C. Board’s approach also differs from the Alberta application of its strike definition to refusal to cross a picket line. The Alberta approach suggest that there is no need for

¹⁰⁶ *MacMillan, Bloedel Packaging Limited v. Pulp, Paper & Woodworkers of Canada, Local 5 et. al.*, [1975] B.C.L.R.B.D. No. 92 (QL) at 4.

¹⁰⁷ Adams, *Canadian Labour Law, supra* note 66 at 11-6.

evidence that employees have taken collective steps to respect the picket line nor to inform themselves of the details of the strike, as suggested in *MacMillan Bloedel*. The British Columbia cases seem to suggest that union solidarity is instinctive, moral, and perhaps even irrational. The Alberta cases, on the other hand, seem to suggest that union solidarity – “not blind” to the realities of labour law, as the Board notes in *McGavin Foods* – is pragmatic and based upon enlightened self-interest.

Seemingly alone in Canada, the Manitoba *Labour Relations Act* provides explicit protection for an employee who takes sympathetic action, as follows:

An employee who is in a unit of employees of an employer in respect of which there is a collective agreement in force and who refuses to perform work which would directly facilitate the operation or business of another employer whose employees within Canada are locked out or on a legal strike is not by reason of that refusal in breach of the collective agreement or of any term or condition of his employment and is not, by reason of that refusal, subject to any disciplinary action by the employer or the bargaining agent that is a party to the collective agreement.¹⁰⁸

The wording of the Manitoba statute is remarkably broad, and conceivably covers not merely refusal to handle hot cargo, but also refusal to cross a picket line and refusal to do work at one’s own workplace that might, for instance, supply goods to a struck workplace. Despite its broad wording, however, this section is subject to a number of limitations. It expressly sets out that an employer is not required to pay an employee for work not done,¹⁰⁹ which seems neither surprising nor unreasonable. However it also does not allow an employee to refuse work that would facilitate production at a struck or locked-out workplace that is run by the *same* employer, even if that other workplace is in a different province.¹¹⁰ The section specifies facilitating

¹⁰⁸ Manitoba *Labour Relations Act*, *supra* note 71, s. 15(1).

¹⁰⁹ *Ibid.*, s. 15(5).

¹¹⁰ *Re Vale Inco Ltd.*, [2010] M.L.B.D. No. 14; *Molson Breweries (Winnipeg) v. United Food & Commercial Workers International Union, Local 330W*, [1991] M.L.B.D. No. 18.

production of another *employer*, not another *workplace*. In addition it specifies that the action must be in support of employees "within Canada", hence, the action cannot be in sympathy with foreign workers.¹¹¹

More significantly for this thesis, however, is that the protection is exclusively *individual*. It does not extend to the union to which the employee may belong, as sympathetic action that is taken collectively and urged or co-ordinated by the employee's union could constitute an illegal work stoppage under the *Act*.¹¹² It is not clear if a group of workers that undertakes sympathetic action, absent encouragement from union officials, would be in breach of the *Act's* peace obligation; it seems likely that such activity would be considered an illegal strike, however.

Sympathetic Action Under Contract

For both unionized and non-unionized workers in most Canadian jurisdictions (Manitoba being the most obvious exception), individually refusing to cross a picket line, to handle goods from a struck workplace, or otherwise refuse work in solidarity with striking workers, can lead to discipline for insubordination.¹¹³

The British Columbia Board has consistently upheld clauses in a collective agreement that allow for sympathetic action. This contrasts with Ontario¹¹⁴ and Alberta,¹¹⁵ where clauses that allow for sympathetic action cannot authorize a strike because they contradict the statutory prohibition on mid-term strike action, though they can insulate employees from discipline for

¹¹¹ Geoffrey England, "Peace Obligation", *supra* note 69 at 585.

¹¹² *Retail Store Employees' Union, Local 832 v. Canada Safeway Ltd.*, [1979] M.J. No. 217 (QL) (Q.B.).

¹¹³ In the unionized context, see for example *Grain Workers*, *supra* note 4; *Natrel Inc. v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Teamsters, Local 647*, [2001] O.L.A.A. No. 395 (Albertyn); *British Columbia Hydro and Power Authority v. Office & Professional Employees' International Union, Local 378* (2003), 117 L.A.C. (4th) 419 (Larson). The one jurisdiction where an individual worker may be able to engage in sympathetic action without being disciplined is Manitoba; this will be discussed further below.

¹¹⁴ *Nelson Crushed Stone and United Cement Workers et al.* (1977) 1 C.L.R.B.R.115.

¹¹⁵ *McGavin Foods Ltd.*, *supra* note 101.

refusal to cross. Even in British Columbia, however, the phrasing of the clause matters. A collective agreement clause that allows explicitly for mid-term strike action is prohibited.¹¹⁶ However a clause or clauses that relate to the scheduling of “work” can arguably be upheld because if work is not scheduled then there can be no cessation of work by the union.¹¹⁷

For the worker who is not unionized, because sympathetic action will inevitably involve a refusal to perform certain duties, an individual worker who refuses a legitimate order¹¹⁸ to perform work is vulnerable to discipline:

Where the job action takes the form, not of a full-scale walkout, but of a work-to-rule, go-slow, overtime ban, mass sick-out, the English precedents hold that such conduct will also repudiate the employee's implied obligation to further the employer's interests unless their contract of employment clearly entitles them to refuse to perform the work assignments in question. The same analysis would appear to hold good for employees who refuse to cross a picket line; they are in breach of their obligation to work, unless there is some express or implied provision in their contract of employment that excuses them from working in such circumstances.¹¹⁹ [Citations omitted]

The one exception may a refusal of overtime (for instance, to prevent an increase in production intended to make up for loss of production at a struck work site), which would seem to be protected to a certain extent under labour standards legislation in some jurisdictions, so, for instance, employees in those jurisdictions are free to refuse to work more than a certain number of hours of overtime in a week.¹²⁰ A concerted refusal by workers to work overtime has been held to be a "strike" in Ontario¹²¹ and Saskatchewan¹²² but not in British Columbia.¹²³

¹¹⁶ *Macdonalds Consolidated Ltd. et. al. v. RWDSU Loc. 580*, [1976] B.C.L.R.B.D. No. 51 (QL).

¹¹⁷ England, "Statutory Definition of 'Strike'", *supra* note 18 at 790.

¹¹⁸ The order must of course be legitimate and lawful. For example, workers have the right to refuse work that puts their health and safety at risk; this right is protected under occupational health and safety legislation as well as at common law. See for example *The Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1, s. 23.

¹¹⁹ *Employment Law in Canada*, *supra* note 103 at 11-61. Workers also have the right to refuse an order to do something illegal: *ibid.* at 11-66; Geoffrey England, *Individual Employment Law* (2nd Ed.) (Toronto: Irwin Law, 2008) at 59.

¹²⁰ The right to refuse overtime beyond a certain number of hours per week is set out in some labour standards legislation, e.g.: *The Labour Standards Act*, R.S.S. 1978, c. L-1, s. 12(1); *Canada Labour Code*, *supra* note 71, s. 171. Manitoba sets out that the employer does not have an implied right to require an employee to work overtime:

It seems to be the case in Canada “that strikes and other forms of industrial action will amount to a breach of contract”,¹²⁴ at common law, “going on strike almost certainly constitutes a repudiatory breach of the employee's implied obligation to his or her employer so as to warrant summary dismissal.”¹²⁵ Professor Brian Langille describes it thusly:

The common law “right” to strike amounts to this: it is the freedom of a group of workers, playing by the rules of contract termination, and acting for a certain purpose (i.e., (re)negotiation of their contract with the employer), to stop working in an effort to get the employer to come to terms...But it is purely a *freedom* at common law, and one not protected by a perimeter of rights. There is no protection, no right, against employer retaliation for the exercise of the freedom (and the employer has no duty not to dismiss, no duty to rehire, etc.)...[That protection] did not exist at common law and...is withheld from all workers who are excluded from the statute.¹²⁶

As McIntyre J. noted in his concurring reasons in the *Alberta Reference*:

It is not correct to say that it is lawful for an individual employee to cease work during the currency of his contract of employment. Bezil J.A., in the Alberta Court of Appeal, in the case at bar, dealt with this point in these words:

The argument falters on the premise that cessation of work by one person is lawful. The rationale advanced for that premise is that the courts will not compel a servant to fulfil his contract of service, therefore cessation of work by a servant is lawful. While it is true that the courts will not compel a servant to fulfil his contract of service, the servant is nevertheless bound in law by his contract and may be ordered to pay damages for the unlawful breach of it. It cannot be said that his cessation of work is lawful.

...The individual has, by reason of the cessation of work, either breached or terminated his contract of employment.¹²⁷

The Employment Standards Code, S.M. 2006, c. 26, s. 19(1). British Columbia only sets out that an employee cannot be required or allowed “to work excessive hours or hours detrimental to the employee's health or safety”: *The Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 39.

¹²¹ *Watts and Henderson Ltd. v. Mechanical Contractors Assn. of Ontario and Plumbers, Local 46*, [1988] OLRB Rep. July 721.

¹²² *Mosaic Potash Colonsay ULC v. United Steelworkers Union Local 7656*, 2012 CanLII 58952 (Sask. LRB); *Re Westank-Willock and USWA Local 4728*, [1980] May Sask Labour Rep. 72.

¹²³ *Northstar Lumber v. USWA Local 1-424*, 2006 CanLII 33604 (B.C. LRB).

¹²⁴ K.D. Ewing, *The Right to Strike* (New York: Oxford University Press, 1991) at 14.

¹²⁵ *Employment Law in Canada*, *supra* note 103 at 11-61.

¹²⁶ Brian Langille, “What is a Strike?” *supra* note 72 at 368-369.

¹²⁷ *Alberta Reference*, *supra* note 13 at 176-177. See also England, *Individual Employment Law*, *supra*, note 119 at 60 and 343-344, re: absenteeism and quitting generally.

If a strike is a breach of contract, it would open an employee to liability for damages and dismissal on that basis. If it is a termination, then the employer need not take any disciplinary action at all; the contract is at an end, and the employer can freely treat the strike as a resignation.

The ability of unions and workers to take sympathetic action in Canada is thus severely limited, even action that is not a “strike” *stricto sensu* and even action taken over issues – such as solidarity strikes, protest strikes, or disputes over matters not negotiated – where there is no recourse to any dispute resolution mechanism to resolve matters.

PART II
SYMPATHETIC ACTION AND THE *CHARTER*

Application of the Charter

The two employment regimes dealt with in this thesis - labour relations legislation, on the one hand, and the common law contract of employment, on the other - will require different approaches to the question of *Charter* protection of sympathetic action. The *Charter* will apply directly to legislation. However it does not apply directly to the common law; rather, the common law must comply with "*Charter* values", rather than the *Charter* itself.

The *Charter* expressly applies to government action;¹²⁸ as such the statutory prohibitions on sympathetic action are directly subject to *Charter* review. The Supreme Court definitively rejected the argument that the statutory labour relations regime was a purely private matter between an employer and a union: "once the state has chosen to regulate a private relationship such as that between employer and employee...it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to Charter review."¹²⁹

The *Charter* does not, however, apply to relationships between private parties.¹³⁰ Private parties owe each other no constitutional duties; therefore, a litigant cannot found a cause of action on a *Charter* right, nor can they claim that the common law violates the *Charter* because "*Charter* rights do not exist in the absence of state action."¹³¹

The *Charter* therefore does not apply to the common law contract of employment unless a government actor relies upon the common law in which case the *Charter* will apply directly.¹³²

¹²⁸ Section 32(1) of the *Charter* provides: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

¹²⁹ *Dunmore v. Ontario*, 2001 SCC 94 at para. 29. See also *Labour Relations Board v. John East Iron Works*, [1949] S.C.R. 677.

¹³⁰ *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

¹³¹ *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64 (QL) at para. 95.

¹³² *Dolphin Delivery*, *supra* note 130 at para. 34.

Rather, absent a government actor, the common law must be interpreted in such a way as to conform to *Charter* "principles" or "values".

It is clear from *Dolphin Delivery*...that the common law must be interpreted in a manner which is consistent with Charter principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values.¹³³

Therefore when dealing with protection of sympathetic action under the freedoms of association, expression, and conscience, two questions must be asked: first, does the statutory prohibition on sympathetic action infringe upon that freedom? And second, where there is no government actor or action, are the various common law prohibitions or penalties regarding sympathetic action inconsistent with *Charter* values or principles?

The indirect application of the *Charter* to the common law and the caution of the courts in amending the common law will also be factors considered in Part III of this thesis and, in particular, regarding the question of whether reform should be accomplished through statutory reform or whether the courts would be justified in amending the common law.

It is worth noting, however, that three Canadian jurisdictions - Saskatchewan, Québec, and the Yukon Territory - have included fundamental freedoms similar to those found within s. 2 of the *Charter* within their provincial legislation.¹³⁴ While this thesis is concerned with the *Charter*, it would seem undeniable that similar arguments for protection of sympathetic action may be made under these provincial statutes and that these statutes, unlike the *Charter*, may apply directly to private action. When dealing with the common law, therefore, the impact of provincial legislation will also be considered.

¹³³ *Hill*, *supra* note 131 at para. 91.

¹³⁴ *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 4-8; *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 (the "*Québec Charter*"), ss. 1-9.1; *The Human Rights Act*, R.S.Y. 2002, c. 116, ss. 3-6.

Sympathetic Action and Section 2 of the Charter

Before dealing with the application of the various freedoms to sympathetic action, however, it is necessary to consider whether section 2 of the *Charter* protects sympathetic action at all. On the face of it, it seems that the *Charter* has the potential to protect such a right. While the Supreme Court in 1987 held that the *Charter* did not protect the right of workers to collectively bargain or to strike, the 2007 *B.C. Health Services* case reversed this ruling; it is now the law in Canada that the right to collectively bargain is protected by section 2(d). It is still an open question whether the right to strike is afforded *Charter* protection beyond the expressive right to picket during an otherwise legal strike. Nonetheless, labour relations are no longer inherently excluded from *Charter* review. That said, the Federal Court of Appeal in *Grain Workers*¹³⁵ - the one case to consider sympathetic action post-*B.C. Health Services* - has held that there is no right to strike and therefore necessarily no right to sympathetic action. In the majority's view, the right to respect a picket line rose and fell with the right to strike *simpliciter*.

Because *Grain Workers* is the one case since 2007 that is squarely on-point and because its reasoning applies to section 2 generally, it is summarized here in some detail rather than in one of the sections dealing with a specific freedom. Following that summary, I argue that the reasoning of the majority in *Grain Workers* is fundamentally flawed, and that even the dissent of Evans J.A. does not fully address the question of sympathetic action.

The majority decision – represented by the decision of Blais J.A. and the concurring decision of Ryer J.A. – is formalistic, minimalist, and acontextual. It is very much a holdover from the days of the Labour Trilogy. The decision of Evans J.A. is more in keeping with Dickson C.J.'s dissent in the *Alberta Reference* and of the Supreme Court in *R.W.D.S.U. v.*

¹³⁵ *Supra* note 4.

Pepsi-Cola and *B.C. Health Services*. However it, too, has limitations, in particular around its application of section 1 of the *Charter* and the *Oakes* test – though in fairness, the parties to the appeal agreed that the s.1 analysis would be the same as it relates to s. 2(d) as it is to 2(b). For reasons explored later, I believe this is a problematic conclusion, but Evans J.A. clearly has a sounder grasp of the realities of labour relations, and of the interests protected by the Charter in the labour context, than does the majority.

Grain Workers' Union involved a number of unions and locals - the Public Service Alliance of Canada (“PSAC”) and Grain Workers’ Union, Local 333, (“GWU”), as well as three locals of the International Longshore and Warehouse Union: ILWU-Canada, ILWU Local 500, and ILWU Ship & Dock Foremen, Local 514. (The ILWU locals will be referred to collectively herein as simply “ILWU”.) PSAC represented employees of the Canada Grain Commission (“CGC”, a public employer) , who are responsible, under the auspices of the *Canada Grain Act*,¹³⁶ for inspecting grain being stored and shipped at grain terminals at the Port of Vancouver. GWU represented employees of the grain terminals themselves, while ILWU-Canada and ILWU, Local 500 represented employees of stevedoring companies responsible for loading grain for shipment. ILWU Ship & Dock Foremen, Local 514 represented foremen dispatched to the worksites of the stevedoring companies as required.

The case also involved three employers or employers’ organizations. The CGC was party to a collective agreement with PSAC. The B.C. Terminal Elevator Operators’ Association (“BCTEOA”) was party to a collective agreement with GWU. Finally, the B.C. Maritime Employers’ Association (“BCMEA”) was party to a collective agreement with ILWU. A fourth employer organization, the Waterfront Foremen Employers Association, had ceased to exist by

¹³⁶ R.S.C. 1985, c. G-10.

the time the appeal was heard, and its collective bargaining relationship with ILWU Ship & Dock Foremen, Local 514 had been assumed by the BCMEA.

Members of PSAC were in a legal strike position and ultimately took strike action against the CGC. PSAC members set up picket lines around the grain terminals. Most, if not all, of the members of GWU and ILWU refused to cross those picket lines although performance of their work duties required them to do so. It is not clear from either the Federal Court of Appeal decision or the earlier decision of the Canada Industrial Relations Board whether the refusal to cross the picket lines was authorized or promoted by union officials within GWU or ILWU. Nor is it clear whether the refusal to cross the picket lines was universal among GWU and ILWU members. It does appear that the refusals to cross were widespread, however.

Both GWU and ILWU had, in the collective agreements with their respective employers, negotiated clauses that stated the employer did not expect members of the union to cross a picket line.¹³⁷ The BCMEA and the BCTEOA each applied to the Canada Industrial Relations Board for interim back-to-work orders on the basis that the members of GWU and ILWU were engaged in illegal strike activity contrary to the *Code*; the CIRB granted these orders in quick succession.

The unions stated that they wished to argue sections 2(b) (freedom of expression) and 2(d) (freedom of association) of the *Charter* in their defence. These arguments were heard at a later date¹³⁸ but the CIRB rejected the unions' submissions that their members' freedom of association¹³⁹ and freedom of expression¹⁴⁰ had been infringed; or that in the alternative, any infringement of freedom of expression was justified under s. 1.¹⁴¹

¹³⁷ *Grain Workers*, *supra* note 4 at para. 9.

¹³⁸ *Re British Columbia Terminal Elevator Operators' Assn.* (2007), 148 C.L.R.B.R. (2d) 164.

¹³⁹ *Ibid.* at para. 108.

¹⁴⁰ *Ibid.* at para. 91.

¹⁴¹ *Ibid.* at para. 146.

That Board decision was released on the same day that the Supreme Court released the *B.C. Health Services* decision. As a result the unions applied for reconsideration of the Board's decision. However, in its reconsideration decision,¹⁴² the Board held that *B.C. Health Services* did not affect the earlier decision.

Before the Federal Court of Appeal, the parties agreed that refusal to cross a picket line was an illegal "strike" under s. 3(1) and section 88.1 of the *Code*. The unions challenged the constitutional validity of the strike prohibition and the Board's interpretation of them.¹⁴³

Though all three judges upheld the statutory prohibition on mid-term strikes as constitutionally valid, each wrote a separate decision and only Evans J.A. held that the prohibition infringed the workers' *Charter* rights (though he ultimately held that the infringement was justifiable under s. 1). Blais J.A. held that the prohibition did not infringe on the workers' *Charter* rights at all. Ryer J.A., generally concurring with Blais J.A.'s analysis, offered a concurring opinion agreeing that the prohibition on mid-term strikes did not infringe s. 2(b).

Justice Blais agreed with the CIRB that the *Code's* definition of "strike" does not infringe s. 2(b) "because neither the purpose nor effect of a prohibition on mid-term strikes infringes the applicants' freedom of expression."¹⁴⁴ The purpose of the peace obligation is not to silence expressions of solidarity among unionists, but to "limit the negative consequences that strikes have on employers in the interest of providing certainty and stability in industry labour relations."¹⁴⁵ It aims to control the physical consequences of certain human activity, not to

¹⁴² *Re British Columbia Terminal Elevator Operator's Assn.* (2008), 184 C.L.R.B.R. (2d) 107.

¹⁴³ *Grain Workers*, *supra* note 4 at para. 21.

¹⁴⁴ *Ibid.* at para. 78.

¹⁴⁵ *Ibid.* at para. 85.

control expression itself.¹⁴⁶ He rejected the unions' argument that the form of the expression (withdrawal of services) was indivisible from its content – “that the message ‘we will shoulder the same burden as you’ could not be demonstrated by other means.”¹⁴⁷

Because he held it was not the purpose of the *legislation* to infringe freedom of expression, Blais J.A. turned to the purpose of the *expression* to determine if the legislation had the *effect* of infringing freedom of expression. Citing the principles set out in *Irwin Toy*,¹⁴⁸ Justice Blais found that refusing to cross a picket line “had neither a social or political purpose”; it was, rather, “an intrusion into a private contractual dispute”.¹⁴⁹ It promoted neither seeking and attaining the truth, participating in social and political decision-making, or cultivating diversity in the form of individual self-fulfillment and human flourishing (set out in *Irwin Toy*). Therefore, as the expression did not fall within the type of expression protected by s. 2(b), the provision of the Labour Code infringed freedom of expression in neither purpose nor effect.

Justice Blais concluded that “strikes are not afforded constitutional protection” and that the unions' arguments are simply a reformulation of the issues “to try to avoid the consequences of engaging in an unlawful strike”.¹⁵⁰

Ryer J.A., in his brief reasons, essentially concurred with Blais J.A.'s analysis, adding that in his view the decision-making in this case related to the private contractual affairs of PSAC employees and the CGC, and “decision making that takes place in a private context is...not within the ambit of ‘participation and social and political decision making’ as

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at para. 87.

¹⁴⁸ *Irwin Toy v. Québec (Attorney-General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 (S.C.C.) ("*Irwin Toy*") at para. 53.

¹⁴⁹ *Grain Workers*, *supra* note 4 at para. 88.

¹⁵⁰ *Ibid.* at para. 91. I cannot help but wonder whether Justice Blais reserves such opprobrium only for unions, or extends it to anyone attempting to assert constitutional rights.

contemplated by the Supreme Court of Canada in *Irwin Toy*.”¹⁵¹ Furthermore, the ambit of expression is limited to those with a legal right to participate in the decision-making in question; as the decision-making related to the private dispute between PSAC and the CGC, and members of GWU and ILWU had no legal right to participate in contractual negotiations between PSAC and CGC, the refusal by GWU and ILWU members to cross the picket line was not protected expression.¹⁵² The fact that CGC is a “government emanation” was not sufficient to connect private negotiations with political decision-making.¹⁵³

While concurring in the result, Evans J.A. took the position that the *Code*’s definition of “strike” does in fact infringe workers’ freedom of expression;¹⁵⁴ however, the infringement is justifiable under s. 1.¹⁵⁵ He noted that the Supreme Court has not hesitated to apply s. 2(b) in the context of legislation governing “expressive activities undertaken during a strike”.¹⁵⁶ Notably, while he recognized that *Dunmore v. Ontario*¹⁵⁷ and *B.C. Health Services* have expanded the applicability of s. 2(d) to labour cases, he held that it is unnecessary to consider s. 2(d); s. 2(b) is the relevant provision.¹⁵⁸ Like Justice Blais, Justice Evans held that the purpose of the peace obligation was not to limit expression but rather to limit the “adverse consequences of mid-contract work stoppages”¹⁵⁹ – an “important component of the Code’s attempt to balance

¹⁵¹ *Ibid.* at para. 96.

¹⁵² *Ibid.* at para. 98.

¹⁵³ *Ibid.* Regarding the argument that a dispute with a public or government employer may be inherently political, see the reasons of Evans J.A., *infra*.

¹⁵⁴ *Ibid.* at para. 55.

¹⁵⁵ *Ibid.* at para. 73.

¹⁵⁶ *Ibid.* at para. 25.

¹⁵⁷ *Supra* note 129.

¹⁵⁸ *Grain Workers*, *supra* note 4 at para. 24.

¹⁵⁹ *Ibid.* at para. 37.

equitably the interests of labour and management.”¹⁶⁰ Therefore Justice Evans turned to the purpose of the expression and the effect of the legislation.

However, Evans J.A. held that the *effect* of the peace obligation in this case did, in fact, limit the freedom of expression of the union members. He based this conclusion on three factors: first, the relatively low threshold required to demonstrate an infringement of s. 2(b);¹⁶¹ second, the fundamental importance, as expressed by the Supreme Court, of freedom of expression in labour disputes;¹⁶² and third, that the prohibition, in fact, limits employees’ ability to express support for another union – that a picket line is an “admittedly expressive activity” and that “by requiring employees to cross a picket line, the prohibition has the effect of forcing employees to engage in conduct that may convey the message that they do not support the strike.”¹⁶³

From there, Evans J.A. considered whether the peace obligation had the effect in law of infringing on s. 2(b). In finding that it did so, he noted that in *Irwin Toy* the Supreme Court paraphrased “participation in social and political decision-making” as “participation in the community”, suggesting that the value is of broad application.¹⁶⁴ He also noted that labour disputes involve fundamental legal, political and social issues, and bring debate about labour conditions into the public realm.¹⁶⁵

Justice Evans placed some weight on the fact that the Canada Grain Commission is a government agency. The strike action in *Grain Workers* was not overtly political, but he agreed

¹⁶⁰ *Ibid.* at para. 34.

¹⁶¹ *Ibid.* at para. 41.

¹⁶² *Ibid.* at para. 42.

¹⁶³ *Ibid.* at para. 43.

¹⁶⁴ *Ibid.* at para. 46.

¹⁶⁵ *Ibid.* at para. 47. He also notes, at para. 48, that “[r]efusing to cross a picket line is a uniquely powerful means for employees to publicly express their solidarity with strikers.”

with the B.C. Court of Appeal in *British Columbia Teachers' Federation v. British Columbia Public School Employers Assn.*¹⁶⁶ (“*BCTF*”) that the primary target of a strike is government and public opinion, and is in that sense political. He further held that public sector strikes are inherently “political” because they almost invariably implicate public policy issues such as allocation of public resources, level of services to be provided, and how additional costs are to be defrayed – all matters of “community concern”.¹⁶⁷ Rendering refusal to cross a picket line illegal therefore interferes with employees’ ability to participate in social and political decision-making and in the community.¹⁶⁸

However Justice Evans concluded by holding that the infringements on s. 2(b) are justified under s.1. The parties agreed that s.1 analysis would lead to the same result whether considering s. 2(b) or s. 2(d).¹⁶⁹ For reasons that are explored below, I do not believe that s.1 analysis will necessarily lead to the same result when applied to the various freedoms set out in s.2 of the *Charter*.

In applying the *Oakes* test, he held that the peace obligation is rationally connected to the objective of limiting unpredictable work stoppages.¹⁷⁰ The impairment is minimal – allowing for some margin for legislatures to achieve their ends¹⁷¹ - and “carving out” an exception to allow parties to contract out of the *Code*’s statutory objectives could jeopardize those objectives.¹⁷² Finally the impact is proportional; workers may express their support for the strike in other ways,

¹⁶⁶ *Supra* note 14.

¹⁶⁷ *Grain Workers*, *supra* note 4 at 53.

¹⁶⁸ *Ibid.* at 56. Evans J.A. also states that the *Code*’s definition of “strike” may have a negative effect on promoting “the diversity in forms of individual self-fulfillment and human flourishing”, as set out in *Irwin Toy*, but comes to no definite conclusion in the absence of sustained argument (para. 57).

¹⁶⁹ *Ibid.* at para. 5.

¹⁷⁰ *Ibid.* at para. 63.

¹⁷¹ *Ibid.* at para. 65

¹⁷² *Ibid.* at para. 66.

and “in view of the well-recognized social costs of industrial conflict” the infringement is not “disproportionate to the benefits of achieving the pressing and substantial objective of the *Code*.”¹⁷³

Grain Workers, therefore, did not disturb the existing legal regime and maintained the application of the “peace obligation” to sympathetic action.

While *Grain Workers* is technically a freedom of expression case, it has implications beyond s. 2(b). The majority decision, of course, bluntly states that there is no *Charter* right to strike, but it is also significant that the majority then assumes that that answers the question of a right to sympathetic action. If there is no right to strike, there can be no right of sympathetic action; sympathetic action, in other words, can only be derived indirectly from a right to strike. Furthermore the majority considered neither freedom of association nor freedom of conscience in their reasons.

In my view the analysis applied by both Blais J.A. and Ryer J.A. is difficult to accept post-*Dunmore* and *B.C. Health Services*. The issue is not whether the employer is public or private, or whether workers, by refusing to cross the picket line, are intruding into a private contractual dispute, but rather, that the government has chosen to regulate labour relations in such a way that it has, by way of statute, inserted a prohibition on mid-term strikes into every collective agreement covered by the *Code*. That must attract *Charter* scrutiny. After all as the Court held in *Dunmore* (*per* Basterache J.),

¹⁷³ *ibid.* at paras. 69-70. The Saskatchewan Court of Appeal in *Saskatchewan Federation of Labour (C.A.)*, *supra* note 14 at para. 76, noted the difference between picketing and the strike, and (similar to Evans J.A.'s reasoning regarding sympathetic action in *Grain Workers*) stated that a limitation on workers' rights to strike under essential services legislation did not restrict their freedom of expression as they could join a picket line when they were not working.

Once the state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a “private sphere” that is impervious to Charter review. As Dean P. W. Hogg has stated, “[t]he effect of the governmental action restriction is that there is a private realm in which people are not obliged to subscribe to ‘state’ values, and into which constitutional norms do not intrude. The boundaries of that realm are marked, not by an *a priori* definition of what is ‘private’, but by the absence of statutory or other governmental intervention”. [citation omitted]¹⁷⁴

Basterache J. was speaking in terms of underinclusive statutes, but I believe the same reasoning applies here. Workers, by virtue of the restriction on mid-term strikes, are required to subscribe to ‘state’ values. They must ignore their own beliefs in union solidarity in favour of the state value of industrial peace. The nature of the employer is irrelevant; it is the state’s legislation of contractual terms and industrial relations norms that attracts *Charter* scrutiny. Yet Blais J.A. and Ryer J.A. both seem to “consign the relationship” between PSAC and the CGC “to a ‘private sphere’ that is impervious to *Charter* review,” thereby making it easier to characterize the sympathetic action undertaken as unconnected to the values protected by s. 2(b).

Evans J.A.'s concurring reasons are significant beyond their interpretation of freedom of expression in that they also described a right to sympathetic action that is necessarily tied to a right to strike *simpliciter*. Furthermore while he did recognize the existence of a right to strike, he expressly held that freedom of association was not the fundamental freedom from which that right ultimately derived. Nor did he consider freedom of conscience at all, though in fairness s. 2(a) was not pleaded in *Grain Workers*. Finally, in upholding the statutory peace obligation under s. 1, he held that the same s. 1 factors applied whether 2(b) or 2(d) were considered - though again, in fairness, the parties agreed with that approach.

The parties in *Grain Workers* did not raise the question of freedom of conscience and none of the Justices considered section 2(a) in their reasons. Similarly, the justices did not

¹⁷⁴ *Dunmore*, *supra* note 129 at para. 29.

consider freedom of association in their reasons. Whether either consideration would have had any substantive impact on the decisions of any of the Justices is debatable, but in my view it is regrettable that they were not addressed.¹⁷⁵ By considering only the expressive aspects of sympathetic action, and not the associational or conscientious aspects, the analysis of sympathetic action was unduly restricted. This is further compounded by viewing considerations under s. 1 as identical regardless of which freedom is affected; I will argue later that limitations that may be justifiable under one right (say, freedom of expression) may nonetheless be unjustifiable under another.

From "Me" to "You" to "Us" : Interaction Between Section 2 Freedoms

I argue that three of the fundamental freedoms in section 2 of the *Charter* - conscience, expression, and association - protect a worker's and a union's right to engage in sympathetic action. The fourth freedom under section 2 - freedom of assembly under s. 2(c) - has not received significant treatment by Canadian courts and would seem to have only incidental application to a right to sympathetic action in any event.

Each freedom protects different interests and each will have a different application to sympathetic action. Sympathetic action may be protected under one, two, or all three of these freedoms; this is, as has been noted by Justice La Forest at the Supreme Court, to be expected:

...[A] person is not deprived of protection under a provision of the Charter merely because protection may also be derived under another. The rights overlap in defining Canadian society, and I see no reason for depriving a litigant of success because he has chosen one provision that legitimately appears to cover the matter of which he or she complains, rather than another. That would often be the effect if the individual rights and freedoms were construed as discrete rather than overlapping.¹⁷⁶

¹⁷⁵ In saying so I am not taking a position on whether Evans J.A. or the other Justices *should* have considered such arguments absent submissions by the parties. My point is only that the omission is unfortunate, and reflects a general neglect of section 2(a) in the labour context.

¹⁷⁶ *Lavigne, supra* note 37 at p. 132.

Depending on which freedom serves as the "lens" through which sympathetic action is viewed, the characterization of the right to sympathetic action may also vary. Ironically, it is under the freedom that has been most canvassed in the labour context - freedom of association - that it may be most complicated to justify a right to sympathetic action. At the same time freedom of association may provide for the most robust protection of sympathetic action when considering section 1, provided justification is proven in the first instance. Sympathetic action engages both freedom of conscience and freedom of expression, and I argue that the argument under freedom of association for protection of sympathetic action, as a collective expression of those other *Charter* freedoms, is therefore strengthened. In particular, I will argue that the exercise of freedom of conscience or freedom of expression collectively is closer to the core of the interests protected by freedom of association than are some other forms of association covered under s. 2(d).

In a sense, the freedoms under section 2 expand outwards.¹⁷⁷ The freedoms of conscience and religion are part of a person's moral and philosophical core.¹⁷⁸ Timothy Macklem has written that "[c]onscience, or at least the possibility of it, is in everything we do. Anything that we believe we have reason to do may, under the correct conditions, become a question of conscience for us."¹⁷⁹

In some...cases conscience is married to religious conviction; in nearly all it is political, involving as it does the refusal of a person to do what the political community has called upon him or her to do. In every case it is dramatic and dissentient, principled and autonomous, a matter of following the dictates of one's own reasoning rather than the dictates of others in the discharge of one's moral obligations, and thus a matter of taking

¹⁷⁷ Thanks to Professor Mark Carter for this observation.

¹⁷⁸ See e.g. *Edwards Books*, *supra* note 19, wherein the freedoms in s. 2(a) are described at para. 97 as protecting individuals from government interference with "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."

¹⁷⁹ Timothy Macklem, *Independence of Mind* (Oxford: Oxford University Press, 2006) at 68.

a stand against what one has been called upon to do by exempting oneself from its demands. Not me, or at least not in my name, goes the cry.¹⁸⁰

As the most "internal" of the fundamental freedoms, freedom of conscience is also the most profoundly *individual* freedom. All of the section 2 freedoms are individual rights, but only conscience speaks entirely to the individual's moral centre. As Macklem puts it,

[conscience] often speaks to us in private and in our own voice, reminding us of who we are, what we believe, and what we have committed ourselves to, not only in those matters affecting others, the matters that we think of as our moral life, but also in those matters that affect ourselves alone.¹⁸¹

Freedom of expression includes thought and opinion, but addresses the importance of vibrant discussion within society; that is, s. 2(b) has an inherently *interactive* element. Richard Moon has argued:

Whether the emphasis is on democracy, autonomy, or self-expression, each of the established accounts of the value of freedom of expression rests on a recognition that human autonomy/agency is deeply social in its creation and expression. Each recognizes that human judgment, reason, feeling, and identity are realized in communicative interaction with friends, family, co-workers, and other members of the community.¹⁸²

Freedom of assembly (which has been described as part of the "pantheon of freedom of expression"¹⁸³) follows, and expands the circle to encompass expressing an opinion as a physical group.¹⁸⁴

Freedom of association, of course, necessarily includes other individuals to be meaningful. It protects activity taken with others - not merely a right to physical assembly but also rights to political, intellectual, or simply social association.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.* at 69.

¹⁸² Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 21.

¹⁸³ W.S. Tarnopolsky and G.-A. Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 138.

¹⁸⁴ This has been denied status as "speech" at times – it being "signalling" rather than "speech". See: *Canada (Attorney-General) v. Dupond* (1978), 84 D.L.R. (3d) 420 (S.C.C.). This approach has been rejected by our Supreme Court, however, in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, discussed *infra*.

Within all of these fundamental freedoms is a common theme, however - recognition and protection of individual worth: "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*."¹⁸⁵

I suggest that as one moves "outward" from conscience to expression to association, the more "internal" freedoms, as well as being inherently important, strengthen the more "external" freedoms. Given the importance of conscience to individual self-fulfillment and human dignity, for example, expression that gives voice to matters of conscience are arguably of greater significance than expression that does not. Similarly, association that is the collective exercise of freedom of conscience, or freedom of expression, is arguably of greater significance than associative activities that do not involve other *Charter* freedoms.

This may at first blush appear to run afoul of the doctrine that there is "no hierarchy of constitutional rights",¹⁸⁶ which

holds that guarantees of rights and freedoms that are contained in one part of the Constitution can not be used to prevent, restrict, or expand the implementation of rights or privileges that are contained in another part of the Constitution...¹⁸⁷

As Mark Carter has noted, however, that doctrine is "something of a misnomer,"¹⁸⁸ as there are a number of formal and informal hierarchies found among *Charter* rights.

In particular, the rights and freedoms in the *Charter* that are universally applicable – which does not include all of them – are always subordinate to the (relatively few) special rights and privileges that are contained in other parts of the *Charter* or in the *Constitution Act, 1867*.¹⁸⁹

¹⁸⁵ *Alberta Reference, supra*, note 13 at para. 81.

¹⁸⁶ See e.g. *Gosselin (Tutor of) v. Québec (A.-G.)*, 2005 SCC 15, [2005] 1 S.C.R. 238.

¹⁸⁷ Mark Carter, "An Analysis of the "No Hierarchy of Constitutional Rights" Doctrine" (2007), 12 Rev. Const. Stud. 19 at 20.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.* at 21.

Further, the courts often set "contingent hierarchies" of rights when resolving disputes involving conflicting *Charter* rights, though this is usually done by performing a "balancing exercise under section 1" of the *Charter* rather than by insulating the government activity in question from review.¹⁹⁰ Carter notes that in *R. v. Keegstra*, the Supreme Court balanced the rights of the targets of hate speech (equality under s. 15 and life, liberty, and security of the person under s. 7) and the freedom of expression of the producers of hate speech under section 1, before ultimately finding that the hate speech provisions of the *Criminal Code* were reasonable limitations on freedom of expression.¹⁹¹

In the case of sympathetic action I will argue that the section 2 freedoms *strengthen* each other rather than conflict with each other, but the principle that the interaction of *Charter* rights or freedoms should be addressed under section 1 seems applicable - particularly where all of the rights or freedoms involved are, as here, fundamental and universal.

Direct and Indirect Derivation and "Derivative Rights" Under the Charter

Consideration of sympathetic action raises another question: whether a right to sympathetic action can be derived directly from a fundamental freedom, or if it must be derived indirectly, through another right that is itself directly derived from that freedom. In recent *Charter* jurisprudence the concept of a *derivative* right has arisen.¹⁹² The concept of "derivative rights" is similar to the question of direct or indirect derivation, but as the concept has been applied by the Courts, it appears that a "derivative right" is not necessarily the same as a right "indirectly derived".

¹⁹⁰ *ibid.* at 38.

¹⁹¹ *ibid.* See *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 733-734.

¹⁹² For a recent discussion of "derivative" rights under the *Charter*, see *Ministry of Public Safety and Security (Formerly Solicitor General) and Attorney General of Ontario v. Criminal Lawyers' Association et. al.*, [2010] 1 S.C.R. 815 ("*Criminal Lawyers' Association*").

It is arguable that the right to strike itself is a derivative or indirectly derived right, having value only insofar as it promotes the right to collective bargaining. Sympathetic action adds an additional complication. The right to sympathetic action could be seen as derivative of freedom of association directly; of the right to collectively bargain; *or* of the right to strike. I argue, however, that the right to sympathetic action deserves protection as a stand-alone right under each of the freedoms in question.

Criminal Lawyers' Association dealt with a request by the Criminal Lawyers' Association (the "CLA") for documents in the hands of the Crown, including a report by the Ontario Provincial Police relating to an investigation of police misconduct. The responsible Minister refused to disclose the documents, citing exemptions in the Ontario *Freedom of Information and Protection of Privacy Act*.¹⁹³ The CLA argued as one of its grounds of appeal that the *Charter* guarantee of freedom of expression necessitated the release of the documents; without access to the government's information, it was impossible to make public comment on the matter and the CLA's freedom of expression was infringed. The Court, however, disagreed, stating:

The first question to be addressed is whether s. 2(b) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

...The main question in this case is whether s. 2(b) is engaged at all. We conclude that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed more fully below, that in this case these requirements are not satisfied. As a result, s. 2(b) is not engaged.

¹⁹³ R.S.O. 1990, c. F-31.

...To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary...[Emphasis added.]¹⁹⁴

Therefore, access to information, the Court held, was not a stand-alone right. It was not absolute and in that case did not engage freedom of expression at all. A right to access was, rather, derivative of the freedom of expression and only protected by the *Charter* where lack of access *effectively precluded* meaningful expression or commentary.

In *Fraser v. Ontario*, the Supreme Court cited *Criminal Lawyers' Association* in its discussion of when a government must take positive action to protect a fundamental freedom.

The majority in *Fraser* held that

[a] purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities, just as a purposive interpretation of freedom of expression may require the state to disclose documents to permit meaningful discussion.¹⁹⁵

Notably, the Ontario Court of Appeal recently held on the basis of *Fraser* that *collective bargaining* was not a stand-alone constitutional right in itself. Collective bargaining was instead a right derivative of freedom of association:

...A government employer is obligated to engage in "collective bargaining" under s. 2(d) only when the employees are able to claim the derivative right under s. 2(d). They are able to claim that derivative right upon showing that the exercise of the fundamental freedom of association is "effectively impossible". Only where the "core protection of s. 2(d)...to act in association with others to pursue common objectives and goals"...cannot be meaningfully exercised does the derivative right arise...¹⁹⁶

With respect, however, the Ontario Court of Appeal appears to be making the matter more complicated than it needs to be. "Derivative rights" as such were not discussed in *Fraser*;

¹⁹⁴ *Criminal Lawyers' Association*, *supra* note 192 at paras. 30-31 and 33.

¹⁹⁵ *Fraser v. Ontario*, 2011 SCC 20 at para. 70.

¹⁹⁶ *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2012] O.J. No. 2420 (C.A.)(QL) ("*Mounted Police Association*") at para. 120.

rather, *Criminal Lawyers' Association* was cited in *Fraser* to demonstrate that the Supreme Court had

...consistently rejected a rigid distinction between 'positive' freedoms and 'negative' rights in the *Charter*. For example, it recently held that s. 2(b) may require the government to disclose documents to the public in order to enable meaningful discourse.¹⁹⁷

The basic concept found in both *Criminal Lawyers' Association* and *Mounted Police Association* - that certain rights are valuable only insofar as they are necessary for the expression of other rights - may not in itself be problematic. However, it is not clear why, in the labour context, rights such as collective bargaining, the right to strike, and (as I argue here) the right to sympathetic action are necessarily "derivative rights" and not manifestations of a fundamental *Charter* right *in themselves*. Justice Ball, of the Saskatchewan Court of Queen's Bench, in *Saskatchewan Federation of Labour* took the latter approach, holding that:

I am satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively.¹⁹⁸

So, for instance, in the context of the right to strike, one could derive a right to strike directly from section 2(d):

The right to freedom of association might require recognition of a right to strike because the latter is a species of the former. This is similar to the way the relatively specific right not to be censored for uttering critical opinions about government can be derived from the more abstract right to free speech. The right to strike would here be seen as a species of the wider genus of associated activity to which one has a fundamental entitlement. In can also include, for example, the right to join with other citizens to mount a campaign on a matter of public concern or to pursue some private interest together in a club.¹⁹⁹

¹⁹⁷ *Fraser*, *supra* note 195 at para. 69.

¹⁹⁸ *Saskatchewan Federation of Labour* (Q.B.), *supra* note 14 at para. 115.

¹⁹⁹ Sheldon Leader, "Can You Derive a Right to Strike from the Right to Freedom of Association?" (2010), 15(2) C.L.E.L.J. 271 at 273.

On the other hand, an *indirect* derivation would view the right to strike as instrumental to other rights that *are* directly derived from freedom of association, for instance as a necessary support for trade unions:

The strike might not be protected as a species of the right to freedom of association, but could nevertheless be derived from that right by being seen as a means to furthering it. The most frequently found version of this view is that the right to strike furthers the functions of an institution - the trade union...

There is a further subdivision within indirect derivation. In asking just what are the *essential* supports for trade union activity, decisions in some jurisdictions say that the right to strike is indispensable. Others, however, say that the right to strike forms part of a set of alternative supports, no single one of which is essential...The set taken as a whole is an indispensable support, but no single part of it is, including the right to strike...²⁰⁰

The distinction is more than academic. An indirect derivation (or characterizing sympathetic action as a "derivative right") invites interpretations of a right that favour greater deference to legislative choices that restrict that right. So in dealing with the right to strike,

[w]hat is at stake in direct versus indirect derivation? The latter permits greater judicial deference to the legislatures desire to shape the norms governing the right to strike. If the derivation is indirect, then there will be persistent room for debate over whether or not the right to strike - or any particular element of it - is in fact indispensable to trade union freedom. But if the derivation is one seeing whether the species is located within the wider genus, there is less room for deference to a variety of legislative choices. The concrete right either is or is not legitimately included within the range of concrete examples of freedom of association....

In dealing with the right to sympathetic action, the distinction between "positive" and "negative" rights discussed in *Fraser* is for the most part irrelevant. Legislation enacted by government prohibits workers from taking sympathetic action. The right in question (as with the right to strike) falls squarely into the category of "negative" rights. The main question regarding a right to sympathetic action is whether it can be derived directly from one or more fundamental freedoms, or whether it is an instrumental or derivative right - in particular derivative of the

²⁰⁰ *ibid.*

rights to collectively bargain and to strike, or necessary for the support of the institution of trade unions. Therefore in this Part the approach taken by the Court of Appeal in *Mounted Police Association* will be, for the most part, rejected, and rather than the concept of "derivative rights" is will prefer to limit discussion to the related concept of direct versus indirect derivation.

Freedom of Conscience

To argue that sympathetic action is a protected right under the *Charter's* freedom of conscience guarantee, it is of course necessary to establish that sympathetic action (and trade union solidarity generally) *is*, in fact, a matter of conscience. To any dedicated trade unionist this is almost certainly a given. Solidarity, as Chief Justice Brian Dickson noted in *BCGEU*, is at the heart of trade unionism. It has been vital to the success of organized labour. Its deceptively simple definition – “unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group”²⁰¹ – does not fully capture the emotional and moral impact of solidarity within the labour movement. That impact is evident in rhetoric and songs that have arisen from the labour movement, both those that extol the virtues of solidarity – the most famous in North America being, no doubt, the labour anthem “Solidarity Forever”²⁰² – and those that condemn, often in the bitterest terms, those that would cross a picket line or otherwise undermine their fellow workers.²⁰³ The term “scab” or “blackleg” continue to be terms of direct abuse and condemnation to trade unionists.²⁰⁴

²⁰¹ *Oxford English Dictionary*, 3rd Ed. (Oxford: Oxford University Press, 2011).

²⁰² Written by Ralph Chaplin in 1915, its chorus – “Solidarity Forever, for the Union makes us strong” – is sung and quoted throughout the labour movement, labour literature and, of course, here. Other examples of solidarity in song – such as “Which Side Are You On?”, cited *supra* – are legion.

²⁰³ The English folksong “Blackleg Miner” (Trad., reproduced in Mal Collins et. al. (Eds.), *Big Red Songbook* (London: Pluto Press, 1981)) is not unique in its hostility to the strikebreaker:

So join the union while you may.
Don't wait till your dying day,
For that may not be far away,
You dirty blackleg miner!

To those who do not ascribe to traditional trade union principles, however, the conscientious aspects of union solidarity may not be so obvious.

In this Part I will review the *Charter* caselaw around section 2(a) and draw from that the governing principles used by the courts in addressing questions of conscience. From the caselaw I will turn to the question of conscience generally. I will then apply those principles to the question of union solidarity and conclude that solidarity is indeed a question of conscience subject to *Charter* protection.

Religion, Conscience, and the Charter

i. Freedom of Religion in the Courts

While freedom of religion under section 2(a) of the *Charter* has been judicially considered a number of times,²⁰⁴ freedom of conscience has, for the most part, received only

²⁰⁴ In terms of legal history the term “scab” was perhaps made most famous in the United States Supreme Court decision *Old Dominion Branch No. 496 Nat’l Assoc. Of Letter Carriers, AFL-CIO et. al. v. Austin et. al.* (1974), 418 U.S. 264. Justice Thurgood Marshall, at p. 268, quoted “a well-known piece of trade union literature, generally attributed to author Jack London, which purported to supply a definition:

The Scab

After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.”

²⁰⁵ Notable examples include *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (“*Big M Drug Mart*”); *Edwards Books*, *supra* note 19; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (“*Ross*”); *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (“*Syndicat Northcrest*”); *Multani*, *supra* note 19; *Hutterian Brethren*, *supra* note 19.

cursory treatment by Canadian courts. It is perhaps odd that this is the case. After all, it would seem that the concept of conscience generally is broader than the concept of religion: "It is possible to think...that freedom of religion, for example, has no distinctive value that is not captured by the broader guarantee of freedom of conscience."²⁰⁶ Both freedom of religion and conscience are also protected under human rights instruments to which Canada is a party.²⁰⁷

The relative lack of cases regarding freedom of conscience may simply be an accident of history - that the first s. 2(a) cases dealt with questions of religion specifically. That said, the language used by the Supreme Court regarding section 2(a) for the most part seems to encompass matters of conscience beyond the explicitly religious.

In *Big M Drug Mart*, Dickson J. (as he then was) described freedom of conscience and freedom of religion as forming "a single integrated concept" in section 2(a).²⁰⁸ Dickson J. described section 2(a) as arising from centuries of opposition against State coercion in matters of belief:

The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures.²⁰⁹

Big M Drug Mart also established that freedom of conscience and religion is primarily a civil liberty (per the discussion in Part I, *supra*) and, as such, an individual right. Freedom is

²⁰⁶ Macklem, *supra* note 179 at viii; though it should be noted that Macklem does view conscience and religion as distinct concepts.

²⁰⁷ See the United Nations *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) (the "UDHR") at Art. 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." See also 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) (the "ICCPR") at Art. 18 ("thought, conscience and religion").

²⁰⁸ *Big M Drug Mart*, *supra* note 205 at para. 120.

²⁰⁹ *ibid.*

characterized by the absence of coercion or constraint and is founded upon "respect for the inherent dignity and the inviolable rights of the human person."²¹⁰ Regarding the freedoms in s.

2(a) Dickson J. stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.²¹¹ [Emphasis added.]

While Dickson J.'s reasons suggest that conscience and religion are linked, they are not indistinguishable. However both freedoms speak to a rejection not only of the desirability of state-imposed belief but even of its possibility. They represent a fear of *attempts* by the state to force conformity of conscience (given the inability of the state to *actually* enforce such conformity)²¹². However, such freedom is not absolute. The state is entitled to infringe upon freedom of conscience and religion to protect "public safety, order, health, or morals"²¹³ or the fundamental rights and freedoms of others".

In *Edwards Books*, the Supreme Court expanded upon *Big M Drug Mart*. Though once again dealing with freedom of religion, the language used by then-Chief Justice Dickson does not require that beliefs have a religious source. It is the nature of the beliefs, not their origin, that is important.

...The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some

²¹⁰ *ibid.* at para. 94-95.

²¹¹ *ibid.*

²¹² Notwithstanding dystopian exercises in thought control such as Newspeak in George Orwell's *1984*.

²¹³ The inclusion of "morals" in this list is interesting given that imposed morality is one of the evils the freedoms in s. 2(a) are meant to avoid.

cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial...²¹⁴ [Emphasis added.]

The language used by the Court here clearly extends beyond the religious, but it also seems clear that conscience, in the *Charter* context, is interpreted to refer to beliefs that are, if not religious, then of almost-religious character:

Section 2(a)'s reference to "conscience", which is not found in the first amendment [of the United States Constitution], would protect systems of belief which are not theocentric (centred on a deity), and which might not be characterized as religions for that reason (or for some other reason).²¹⁵

Edwards Books also reaffirms the individual character of section 2(a) and adds the "trivial and insubstantial" hurdle for *Charter* review of freedom of religion, which was applied by Linden J.A. in his dissent in *Roach v. Canada, infra*, regarding freedom of conscience.

More recent cases have reaffirmed that freedom of religion, while it may draw from a communal or group source, remains an individual freedom. The Court cannot be arbiter of religious dogma, as the Court stated strongly in *Syndicat Northcrest*, nor should it judicially consider or determine the content of religious requirements.²¹⁶ However, the Court can and will inquire into the *sincerity* of the claimant's belief, which simply suggests that the belief is held honestly and in good faith.²¹⁷ The assessment of sincerity is a question of fact and can include a number of criteria including the credibility of the claimant's testimony and whether the claimant's belief is consistent with his or her other religious practices. The courts should not be rigorous in studying the claimant's past practices; religious beliefs often change over an individual's

²¹⁴ *Edwards Books, supra* note 19 at para. 97.

²¹⁵ Peter Hogg, *Constitutional Law of Canada*, (5th Ed.) (Toronto: Carswell, 2007) at 42-3.

²¹⁶ *Syndicat Northcrest, supra* note 205 at para. 50.

²¹⁷ *ibid.* at para. 51-52.

lifetime, and the focus of the courts must therefore be on the claimant's belief at the time of the alleged infringement.²¹⁸ Expert testimony regarding the practices and beliefs of other adherents may be relevant to demonstrating the claimant's sincerity but is not required; what is important is what the claimant views his or her religious obligations to be, not what others professing the same faith may believe.²¹⁹

Bastarache J. , writing for the minority in *Syndicat Northcrest*, would have required that the applicants demonstrate a "nexus" between personal beliefs and a religion's precepts. Religious precepts "constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience."²²⁰ This would have lead to a more objective test regarding the validity of a given religious belief. The majority, however, rejected such a test.

While sincerity should not be extensively questioned, the Supreme Court recently held²²¹ that the *strength* of belief may be relevant - not whether the practice is mandatory or voluntary, but rather how important the practice is to the claimant.²²² Under this approach claimants might be asked how strongly they believe in their religious strictures and obligations or whether they have failed to observe those obligations in the past - indeed, potentially the very questions that the Court stated should not be asked in evaluating sincerity.²²³ Even if sincerity is established the analysis may not be complete.

²¹⁸ *ibid.* at para. 53.

²¹⁹ *ibid.* at para. 54.

²²⁰ *ibid.* at para. 135.

²²¹ *R. v. N.S.*, 2012 SCC 72 (CanLII).

²²² *ibid.* at para. 36.

²²³ Note Justice Abella's dissent, *ibid.*, at para. 80ff, particularly at para. 89, where she argues that evaluating the "strength" of a claimant's belief "risks re-entering into inappropriate inquiries into a claimant's past practices, or into the extent to which a claimant's practices follow a religion's orthodox traditions."

Therefore, when it comes to religious doctrine, it is inappropriate for the Court to inquire into anything but the sincerity and strength of the individual's belief, and the inquiry into sincerity should be as unintrusive and minimal as possible. It does not seem clear whether the inquiry into the "strength" of a claimant's belief will change the rigour and detail of the questions asked of a claimant.

The minimalist inquiry regarding sincerity was demonstrated in *Syndicat Northcrest*, where the applicants believed that their Orthodox Jewish faith required them to construct an individual *succah* (a temporary shelter for the purposes of prayer during the annual religious festival of Succot) on their balcony, in contravention of the condominium complex's bylaws. Experts testified that Orthodox Judaism did not require individual *succahs* and that a communal one - which had been constructed in the complex's communal area - would suffice, but that was held to be irrelevant as it was the individual's beliefs that were important. Similarly in *Multani*, a Sikh boy insisted on wearing a metal *kirpan* (a ceremonial knife) to school. As in *Syndicat Northcrest*, the Court held it was not relevant that other Sikhs were agreeable to carrying a wooden *kirpan* or to other alternatives - it was the boy's individual belief that was important.²²⁴

It is important to note, however, that an applicant alleging infringement of their s. 2(a) rights still must prove the infringement on an objective standard. The Supreme Court stated in a recent case:

At the stage of establishing an infringement...it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. For example, in *Edwards Books*, the legislation required retailers who were Saturday observers to close a day more than

²²⁴ *Multani*, *supra* note 19 at para. 36. See also *Ross*, *supra* note 205, regarding a belief that Christianity mandated anti-Semitism; or *Hutterian Brethren*, *supra* note 19, regarding a belief that the Second Commandment forbade individuals from having their photograph taken.

Sunday observers. In *Amselem*, the infringement resulted from a prohibition against erecting any structure on the balconies of a building held in co-ownership, while the appellants believed that their religion required them to dwell in their own succahs.

It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the Canadian *Charter* and the Quebec *Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

Furthermore, the following comment of Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 313-14, which Iacobucci J. quoted in *Amselem*, para. 58, bears repeating: s. 2(a) of the Canadian Charter “does not require the legislature to refrain from imposing any burdens on the practice of religion” (emphasis omitted; see also *Edwards Books*). “The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises” (*Amselem*, at para. 62). No right is absolute.²²⁵

The principles drawn from the above cases do seem applicable to a question of secular conscience and are relevant to the question at hand. Nonetheless, secular conscience *has* been considered by our courts.

ii. *Freedom of Conscience in the Courts*

Most of the caselaw dealing with freedom of conscience has, perhaps surprisingly, arisen in taxation law, where taxpayers have had conscientious objections to particular areas of government spending and have sought an exemption from a portion or all of their income tax as a result.²²⁶ It should be noted, however, that the taxation cases do not deal exclusively with

²²⁵ *S.L. v. Commission Scolaire des Chênes*, 2012 SCC 7 at paras. 23 to 25.

²²⁶ E.g. *Norejko v. Canada*, [2005] T.C.J. No. 5 (T.C.C.) (abortion); *Petrini v. Canada*, [1994] F.C.J. No. 1451 (F.C.A.), leave to appeal refused [1994] S.C.C.A. No. 504 (S.C.C.) (military spending); *Woodside v. Canada*, [1993] T.C.J. No. 315 (T.C.C.) (“*Woodside*”) (military spending); *Hertzog v. Canada*, [1991] T.C.J. No. 110 (T.C.C.) (military spending); *O’Sullivan v. Her Majesty the Queen*, [1991] 2 C.T.C. 177 (T.C.C.) and *O’Sullivan v. Her Majesty the Queen*, 91 DTC 5491 (F.C.T.D.) (abortion); *Prior v. Her Majesty The Queen*, [1989] 2 C.T.C. 280 (T.C.C.) and *Prior v. Her Majesty the Queen* (1989), 89 DTC 5503 (F.C.A.) (military spending).

secular conscience. The objection to paying taxes that in part fund abortions is almost certainly a religious one, for instance, and some cases dealing with an objection to military spending by the government have been brought by Quakers who have a religious commitment to pacifism. However, the language used in the cases tends to be fairly neutral and would seem to have application whether the objection in question is religious or secular:

There has been some consideration of freedom of conscience in immigration law, usually where individuals have had conscientious objections to taking the oath of citizenship required under the *Citizenship Act*²²⁷ and, in particular, to the portion of the oath where a prospective citizen must swear or affirm that they will "will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors."²²⁸ Unlike the objection to abortion, the objection to swearing allegiance to a monarch is just as likely to arise from secular beliefs (such as political republicanism) as it is to arise from a religious one (such as a belief that a person owes allegiance only to God). For example,

[a] person could believe strongly that the Queen, or a person in general, is not a fit subject of allegiance. He could be an unwavering republican, and want to abolish the monarchy or change the structure of Canada. Despite personal convictions that the Canadian state should change radically, his conscience is burdened by the current oath because he must proclaim publicly his loyalty to the Queen, and that he will faithfully observe the laws of Canada and his duties as a citizen.²²⁹

A similar, secular, objection was raised, unsuccessfully, by a military officer to displays of allegiance to the Queen.²³⁰

²²⁷ R.S.C. 1985, c. C-29, ss. 3(1)(c) and 24, and schedule 1.

²²⁸ E.g. *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] F.C.J. No. 33 (F.C.A.) ("*Roach*"),

²²⁹ Bryce Edwards, "Let Your Yea be Yea: The Citizenship Oath, the *Charter*, and the Conscientious Objector" (2002), 60 U.T. Fac. L. Rev. No. 2, 39-83 at para. 83.

²³⁰ *Chainnigh v. Canada (Attorney-General)*, [1994] 1 F.C. 250 (F.C.T.D.).

Conscience was also raised in *Maurice v. Canada (Attorney-General)*.²³¹ In *Maurice*, an inmate at a federal penitentiary had demanded vegetarian meals based on his "conscientiously held belief" that eating meat and certain other foods was "morally reprehensible and poisonous to society as a whole."²³² The Federal Court held that the penitentiary's refusal to provide the inmate with vegetarian meals violated the inmate's freedom of conscience. Vegetarian meals were provided to inmates with *religious* objections to eating meat, and as s. 2(a) provides for freedom of conscience as well as freedom of religion, "a similar entitlement for a vegetarian diet exists based on the right to freedom of conscience."²³³

In the area of labour law, freedom of conscience has received only the briefest of glances and generally speaking only at the administrative tribunal or lower court level, and even then has been rarely argued or formed the basis for a decision.²³⁴ Even *Lavigne* and *Advance Cutting & Coring*, both of which dealt with concerns about "ideological conformity",²³⁵ were decided on the basis of freedom of association (though freedom of expression was also raised in *Lavigne*) rather than freedom of conscience, although freedom from ideological conformity would seem to have a strong tie to freedom of conscience.²³⁶ And of course, freedom of conscience has not been considered in the context of refusing to cross a picket line, as in *Grain Workers*.

²³¹ 2002 FCT 69 (CanLII) ("*Maurice*").

²³² *ibid.* at para. 1.

²³³ *ibid.* at para. 11.

²³⁴ See, e.g., *Re Coast Mountain Bus Company*, 159 C.L.R.B.R. (2d) 82 (B.C.L.R.B.); *Canadian Union of Postal Workers and Canada Post Corp. (Safire Grievance)*, [1996] C.L.A.D. No. 1156 (Christie). In *Coast Mountain Bus Co.*, section 2(a) was raised but no argument was presented; in *Safire* s. 2(a) was raised but the decision was rendered based on section 2(d)'s freedom of association.

²³⁵ *Lavigne*, *supra* note 37 at para. 287 (*per* McLachlin J.); *Advance Cutting & Coring*, *supra* note 37.

²³⁶ That said, my view is that while *Lavigne* is just as much a freedom of conscience case as it is a freedom of expression case, *Advance Cutting & Coring* may actually better fit within the freedom of expression cases due to the presence of freedom of "opinion" and "belief" within s. 2(b). I will discuss this distinction and its significance *infra*.

While freedom of conscience was given serious consideration in *Maurice*, conscientious objection in the context of either taxation or immigration have generally fared badly in the courts. In the examples given above have universally been dismissed, often with only brief reasons; few of these cases have given detailed consideration to freedom of conscience. Some judges have been critical of the very notion of bringing *Charter* challenges on the basis of such conscientious objections. The majority in *Roach*, for instance, held that requiring a dedicated republican to swear an allegiance to the Queen in order to gain citizenship “could not be even a trivial or insubstantial interference with the appellant's exercise of those freedoms.”²³⁷ Morgan T.C.J. in *Hertzog* went so far as to state that a *Charter* challenge on the basis of conscientious objection to military spending demeaned the *Charter*.²³⁸

The leading definition of conscience therefore remains that set out by Justice Bertha Wilson in her concurring reasons in *R. v. Morgentaler*:²³⁹

...[I]t would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a). In so saying I am not unmindful of the fact that the Charter opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God..." But I am also mindful that the values entrenched in the Charter are those which characterize a free and democratic society. ...

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.²⁴⁰ [Emphasis added.]

²³⁷ *Roach*, *supra* note 228 at para. 2.

²³⁸ *Supra* note 226 at p. 5 (QL).

²³⁹ [1988] 1 S.C.R. 30 ("*Morgentaler*") at para. 217ff.

²⁴⁰ *Ibid.* at paras. 249 and 251.

Linden J.A.'s dissent in *Roach*²⁴¹ follows Wilson J.'s reasons, and while the majority in *Roach* came to a different result they accepted Linden J.A.'s reasoning in relation to section 2(a).²⁴² Regarding freedom of conscience, Linden J.A. held:

It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the Charter. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b).²⁴³

Both Wilson J. In *Morgentaler* and Linden J.A. in *Roach* note the inter-relationship of conscience and religion. Linden J.A. also notes the distinction between “profound moral and ethical beliefs”, on the one hand, and “political or other beliefs”, on the other. While this distinction is both significant and necessary (given the freedoms set out in section 2(b)), it is hardly an easy one to draw or to maintain. The advantage of religion, analytically speaking, is that even though freedom of religion technically adheres to the individual rather than necessarily to a church or congregation, one can generally point to a tradition or body of belief that goes beyond the individual. A particular person’s religious belief system may be idiosyncratic or eccentric but they can still usually be identified as stemming from a given religious tradition, even if there may be significant overlap with political aims. Secular morality, on the other hand, can be more difficult to distinguish from opinion or political beliefs. It can be difficult to define

²⁴¹ *supra* note 228 at para. 21ff.

²⁴² *Ibid.* at para. 2.

²⁴³ *Ibid.* at para. 45.

at which point a belief in republicanism or pacifism or trade union solidarity, for instance, becomes more than simply a political preference, however strongly held, and rise to the level of a profound moral or ethical belief.

Labour relations boards differ in their interpretation of what sympathetic strike action represents. As has been noted previously, the British Columbia Labour Relations Board has tended to view refusal to cross a picket line (and potentially other sympathetic strike action) as almost instinctive - or to use Paul Weiler's word, "Pavlovian". The Alberta Board, however, has viewed refusal to cross as a rational exercise in enlightened self-interest. These categories are not mutually exclusive, of course (and neither has either Board suggested that they are). However, the latter interpretation suggests a version of union solidarity that may be a belief, but is not a profound moral or ethical one. Rather, such an interpretation tends to remove solidarity from the realm of morality or personal conduct (and hence s. 2(a) of the *Charter*) and places it instead into the realm of opinion and belief (s. 2(b)) or association (s. 2(d)).

That being said, the fact that a belief is *rational* does not necessarily preclude it from being a matter of conscience. Conscience may itself be a part of our "rational personality",²⁴⁴ a concept that will be explored further below.

Again, these are not mutually exclusive, and as was noted in *Lavigne* a given freedom may be protected by more than one section of the *Charter*. But to trigger s. 2(a), the beliefs in question must have not only sincerity but also profundity, and following *Grain Workers* it seems likely that some courts, at least, would be entirely willing to question both. The *Charter* application in *Grain Workers* was merely an attempt by workers to avoid just punishment, said the Federal Court of Appeal - hence, in 2(a) terms, it lacked sincerity. The approach by the

²⁴⁴ Macklem, *supra* note 179 at 98.

majority in *Grain Workers* suggests that the courts would be less likely to give credence to the stated reasons why, exactly, a given worker or group of workers refused to cross a picket line, and, finding the reasons given not acceptable from the perspective of the Bench, consequently finding that refusal was not protected by s. 2(a).

iii. Conscience vs. Opinion and Belief

Timothy Macklem views conscience as part of our "rational personality". "The commitment that conscience embodies," he writes, "...is a commitment that makes possible the creation and survival of central elements of what I will call our *rational personality*....[O]ur rational personality includes not only our distinctive capacity to appreciate reasons, but our virtues and vices and the demands of our conscience."²⁴⁵ He views conscience as a *source* of reason rather than exclusive of reason:

[C]onscience has a role to play in the development as well as in the articulation of our practical reasoning. This means that conscience must be something more than our concluded beliefs on a topic, for it has a part to play in generating those beliefs in the first place. Conscience, it would appear, is a rational resource that we are able to call upon when we want to know what we should do, and the conclusions that we reach with its aid are the conclusions that we subsequently present to the world as the products of our conscience. It is true to say, therefore, that the conscience that we express to others represents our concluded beliefs on the matter in question. What is more, it is correct to describe those beliefs as the claims of our conscience. Yet it is also true that the beliefs in question have the content they do only because they have already been shaped, within the process of our reasoning, by the existing claims of that same conscience.²⁴⁶

From Macklem's perspective, therefore, *rationality* is not a bar to *profundity*. Indeed, the two are inseparable.

Similarly, Dianne Pothier has argued that respecting a picket line may be instinctive, but not irrational:

²⁴⁵ *ibid.* at 98-99.

²⁴⁶ *ibid.* at 86-87.

I have little difficulty with the general descriptive accuracy of the “signal effect”; conventional picket lines are designed to induce people not to cross, and are largely effective in that aim. What I fail to understand is why the “signal effect” in any way detract from picketing being expression worthy of protection, or makes respect of a picket line irrational.

...

The assumption that the reflexive nature of observing a picket line makes it irrational is even more troubling. The automatic response does not indicate an automaton state; instead, it means that the issue has been previously thought through. Refusal to cross a picket line is a political and ideological statement of union solidarity; the fact that others may not share the same ideology does not make it irrational. The equation of solidarity to irrationality attacks the core values of both freedom of expression and freedom of association, despite the fact that, as noted in the previous part, the Court so readily accepted the principle of freedom of association includes the collective exercise of freedom of expression. [Emphasis added]²⁴⁷

While Pothier's argument deals with the freedoms of expression and association, it seems entirely applicable to freedom of conscience. Like Macklem, Pothier puts forward a rational basis for an ostensibly instinctive or irrational act - an issue that "has been previously thought through". The danger this "rationality" presents to an argument on freedom of conscience, however, is that it may take the argument out of the realm of freedom of conscience and place it into the realm of freedom of expression. For instance, while Justice Evans noted in *Grain Workers* that trade unionists regard it as an “ethical obligation” not to cross another union’s picket line, he interprets this only in the context of freedom of expression – promotion of the value of promoting diversity in forms of individual self-fulfillment and human flourishing.²⁴⁸ Linden J.A. in *Roach* seems to assume that "reason" is incompatible with "conscience", though he does concede there is no bright line between them:

Freedom of thought, belief and opinion is distinct from freedom of conscience. Freedom of thought, belief and opinion encompasses many ideas and principles that are not matters of conscience, nor of right or wrong; what is involved here are political, social, economic

²⁴⁷ Dianne Pothier, “Twenty Years of Labour Law and the Charter” (2002), 40 Osgoode Hall L.J. 369 at 390.

²⁴⁸ *Grain Workers*, *supra* note 4 at para. 57.

or cultural ideas. We are dealing here in the realm of reason, not of faith, nor of morality. It is obvious that there are no sharp dividing lines here; these matters may blur into one another, making them difficult to differentiate.²⁴⁹ [Emphasis added.]

Linden J.A. held that infringement of freedom of conscience had not been made out in *Roach*; he held that the appellant's claim was not about the oath itself, but rather its *content*, and that therefore the claim was more properly brought under s. 2(b), though "[t]his is not to say that the appellant might not have made a valid argument regarding freedom of conscience had he articulated a conscientious objection to the content of the oath or affirmation."²⁵⁰ Linden J.A. appears to assume that because affirmation was an available alternative to swearing an oath, conscience was not engaged. This is a problematic conclusion; as Bryce Edwards points out, the content of the oath is non-negotiable, and dictated by statute. It is meant to commit the speaker to the promise made - to bind the speaker's conscience. If an individual refuses to take the oath, then he or she cannot become a citizen. It is therefore properly a matter for s. 2(a), not s. 2(b).²⁵¹

Because I will later argue that freedom of expression *also* protects the right to sympathetic action, it is not fatal to recognition of such a right if sympathetic action is not a matter of conscience. However to a certain extent relegating beliefs in union solidarity to "mere" political beliefs would seem to ignore the role of such beliefs as part of the moral core of trade unionists.

That moral core can manifest in the initiation oaths within trade unions. Many unions still include initiation rituals for new members, and include oaths therein.²⁵² These are generally

²⁴⁹ *Roach*, *supra* note 228 at para. 55.

²⁵⁰ *ibid.* at para. 49.

²⁵¹ Edwards, "Let Your Yea be Yea", *supra* note 229 at para. 151.

²⁵² See, e.g., 2012 Constitution and Bylaws of the Service Employees International Union, available online at <http://www.seiu.org/15728.SEIU-Constitution-Bylaws-2012.pdf> (last visited April 4, 2013) at p. 45; 2011 Constitution of the Canadian Union of Public Employees, available online at http://cupe.ca/updir/Constitution2011_english.pdf (last visited April 4, 2013) at p. 64; 2012 Constitution of the Communications, Energy and Paperworkers Union, available online at <http://www.cep.ca/sites/cep.ca/files/docs/en/130117-Constitution-2012.pdf> (last visited April 4, 2013) at p. 5.

not oaths to a higher power but, rather, to one's "honour", or simply phrased as a solemn promise.²⁵³ The fact that initiation rituals are generally done publicly and witnessed - an oath from the Communication, Energy, and Paperworkers Union, for example, has all members present state "your pledge will be remembered" after the new members complete their initiation. At least some Locals of the Canadian Union of Public Employees include a requirement that the promise be witnessed, adding a solemnity and seriousness to the occasion. Like a citizenship oath, it is a "public ceremony, with personal, religious, social and political ramifications."²⁵⁴ These are public declarations of allegiance and principle, meant to bind the conscience.

This is not to say that merely taking an oath renders everything one does an act of conscience. Were that so, one can easily imagine oaths being taken to justify any number of dubious pursuits. However, I submit that union oaths demonstrate the historical importance of union solidarity and that, at the very least, there can be a moral component to respecting a picket line.

If union oaths bind the conscience, however, it is not entirely to the benefit of unions. Such oaths are of questionable value when in a "union shop" environment, where union membership is a condition of employment.²⁵⁵ In theory, all in-scope workers would be required to take the oath. Much like the citizenship oath, forcing an individual to swear an oath to a person or principle with which they have a profound disagreement would seem to go against the very point of conscience. The greater the significance given to freedom of conscience in the labour relations context, the greater the chance that it will be used to weaken union authority.

²⁵³ Notably, however, invocation of a higher power is no longer considered necessary to bind one's conscience in court: *R. v. Khan*, [1990] 2 S.C.R. 531.

²⁵⁴ Edwards, "Let Your Yea be Yea", *supra* note 229 at para. 90.

²⁵⁵ See, e.g. the Saskatchewan *Trade Union Act*, *supra* note 71, s. 36.

However labour relations statutes generally limit the impact of union membership; Saskatchewan's *Trade Union Act*, for instance, provides that an employee cannot be dismissed for failing to maintain union membership, provided that employee pays dues²⁵⁶ and that those employees who have a *religious* conscientious objection (but not a secular one) to union membership and paying dues may be allowed to have their dues directed to a charitable organization.²⁵⁷ Furthermore, most jurisdictions in Canada utilize the "agency shop" model, where union membership is not a condition of employment and only payment of dues is required. In an "agency shop" workers may choose to join the union or not; as such the oaths will only be administered to those who choose to accept them. Therefore conscientious objection to swearing a union oath appears to be addressed already in the labour relations regime. If anything, "agency shop" situations make the claim of conscience that much stronger. If union membership is optional, then it is arguable that those workers who choose to become union members and take the oath of membership understand their responsibilities and choose to bind their consciences accordingly.

The non-unionized worker is a different matter. A non-unionized worker may have been a union member previously, or may even still be one; some unions allow members to maintain membership after they have ceased employment in a bargaining unit for which that union holds certification. Or a non-unionized worker may never have signed a union card and may never have taken an oath; they have no basis for sympathetic action beyond their own beliefs.

²⁵⁶ E.g. *ibid.* at s. 11(2)(e): "It shall be an unfair labour practice for any employee, trade union, or any other person... (e) to seek or take steps to have an employee discharged for failure to acquire or maintain membership in a trade union, where such membership is a condition of employment, if the employee complies with subsection 36(3)..."

²⁵⁷ *ibid.*, s. 5(l). I would note that the Ontario Labour Relations Board has held that an *employer* has no right to remain non-unionized, as an employer is obviously not required to join the union: *Labourers' International Union of North America, Local 1059 v. Roger Good*, 2010 CanLII 47146 (ON LRB).

Regardless, they do not have the protections within their *own* workplace that a unionized worker has. They also will generally have to make a decision to respect a picket line on their own, without leadership or support from a union. As noted above, this leaves non-unionized workers particularly vulnerable to retaliation by their employer if they choose to refuse to cross a picket line.

Whether unionized or not unionized, however, workers cannot take sympathetic action lightly. Even where authorized on an individual basis (as in Manitoba), workers may face a loss of pay for work not performed and no doubt subtle and less-than-subtle pressure from their employer. The choice to respect a picket line is not consequence-free even if that choice is permitted in law. Where a worker chooses to take sympathetic action (other than in situations such as refusing to cross a picket line due to fear for their personal safety, of course) it seems almost certain that that choice will be taken as a matter of conscience.

iv. Proving Infringement

That sympathetic action may be a matter of conscience is only part of the picture. Freedom of conscience appears to be subject to the same analysis as freedom of religion under s. 2(a). Therefore, applying that analysis, applicants must demonstrate that their freedom of conscience has, in fact, been infringed (*Commission Scolaire des Chênes*); it is not sufficient to simply state that they feel it has been infringed. They must demonstrate that the infringement is not trivial or insubstantial (*Edwards Books*). They must demonstrate that they are sincere in their beliefs (*Syndicat Northcrest, Multani*).

Commission Scolaire des Chênes set out the standard that the applicant must prove, on the balance of probabilities, that a religious practice or belief exists that has been infringed. I submit that in the case of sympathetic action, this standard is easily met. If sympathetic action is

a matter of conscience, then any statutory restriction on sympathetic action potentially infringes s. 2(a). To believe strongly in solidarity and yet to be required to cross a picket line for fear of statutory penalty, for instance, is an actual infringement of a deeply-held moral belief. The believer is forced to act in direct opposition to their moral code.

Is the infringement not trivial or insubstantial? The majority in *Roach* held that being forced to swear an oath to the Queen or be denied citizenship was no infringement of freedom of conscience. The Court in *Commission Scolaire des Chênes* held that mandatory classes exposing students to a variety of different religions did not violate freedom of religion. And again, the majority in *Grain Workers* gives little faith that the courts will give much credence to unionists' claims that their *Charter* freedoms are infringed by the peace obligation.

I submit that the beliefs inherent to sympathetic action are more in line with conscientious objection to military service, which Linden J.A. suggested triggered freedom of conscience,²⁵⁸ or the right to carry a *kirpan* in school as in *Multani*. The infringement upon unionists' freedom of conscience is a direct interference with their ability to exercise that *Charter* freedom. Indeed, without the right to sympathetic action, solidarity as an expression of freedom of conscience is essentially impotent. The ability to express support for strikers through other means, such as writing letters to the editor or joining the picket line on one's own time (as Evans J.A. suggested in *Grain Workers*) may address the interests inherent in s. 2(b), but not the basic affront to one's conscience at being forced to do something that one believes is morally wrong.

The evaluation of *sincerity* may be problematic. However, the Supreme Court specifically rejected the "objective" test suggested by Justice Basterache in *Syndicat Northcrest*. As a result the Courts should keep to a minimum their assessment of an individual's sincerity of

²⁵⁸ *Roach, supra* note 228 at para. 45.

belief. Therefore while a court can inquire into an individual's sincerity, it should not pass judgment on the validity of beliefs nor whether such beliefs are in keeping with others' interpretation of religious precepts. Applied to sympathetic action, the evaluation seems quite straightforward, especially given the prevalence of "solidarity" as the guiding principle for most trade unions.

All that being said, the application of freedom of conscience, as perhaps the most profoundly individual right, to a right to sympathetic action presents a very basic problem: what impact should it have on the law? Individual sympathetic action is already not subject to statutory prohibition. As such, can it have any impact on the *status quo*?

v. Conscience and the Peace Obligation

The peace obligation under labour legislation is not directly challenged by individual freedom of conscience. Individual action already does not contravene the peace obligation. However, when sympathetic action is undertaken by union members collectively - either refusing to cross a picket line or engaging in a full-on sympathy strike - the peace obligation is infringed.

What is relevant is therefore that the peace obligation prohibits the exercise of conscience *in association*. It is the associational aspect that is itself illegal. That said, Evans J.A. in *Grain Workers* did not consider freedom of association in his analysis but, rather, limited his analysis to freedom of expression. The learned judge made his decision in this regard at least partly because the Supreme Court has used s. 2(b) as a basis to determine the validity of expressive conduct during a strike. Reference was also made to the then-recently-decided *BCTF* case, where the B.C. Court of Appeal held that while a right to strike is, in principle, included in freedom of association,²⁵⁹ the "associative dimension" of the protest strikes (rather than the expressive

²⁵⁹ *Ibid.* at para. 41.

dimension) was directed at “an interference with free collective bargaining”, which was more properly the subject of a separate, pending, challenge on 2(d) grounds to the proposed legislation²⁶⁰ (that legislation being the reason for the protests in the first place).

However, with respect, both of these sets of reasons appear to miss the point. Of the two cases cited by Evans J.A. - *Pepsi-Cola* and *KMart Canada*²⁶¹ - both dealt with statutory prohibitions on expressive activities undertaken pursuant to an ongoing and legal strike. In *Pepsi-Cola*, the issue was picketing secondary sites away from the worksite; in *KMart Canada* it was leafleting secondary sites. Neither case dealt with the peace obligation nor with the statutory definition of a "strike". In the case of *Grain Workers*, what made the workers' actions illegal was the fact that the actions were taken *collectively*. Individual workers refusing to cross the line would have been exercising their right to free expression without collaboration, and the statutory definition of "strike" would not have been an issue.

Similarly in *BCTF*, had the protests not been collective, the prohibition on mid-term strikes would not have been infringed. It would have been a matter of individual teachers facing discipline. Section 2(d) would have been appropriate and, indeed, even necessary if the view of the section 2 rights set out herein is to be applied.

I submit on this basis that freedom of conscience serves to bolster sympathetic action under freedom of association, and that while conscience itself does not necessitate qualifying or removing the peace obligation, when taken in conjunction with freedom of association such qualification or removal *is* indeed called for.

²⁶⁰ *Ibid.* at para. 42. The legislative provisions themselves, of course, had been in effect for some years by the time the Court of Appeal heard the appeal.

²⁶¹ *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 (“*Kmart Canada*”)

vi. *Conscience and Provincial Human Rights Legislation*

Three jurisdictions in Canada - Saskatchewan,²⁶² Québec,²⁶³ and the Yukon Territory²⁶⁴ - guarantee freedom of conscience in their human rights legislation. As such, the *individual* exercise of sympathetic action is arguably protected, even absent government action. These statutes apply to private actors as well as public and quasi-public ones.

Human rights legislation, while not truly constitutional, is of a “special character” and should be given a purposive interpretation.²⁶⁵ It is “fundamental [law] intended to apply to all other legislation of the enacting body in the absence of express words in the legislation denying it that power.”²⁶⁶ The language in the three statutes is “imperative”; like the *Charter* (and unlike the *Canadian Bill of Rights*) they can be seen intending to “set a standard upon which present as well as future legislation is to be tested.”²⁶⁷ The Saskatchewan and Yukon statutes also expressly provide that they take precedence over other provincial legislation.²⁶⁸ Human rights legislation is already incorporated into all collective agreements and contracts of employment.²⁶⁹

²⁶² *The Saskatchewan Human Rights Code*, *supra* note 134, s. 4: “Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.”

²⁶³ The *Québec Charter*, *supra* note 134, s. 3: “Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.”

²⁶⁴ The *Human Rights Act*, *supra* note 134, s. 4: “Every individual and every group shall, in accordance with the law, enjoy the right to freedom of religion, conscience, opinion, and belief.” Note that the *Yukon Act* includes opinion and belief in this section, and includes freedom of *expression* separately in section 5.

²⁶⁵ *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 12: “[Human rights legislation] is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect...”

²⁶⁶ *Scowby v. Clendenning* (1983) 148 D.L.R. (3d) 155 (rev’d on other grounds [1986] 2 S.C.R. 226) at para. 14.

²⁶⁷ *R. v. Big M Drug Mart*, *supra* note 205 at 342-344, in reference to the *Charter*.

²⁶⁸ *Yukon Human Rights Act*, *supra* note 134, s. 39; *Saskatchewan Human Rights Code*, *supra* note 134, s. 44.

²⁶⁹ *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, [2003] SCC 42, at para. 28: “Human rights and other employment-related statutes establish a floor beneath which an employer and a union cannot contract.”

Furthermore, the Supreme Court in *Syndicat Northcrest* (applying the *Québec Charter*) made clear the application of human rights legislation to the law of contract. As Peter Hogg notes:

It is not surprising that freedom of religion confers a constitutional right to hold and profess religious views that are purely personal and private. The remarkable feature of the majority opinion in *Syndicat Northcrest* is that a person also has a constitutional right to *act* on those views...

It is an extraordinary doctrine that permits a contracting party to invoke a sincere religious belief as the basis for ignoring a contractual promise that the promisor freely made but no longer wishes to keep. After all, as Binnie J. emphasised, the counterparties will have ordered their affairs in reliance on the external manifestation of an agreement, and will be rightly disturbed by the promisor's assertion of a hitherto secret religious scruple to justify not keeping the promise.²⁷⁰

The analysis set out *supra* regarding freedom of conscience under the *Charter* therefore seems applicable to freedom of conscience under provincial human rights legislation. The implications are significant. Arguably, an employer who disciplines or dismisses an employee for taking sympathetic action is violating that employee's freedom of conscience and may be subject to a human rights complaint. Given the principle in *Parry Sound*, the human rights provisions may even be incorporated into wrongful dismissal claims or labour arbitrations, if only as an additional ground of damages, as at least one labour arbitrator has done in Saskatchewan with the Saskatchewan *Code's* guarantee of freedom of association.²⁷¹ It is through these statutes that conscience might have its best chance of enforcement in the context of labour and employment.

vi. *Worker Conscience and Employer Retaliation*

Without the involvement of a government actor (for the *Charter*) or statutory enforcement (as under provincial human rights legislation), freedom of conscience cannot be

²⁷⁰ Hogg, *supra* note 215 at 42-10 and 42-14.

²⁷¹ *Johner's Homestyle Catering v. R.W.D.S.U. Local 568* (Nov. 2, 2010, Norman, unreported, aff'd 2012 SKQB 539).

applied directly. Therefore the employer's ability to discipline workers who refuse to perform work, grounded as that is in the employer's common law right to manage the workplace, is not subject to *Charter* review as such; the exception being where the employer is the government actor, where the *Charter* will apply directly²⁷² and, hence, discipline or dismissal could conceivably be a direct breach of the worker's *Charter* rights.

The Supreme Court has urged caution in applying *Charter* values to interpretation of the common law:

...Care must be taken not to expand the application of the Charter beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to Charter scrutiny. Therefore, in the context of civil litigation involving only private parties, the Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent with Charter values.

Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking Charter values into account. Far-reaching changes to the common law must be left to the legislature.²⁷³

At the same time the Court has stated: "The law of tort may itself be expected to develop in accordance with *Charter* values, thus assuring a reasonable balance between free expression and protection of third parties."²⁷⁴ In my view this must also extend to the law of *contract*; "[w]hile an individual who withdraws his or her labour may be immune from criminal liability or liability in tort, that individual breaches his or her contract of employment by non-performance, thereby giving the employer the option to terminate the contract or seek an alternative form of relief."²⁷⁵

²⁷² *Delisle v. Canada*, [1999] 2 S.C.R. 989.

²⁷³ *Hill v. Church of Scientology*, *supra* note 131 at paras. 95-96.

²⁷⁴ *Pepsi-Cola*, *supra* note 184 at 106.

²⁷⁵ *Novitz*, *supra* note 9 at 68.

With the caution of the Courts in mind, however, I do not suggest that the application of freedom of conscience to sympathetic action warrants a broad intrusion into the common law rights and privileges of the employer. However, I submit that an interpretation based on *Charter* values does require some amendment to the common law as it applies to sympathetic action.

As noted in Part I, a worker who undertakes sympathetic action such as refusing to handle "hot cargo" or refusing to cross a picket line is subject to discipline or even dismissal. Unlike refusal of dangerous work²⁷⁶, there is no explicit protection for sympathetic action at common law or in statute; quite the reverse. A worker's reasons for refusing work *may* factor into the penalty applied; in the modern context where courts are more conscious of the idea of "proportionality" in the context of discipline²⁷⁷, it is possible that a court would find that absence from work due to sympathetic action does not warrant dismissal. That mitigates the extent of discipline, though - it does not make the conduct not worthy of discipline.

If undertaking sympathetic action is a matter of conscience, then any analysis of its impact on the common law must balance the values at stake, as was done regarding the law of defamation in *Hill v. Church of Scientology*, or the law regarding secondary picketing in *RWDSU v. Pepsi-Cola*. Some values underlying the *Charter* were enumerated by Dickson C.J. in the *Alberta Reference*, *supra*; in *Hill*, the Court considered "the innate dignity of the individual" as a theme that underlies all *Charter* rights.²⁷⁸

I submit that respect for an individual's strongly-held moral beliefs also promotes the innate dignity of the individual; conscience is as worthy of protection as reputation. Therefore, it

²⁷⁶ See, e.g., the Saskatchewan *Occupational Health and Safety Act*, *supra* note 118, s. 23.

²⁷⁷ *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 at para. 57.

²⁷⁸ *Hill*, *supra* note 131 at para. 120. Ironically, the *Charter* value in *Hill* - the innate dignity of the individual - was the basis upon which the Court justified the infringement of the common law of defamation upon the express *Charter* right - freedom of expression.

is arguable that individually undertaking sympathetic action should no longer be considered worthy of discipline or dismissal at common law. *Parry Sound* held that the *Charter* is incorporated into every contract of employment; as such, it should be an implied term in every employment contract that a worker may undertake sympathetic action without fear of discipline. Unlike the effect on the law of tort, placing this presumption into contracts of employment does mean that, at least in theory, individual workers could contract out of their right to undertake sympathetic action, just as (at least in theory) a worker could seek to have a clause *allowing* him or her to undertake sympathetic action placed into his or her contract. Nonetheless, given the natural imbalance of bargaining power between employer and employee, I submit that a presumption in favour of sympathetic action better promotes *Charter* values and the "right to decency" that underlies modern employment law.

The countervailing value - the right of the employer to have performed work that was contracted for - is not founded in the *Charter* but, rather, in the "efficiency" paradigm and the capitalist system. That does not make it unworthy of protection or concern, but it does take its underlying ethic out of *Charter* values and into the realm of public policy. Were the *Charter* to apply directly, these would be concerns dealt with under section 1; when dealing with the common law, such concerns are addressed by placing the onus on the party alleging that the common law is inconsistent with *Charter* values: "[i]t is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified."²⁷⁹

I do not suggest that a worker may refuse work without *penalty*. As the Manitoba statutory provision authorizing sympathetic action suggests, it would not be fair for a worker to

²⁷⁹ *ibid.* at para. 98.

be able to refuse work while at the same time expecting to be paid for work not done. In this regard I submit that *Charter* values and the balancing of interests within the common law contract of employment would be served by drawing an analogy between the right to sympathetic action at common law and the right to strike under labour legislation. A worker will not be paid for work refused, but will not be further penalized via discipline for insubordination or liability under the "industrial torts." This approach, I submit, addresses a number of the considerations put forward by the Supreme Court in *Pepsi-Cola*, that is:

- 1) Conformity to *Charter* methodology;
- 2) Protection of the value of the *Charter* right in question;
- 3) Avoidance of excessive emphasis on protection from economic harm;
- 4) Adequate flexibility;
- 5) Rationality; and
- 6) Balance of power.²⁸⁰

Other considerations identified by the court in *Pepsi-Cola* - avoidance of the distinction between primary and secondary picketing and avoidance of the distinction between labour and non-labour expression - are of less relevance regarding freedom of conscience. Concerns about the "signalling effect" of the picket line are not really factors regarding conscience except insofar as conscience may be triggered in response to a picket line - not itself an irrational decision, as discussed *supra*.

The final consideration identified by the Court in *Pepsi-Cola*, however, may be more problematic. At paragraphs 87ff, the Court mentions "undue harm to neutral third parties" as a

²⁸⁰ *Pepsi-Cola*, *supra* note 184 at paras. 67ff.

consideration. The Court found that a prohibition on secondary picketing based on neutral retailers' right to trade presented a number of difficulties:

The first difficulty with this argument is that it gives no weight to free expression. As discussed above, this runs counter to *Charter* methodology and values.

A second difficulty is that the argument overstates the interests of third parties by positing a "fundamental" right to trade in the struck good...[T]he basis for this purported fundamental right is unclear.

A third difficulty is that the argument glosses over the fact that third parties - producers and consumers - are harmed even as a result of primary picketing...

Fourth, the argument contravenes at least the spirit of the *Charter* by sacrificing an individual right to the perceived collective good rather than seeking to balance and reconcile them...

It is important that neutral third parties be protected from wrongful conduct and that labour disputes be prevented from unduly spreading...We are not persuaded, however, that it is necessary to ban all secondary picketing in order to accomplish these goals. Prohibiting strike conduct which is tortious or criminal offers protection against a wide variety of misconduct associated with strike action. Insofar as conduct is non-tortious, it is not clear that more is required to protect third parties.²⁸¹

These considerations, while dealing with freedom of expression, seem apt to the present argument. The current state of the common law, where workers can be disciplined, dismissed, or sued for engaging in sympathetic action, gives no weight to freedom of conscience. There is no fundamental right of an employer to trade in struck goods; hence, there is no fundamental right for an employer to demand that a worker take action to facilitate that trade. Economic harm is already present in any strike, whether or not workers engage in sympathetic action, and the common law sacrifices the individual right of conscience to the perceived collective good of market efficiency rather than seeking to balance and reconcile them.

²⁸¹ *ibid.* at paras. 88-92.

There is no question that as the common law presently stands, sympathetic action is potentially tortious, and involves the spreading of a labour dispute. However the mischiefs that concerned the Court in *Pepsi-Cola* were damage to property or persons. A simple refusal to perform work that would serve to weaken a strike does not involve such mischiefs.

Based on the above, therefore, I submit that sympathetic action is properly subject to the protections of freedom of conscience. While s. 2(a) of the *Charter* does not directly protect individual decisions to undertake sympathetic action (since the statutory prohibition does not prohibit individual action), conscience-related association (i.e. sympathetic action undertaken collectively) arguably has a stronger s. 2(d) claim than other forms of association. In those jurisdictions where it is protected under human rights legislation, freedom of conscience may directly protect a right to both individual and collective sympathetic action. Finally, the values underlying freedom of conscience suggest there should be a tempering of the sanctions available to employers at common law in the case of individual workers exercising their right to sympathetic action.

Freedom of Expression

In *R. v. Sharpe*,²⁸² the Supreme Court set out its understanding of the interests underlying freedom of expression, describing freedom of expression as a fundamental right that makes possible liberty, creativity, and democracy by protecting not only popular expression but also unpopular or offensive expression. Central to the freedom is the conviction that the "best route to truth, individual flourishing and peaceful coexistence in a heterogenous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images."²⁸³

²⁸² [2001] 1 S.C.R. 45 ("*Sharpe*").

²⁸³ *ibid.*, para. 22.

Freedom of expression is not absolute, though because of its importance the courts should strictly scrutinize any attempts to restrict it.²⁸⁴ Its underlying values include "individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy."²⁸⁵ While some expression is of more significance than others, all forms of expression are important:

While some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society...[T]he guarantee "ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection", the Court continued, "is . . . 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual". As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937), free expression is "the matrix, the indispensable condition, of nearly every other form of freedom" (p. 327).²⁸⁶ [Citations omitted, emphasis added]

The value of free expression to a democratic society cannot be denied, though Cardozo J.'s comment in *Palko v. Connecticut*, quoted in *Sharpe*, seems to reflect a more American view where freedoms of assembly and association are seen as inherently tied to freedom of expression. It is also notable that in *Sharpe* the distinction between "conscience" and "opinion, thought and belief", discussed *supra*, becomes more clear. Section 2(b) concerns the *manifestation* of belief, the *exchange* of ideas, and political *discourse*. The interests are clearly interactive and not as strictly personal as the interests protected by section 2(a).

As with the earlier analysis of freedom of conscience, the first step in an analysis of freedom of expression and sympathetic action must begin with determining whether sympathetic action is not merely expression but protected expression. As the Supreme Court stated in *Irwin*

²⁸⁴ *ibid.*, para. 23.

²⁸⁵ *ibid.*, para. 24.

²⁸⁶ *ibid.* at para. 24.

Toy, "the first step to be taken in an inquiry of this kind is to discover whether the activity which the plaintiff wishes to pursue may properly be characterized as falling within 'freedom of expression'".²⁸⁷ The second step is to determine if the purpose or effect of government action is to restrict freedom of expression.²⁸⁸

i. Sympathetic Action as Protected Expression

Unlike freedom of conscience, which has had very little application in the labour context, and freedom of association, which has had a somewhat convoluted relationship to the workplace, freedom of expression received early recognition as a vital component of labour rights and in particular an important aspect of the picket line. This position pre-dated the *Labour Trilogy*, first finding voice in *Dolphin Delivery*, but the *Labour Trilogy* made it clear that as far as the Supreme Court was concerned, the s. 2 *Charter* freedoms had no role in the protection of the rights to collectively bargain or to strike.

It was no doubt galling to unionists that a mere two years after the *Labour Trilogy*, the Court ruled in *Irwin Toy* that freedom of expression protected the right of advertisers to advertise to children. While the rationale for protecting advertising and not picketing seems baffling, nonetheless important principles can be drawn from *Irwin Toy* in determining what is "protected expression".

The first principle is that the content of the expression, in itself, cannot determine whether that expression is protected. So long as it is intended to convey meaning, it is *prima facie* protected.²⁸⁹ Therefore, *commercial* expression is not inherently excluded from s. 2(b)'s protection. The one exception appears to be violent expression. Recent cases have affirmed that

²⁸⁷ *Irwin Toy*, *supra* note 148 at p. 45 (CanLII).

²⁸⁸ *ibid.* at p. 48 (CanLII).

²⁸⁹ *ibid.* at p. 45 (CanLII).

violent expression and expression that advocates violence are not protected by s. 2(b).²⁹⁰ As noted in *Sharpe*, certain types of non-violent speech that may harm others, such as hate speech (*R. v. Keegstra*²⁹¹) or dehumanize others, such as pornography (*R. v. Butler*²⁹²), do fall under s. 2(b) as protected speech but may be justifiably limited.

Second, physical activity may or may not be protected as expression:

Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.²⁹³

Regardless of intent, however, violence cannot be protected expression.²⁹⁴ The application of section 2(b) is therefore broad, but not unlimited.

With the noted exceptions, so long as it is meant to convey meaning, expression or physical activity will fall within the ambit of s. 2(b). Sympathetic action inevitably involves action - or, rather, omission; the refusal to cross a picket line or the refusal to perform work that will benefit an employer against its striking employees. I argue that it is meant to convey meaning - solidarity with striking workers - and that it therefore falls within section 2(b).

Picketing in itself is inherently expressive, as the Supreme Court noted in *Pepsi-Cola*:

...The act of picketing involves an element of physical presence, which in turn incorporates an expressive component. Its purposes are usually twofold: first, to convey

²⁹⁰ *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31 (CanLII); *R. v. Khawaja*, 2012 SCC 69 (CanLII); *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII).

²⁹¹ *Supra* note 178.

²⁹² [1992] 1 S.C.R. 452.

²⁹³ *Irwin Toy*, *supra* note 148 at p. 46 (CanLII).

²⁹⁴ *ibid.* at p. 47.

information about a labour dispute in order to gain support for its cause from other workers, clients of the struck employer, or the general public, and second, to put social and economic pressure on the employer and, often by extension, on its suppliers and clients...

[...]

Picketing represents a continuum of expressive activity. In the labour context it runs the gamut from workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers-by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances of buildings. Beyond the traditional labour context, picketing extends to consumer boycotts and political demonstrations...A picket line may signal labour strife. But it may equally serve as a physical demonstration of individual or group dissatisfaction on an issue.

[...]

Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(b) of the Charter. This Court's jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortuous acts...The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society...The core values which free expression promotes include self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

Free expression is particularly critical in the labour context. As Cory J. observed for the court in *U.F.C.W. Local 1518 v. Kmart Canada Ltd.*, ..."[f]or employees, freedom of expression becomes not only an important but essential component of labour relations."...The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth...[Citations omitted, emphasis added.]²⁹⁵

Strikes taken to protest government action are also inherently expressive, of course.²⁹⁶

Public sector strikes, in particular, are inherently political²⁹⁷ and are "more a political than an economic weapon."²⁹⁸

²⁹⁵ *Pepsi-Cola*, *supra* note 184, at paras. 27, 30, 32-33. See also *BCGEU*, *supra* note 1.

²⁹⁶ *BCTF*, *supra* note 14.

²⁹⁷ *Ibid.* at paras. 21, 37.

²⁹⁸ *Ibid.* at para. 21.

It does not necessarily follow that refusing to cross a picket line is also expressive. After all, a picket line, as noted in *Pepsi-Cola*, has as its very purpose communication. It expresses dissatisfaction and protest; it is meant to garner public support. The economic aspect of the strike is distinct from the expressive content of the picket line,²⁹⁹ but the ties between the strike and the picket line are well-recognized:

To the labour movement picketing is essentially a demonstration of freedom of speech. It is labour's way of announcing its position to the world on a particular issue. It is an action of solidarity and it is effective because it is backed by a powerful social sanction: one crosses a picket line at the peril of one's self-interest, now and over time. It is a useful device for reinforcing a strike – in fact striking and picketing are as dyadic as ham and eggs. It is a useful means to following “hot” goods produced under unacceptable conditions and to induce a boycott of their use. It is useful in organizing the workforce. It can close down an industry in pursuit of a settlement with a single employer. It can be used for political purposes, as can the strike and the collective bargaining process itself. It can be an instrument of civil disobedience. It can cause chaos. It is too powerful an instrument to go unrestrained.³⁰⁰

Sympathetic action, however, may be significantly less public. A true sympathy strike will almost certainly be expressive, as would workers joining with workers from other unions on a picket line. The mere fact of a worker, or even a group of workers, refusing to cross a picket line, or even more so refusing to handle “hot cargo” within their own workplace, could be seen as potentially a matter of *conscience* but not a matter of *expression*. Clearly there is a continuum of sympathetic action; however, I argue that it is all meant to convey meaning and as such falls under section 2(b).

²⁹⁹ “For what conceivable use or purpose would information be furnished if not to win support by the persuasive force of the matter exhibited? The persuasion is not ordinarily or necessarily sought of the person to be compelled; economic pressure is to affect him; but that pressure, quite legitimate, by those who exert it, may easily be set in motion by persuasion exercised upon either workmen or the public is frequent experience of labour controversy.” *Williams et. al. v. Aristocratic Restaurants (1947) Ltd.*, [1951] S.C.R. 762 at 783, *per* Rand J., in finding that an informational picket did not constitute a “private nuisance” or a criminal offence.

³⁰⁰ *Carrothers et al.*, *supra* note 61 at 70.

Evans J.A.'s dissent in *Grain Workers*, discussed *supra*, provides a rationale for refusal to cross a picket line as expressive action. "Refusing to cross a picket line is a uniquely powerful means for employees to publicly express their solidarity with strikers,"³⁰¹ and forcing workers to cross the line can make it appear as if those workers do not support the strike. This reasoning would also suggest that essential services legislation (as in *Saskatchewan Federation of Labour*) that would force workers to cross their fellow workers' picket line also infringes upon the freedom of expression of those crossing the line.

I submit that even sympathetic action taken within one's own workplace is inherently expressive, however. Clearly there is an economic aspect to the action - it is hoped that by refusing to perform work that benefits the struck employer, that employer's economic position will be weakened and the strikers' economic position correspondingly strengthened. Workers who undertake such action, knowing that they will suffer at least a financial penalty if not discipline, will inevitably have goals beyond their own conscience. They will perhaps mean to persuade other workers to take similar action, as with any boycott. The refusal may be publicized via a public statement from the workers' union, if they are unionized. They may wish to persuade their own employer to pressure the struck employer to settle. Or they may wish to express a broader principle, that is, solidarity with other workers, perhaps as part of individual self-fulfilment, perhaps as an inherent part of public decision-making (as Evans J.A. suggested in *Grain Workers*) or as part of the concept of "industrial democracy". Regardless of motive, it would be quite bizarre for workers to take such action without intending to convey *some* meaning. As such, given the overall context of labour relations, the fundamental importance of the strike and the picket line to collective bargaining and to democracy itself, I submit that

³⁰¹ *Grain Workers*, *supra* note 4 at para. 48, *per* Evans J.A.

sympathetic action should be considered "protected expression" under s. 2(b) regardless of where it falls upon the continuum.

I accept the reasons of the Justices in *Grain Workers* that the *purpose* of the statutory bar on sympathetic action is to minimize industrial conflict, not to limit expression. Therefore it is necessary to look to the purpose of the expression in question, and whether that expression falls within the core values of section 2(b). I submit that sympathetic action does fall within those core values, and that the *effect* of the statutory prohibition therefore limits protected expression.

Clearly, this is at odds with the majority decision in *Grain Workers*, where sympathetic action was held not to involve seeking and attaining the truth, social or political decision-making, etc. My disagreement with the majority decision is at least partly based on my argument that sympathetic action can be a matter of conscience. As such, if sympathetic action is an expression of a fundamental moral principle on the part of a worker or workers, it would seem inherently worthy of protection under section 2(b) - though of course still subject to potential limitations if those limitations can be justified under section 1.

On a more basic level, however, I submit that the majority in *Grain Workers* has interpreted the principles of freedom of expression, as described in *Irwin Toy*, in a far too limited manner. The principles as described in *Irwin Toy*

can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.³⁰²

³⁰² *Irwin Toy*, *supra* note 148 at page 53 (CanLII).

Evans J.A., in his dissent, did find that these interests were served and expressed through sympathetic action. Certainly matters of conscience would seem to fall within the seeking and attainment of truth, even if it be a moral "truth". Refusal to perform work in the name of union solidarity seems to have an inherently political or at least socio-political aspect, in addition to the obvious economic "enlightened self-interest" that is also a fundamental part of sympathetic action - noting again that the mere fact that speech is "commercial" or economic does not exclude it from protection under s. 2(b). Finally, choosing to act in solidarity with fellow workers must, I submit, be seen as part of individual self-fulfilment. Such action can form an integral part of a person's identity and a declaration of their thoughts, opinions, and beliefs. I submit the majority's interpretation of freedom of expression as it relates to sympathetic action is flawed and far too narrow, certainly not in keeping with the broad interpretation that freedom of expression has received in other contexts.

ii. Proving Infringement

As with freedom of conscience, however, the simple fact that sympathetic action may be protected under s. 2(b) does not end the inquiry. It must be shown that the freedom has been infringed. For reasons very similar to those raised under freedom of conscience, *supra*, I submit that the barriers to sympathetic action under statute and common law do infringe upon freedom of expression, that is:

1) While the "peace obligation" affects only expression taken in association, and as such expression *stricto sensu* does not violate nor is infringed by the peace obligation, the fact that the peace obligation bars the collective exercise of freedom of expression gives the associational aspects of sympathetic action greater value;

2) In jurisdictions where human rights legislation protects freedom of expression, disciplining a worker for undertaking sympathetic action arguably infringes upon that worker's expressive rights; and

3) Under the common law, *Charter* values protected by freedom of expression should dictate that the managerial power to discipline workers for undertaking sympathetic action should be lessened or removed entirely, as should the industrial torts. Where the employer is a government actor, retaliation for sympathetic action may contravene the *Charter* directly.

For these reasons, as with freedom of conscience, I submit that freedom of expression protects a right to sympathetic action, requires a change to the existing law in both union and non-union contexts, and strengthens a claim under freedom of association to limit or remove the prohibition on sympathetic action.

Freedom of Association

It is generally recognized that freedom of association is “the most fundamental of all the rights of workers.”³⁰³ Indeed, in many cases when talking about “labour rights” or “workers’ rights” it is really freedom of association that is being discussed. Freedom of association is recognized in Canada as a fundamental human right not only in the *Charter* but also in the human rights legislation of Saskatchewan,³⁰⁴ Québec,³⁰⁵ and the Yukon Territory,³⁰⁶ and in

³⁰³ Virginia Leary, "The Paradox of Workers' Rights as Human Rights" in L. Compa and S. Diamond, *Human Rights, Labor Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) 22 at 36.

³⁰⁴ *The Saskatchewan Human Rights Code*, *supra* note 121, s. 6: "Every person and every class of persons shall enjoy the right to peaceable assembly with others and to form with others associations of any character under the law."

³⁰⁵ *The Québec Charter*, *supra* note 134, s. 3: "Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

³⁰⁶ *The Human Rights Act*, *supra* note 134, s. 5: "Every individual and every group shall, in accordance with the law, enjoy the right to peaceable assembly with others and the right to form with others associations of any character."

several international human rights instruments to which Canada is a party³⁰⁷, particularly the *International Covenant on Civil and Political Rights*, Article 22 of which provides that "[e]veryone 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."³⁰⁸

In a more limited sense, the principles of freedom of association (insofar as they are phrased as “rights” or “freedoms” rather than in purely instrumental terms) also appear in some Canadian labour relations legislation.³⁰⁹ In international labour law, freedom of association has long been a key operating principle for the International Labour Organization:

The function of the International Labour Organization in regard to freedom of association and the protection of the individual is to contribute to the effectiveness of the general principles of freedom of association, as one of the primary safeguards of peace and social justice.³¹⁰

Association is the “cornerstone of modern labour relations.”³¹¹ But its significance is not limited to the workplace. The importance of freedom of association has been recognized for many years, perhaps most famously by Alexis de Toqueville:

³⁰⁷ These include the *UDHR* and the *ICCPR*, *supra* note 207; the *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200 A (XXI) 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) (the “*ICESCR*”); and the International Labour Organization *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 67 U.N.T.S. 18 (1948) (“*Convention No. 87*”), as well as the *ILO Declaration on Fundamental Principles and Rights at Work*, ILO, 86th Session, Geneva, 1998, available online at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (last visited November 25, 2012) (the “1998 ILO Declaration”).

³⁰⁸ *ICCPR*, *ibid.*

³⁰⁹ E.g. *Saskatchewan Trade Union Act*, *supra* note 71, s. 3: “Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing...”; *Québec Labour Code*, *supra* note 71, s.3: “Every employee has the right to belong to the association of employees of his choice, and to participate in the formation, activities and management of such association;” *Manitoba Labour Relations Act*, *supra* note 71, s. 5(1): “Every employee has the right (a) to be a member of a union; (b) to participate in the activities of a union; and (c) to participate in the organization of a union;” *Ontario Labour Relations Act*, *supra* note 71, s. 5: “Every person is free to join a trade union of the person’s own choice and to participate in its lawful activities.”

³¹⁰ *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th Ed.) (“*ILO Digest*”) (Geneva: International Labour Office, 2006) at para. 1.

³¹¹ *Alberta Reference*, *supra* note 13 at para. 23, *per* Dickson C.J.

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right to personal liberty. No legislator can attack it without impairing the foundations of society.³¹²

And Virginia Leary has noted the role of freedom of association in protecting human rights and democratic society:

The status of workers' rights in a country is a bellwether for the status of human rights in general. The first sign of a deteriorating situation is often the violation of freedom of association, the most fundamental of workers' rights. Repressive regimes inevitably attempt to suppress or control trade unions; thus, labor leaders are among the most frequent victims of repression. Conversely, the development of free trade unions signals the dissolution of authoritarian regimes, as the example of Poland's Solidarity movement recognizes.³¹³

At the same time association is not always recognized as a stand-alone right. It has been interpreted at times to be inherently tied to freedom of expression and assembly (freedom of assembly itself often seen as an expressive right)³¹⁴. Writing on the guarantee of "freedom of assembly and association" in the *Canadian Bill of Rights*,³¹⁵ Walter Tarnopolsky stated:

Freedom of assembly is concerned with the public expression of opinion by spoken word and by demonstration. For our purposes it is necessary to distinguish between the liberty to express opinions, political or otherwise, which was dealt with in the previous section [on freedom of expression]...and the liberty which the law allows as to choice of time and place, which will be dealt with here. Freedom of association, which can be said to be an outgrowth of the freedoms of speech and assembly, and the much earlier right to petition, concerns the right to join in common cause with another or others in the pursuit of lawful objects. It has an important distinguishing characteristic in that it is of a continuing rather than a temporary nature. [Emphasis added.]

Freedom of association does not appear in the United States Constitution but is, rather, a right tied to freedom of speech under the First Amendment. While freedom of association is "implicit in the concept of ordered liberty, basic to our democratic society, with roots deep in our

³¹² Alexis de Tocqueville, *Democracy in America*, cited in G.-A. Beaudoin and E. Ratushny, *The Canadian Charter of Rights and Freedoms* (2nd Ed.) (Toronto: Carswell, 1989) at 235.

³¹³ Leary, *supra* note 303 at 22.

³¹⁴ Tarnopolsky and Beaudoin, *supra* note 183.

³¹⁵ S.C. 1960, c. 44, s. 1(e).

history",³¹⁶ the American courts have traditionally used it as "little more than a shorthand for safeguarding an individual's rights of speech and petition when he exercises them through a group."³¹⁷ Some American writers have argued that freedom of association should be afforded greater significance in its own right:

...[M]ost of the time, association is instrumentally yoked to speech and is protected only because speech is protected, or it is held worthy of full constitutional protection only in associations of personal intimacy. Only rarely does freedom of association receive a defense that honors it as integral to a free human life, to being a free person. Picking one's company is part of living as one likes; living as one likes (provided one does not injure the vital claims of others) is what being free means...³¹⁸

And:

Freedom of association is valuable for far more than its instrumental relationship to free speech. Freedom of association is necessary to create and maintain intimate relationships of love and friendship, which are valuable for their own sake, as well as for the pleasures that they offer. ... Any serious consideration of [associational] activities...will indicate that not all the aims of associational activities are equally valued by individuals, or equally important for the well-being of a liberal democracy. But all are valued and valuable, and associational freedom is not merely a means to other valuable ends. It is also valuable for the many qualities of human life that the diverse activities of association routinely entail. By associating with one another, we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are possible only in association with others. In addition, we often simply enjoy the company. The pleasures of association are typically by-products of our associating for other reasons.³¹⁹

The drafters of the *Charter* saw fit to include freedom of association as a separate freedom from both speech and assembly, albeit after two initial drafts that included a "freedom of peaceful assembly and of association."³²⁰ At least one writer has argued that this is an

³¹⁶ Reena Raggi, "An Independent Right to Freedom of Association" (1977), 12 Harv. C.R.-C.L.L. Rev. 1 1977 at 14. See, for example, *N.A.A.C.P. v. Alabama* (1958), 357 U.S. 449 at 460: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause, which embraces freedom of speech..."

³¹⁷ *ibid.* at 11.

³¹⁸ George Kateb, "The Value of Association" in A. Gutmann (ed.), *Freedom of Association* (Princeton: Princeton University Press, 1998) at pp. 35-36.

³¹⁹ Amy Gutmann, "Freedom of Association: An Introductory Essay", *ibid.* at pp. 3-4.

³²⁰ Beaudoin and Ratushny, *supra* note 312 at 236.

indication that the Canadian freedom of association guarantee should be seen as more robust than the American.³²¹

While I assume herein that freedom of association is a free-standing right and not inherently connected to freedom of expression, nonetheless based on my prior argument that freedom of expression *also* protects a right to sympathetic action means that such a connection between association and expression is not necessarily fatal.

Whether on its own merits or tied to freedom of expression, freedom of association recognizes that there is a value to common purpose that goes beyond mere strength in numbers. The Canadian courts have recognized this broad principle, though they have perhaps not demonstrated a *de facto* commitment to it in their actual judgments.

Freedom of Association in the Canadian Courts

Ironically, despite its own exhortations to give *Charter* rights a generous and purposive interpretation,³²² the Supreme Court has not given freedom of association a broad interpretation. The Supreme Court first considered freedom of association under the *Charter* in the *Alberta Reference*³²³, where the Court interpreted freedom of association in a manner that has been described as “confined”, “demoralizing”, “minimalist”,³²⁴ and perhaps more charitably, “restrained.”³²⁵

By enshrining freedom of association as one of its fundamental freedoms, Canada followed the lead of international and European human rights instruments. In this, the *Charter*’s framework filled a gap in the much-hallowed *Bill of Rights*: Canada had the foresight to guarantee a right Americans do not explicitly enjoy. By making it the equal

³²¹ Paul Cavaluzzo, "Freedom of Association and the Right to Bargain Collectively" in J. Weiler and R. Elliot (eds.), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 189.

³²² *Big M Drug Mart*, *supra* note 205 at paras. 117 and 118; *Hunter et al v. Southam Inc.*, [1984] 2 S.C.R. 145 at 160.

³²³ *Supra* note 13.

³²⁴ Jamie Cameron, "Due Process, Collective Bargaining, and s. 2(d) of the Charter: A Comment on *B.C. Health Services*" (2008), 13 C.L.E.L.J. 233 ["Due Process"] at 234 and 235.

³²⁵ Cavalluzzo, "Freedom of Association", *supra* note 32 at 273.

of the *Charter's* other guarantees, the text of s. 2(d) created an opportunity for the Supreme Court of Canada to develop a distinctive concept of associational freedom. Rather than seize the opportunity, the Court flinched....

Against its stated commitment to a generous and purposive approach to other *Charter* guarantees, the Court gave s. 2(d) a minimalist interpretation....³²⁶

The majority in the *Alberta Reference* stated bluntly, in a mere four paragraphs, that the rights of trade unions to collectively bargain and to strike unworthy of constitutional protection. Freedom of association under section 2(d) of the *Charter* was not offended by legislative restrictions on these activities; these rights were “modern” rights, the “creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise”, and not “fundamental” rights which were more properly the domain of the courts and worthy of judicial attention.³²⁷ Furthermore, s. 2(d) itself was given a restrictive interpretation; freedom of association did not protect the purposes or activities of an association as such, but rather the freedom to “work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal.”³²⁸ In fairness, LeDain J. did note that these rights are themselves “not insignificant”; however by simply dismissing the broader implications of the freedom of association in labour relations – especially considering the broad interpretation given to freedom of expression shortly thereafter – the majority rendered 2(d) effectively impotent. In his more extensive concurring judgment, McIntyre J. stated that “[p]eople, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.”³²⁹

³²⁶ *ibid.* at 235.

³²⁷ *Alberta Reference*, *supra* note 13 at para. 144, *per* LeDain J.

³²⁸ *ibid.* at para. 143.

³²⁹ *ibid.* at para. 155.

Cases alleging infringement of s. 2(d) outside of the labour context were limited and for the most part unsuccessful. Freedom of association was found not to be infringed by statutory provisions prohibiting street solicitation by prostitutes;³³⁰ prohibiting the inter-provincial sale of eggs outside of the auspices of a national marketing agency;³³¹ or allowing the deportation of refugees who were members of or contributed to terrorist organizations.³³²

Meanwhile in the United States, "[d]espite not being protected in the text of the constitution, freedom of association is regarded as one of the cornerstones of that country's constitutional tradition"³³³ while the fact that the cases that have defined the scope of freedom of association under the *Charter* have been labour cases has meant that section 2(d) has been given a more limited scope than the other section 2 freedoms. This has led one writer to describe the Supreme Court's approach to section 2(d) as "skittish".³³⁴ Indeed, the prevalence of labour cases in Canadian freedom of association jurisprudence, and the Supreme Court's consequent reluctance to give the freedom a broad reading, has led to an interpretation of freedom of association that may not have much relevance outside of the labour relations context.³³⁵

i. Freedom of Association and Labour Rights

Following the *Labour Trilogy* there were, however, cases that tempered the absolute prohibition on the application of the *Charter* to trade union rights. In *Dunmore*³³⁶ the Supreme Court held that freedom of association could require the state to provide at least some basic

³³⁰ *R. v. Skinner*, [1990] 1 S.C.R. 1235. The Court held that the prohibition was of expressive activity and not associational activity.

³³¹ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

³³² *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

³³³ Cameron, "Due Process", *supra* note 324 at 269.

³³⁴ Jamie Cameron, "The Labour Trilogy's Last Rites: B.C. Health and a Constitutional Right to Strike" (2010), 15(2) C.L.E.L.J. 297 at 298.

³³⁵ Cameron, "Due Process", *supra* note 324 at 235 and 253.

³³⁶ *Supra* note 116.

organizational rights to workers, though the freedom did not guarantee inclusion in the full Canadian labour relations model. In *Pepsi-Cola* and *KMart Canada*, the Court upheld a constitutional right to secondary picketing and leafleting under freedom of expression. It was not until 2007, with the release of *B.C. Health Services* that freedom of association, the fundamental right most heavily associated with labour, could truly be applied to labour relations. For the first time since the inception of the *Charter of Rights and Freedoms*, the Court held unanimously³³⁷ that freedom of association under section 2(d) the *Charter* provided constitutional protection to the right of trade unions to bargain collectively with their employers, free from “substantial interference” by government. *B.C. Health Services* did not, however, address the right to strike;³³⁸ indeed, the Court explicitly refused to rule on that issue, noting that “the present case does not concern the right to strike, which was considered in earlier litigation [i.e. the *Labour Trilogy*] on the scope of the guarantee of freedom of association.”³³⁹

In coming to its decision, the Court embraced the strong and even inspirational language used by Chief Justice Dickson in his dissent in the *Alberta Reference*, affirming that

“[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*...All of these values are complemented and, indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*...The right to bargain collectively with an employer enhances the human dignity, liberty, and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work...” [citations omitted]³⁴⁰

³³⁷ Deschamps J. dissented on the question of whether the infringement of the appellant unions’ rights under s. 2(d) were justifiable under s. 1 of the *Charter*, but concurred that the unions’ freedom of association had indeed been infringed.

³³⁸ Nor did the Court address the right to strike in another recent case dealing with labour rights and freedom of association: *Fraser v. Ontario*, *supra* note 195 at para. 190.

³³⁹ *B.C. Health Services*, *supra* note 41 at para. 19.

³⁴⁰ *ibid.* at paras. 81-82.

In coming to its decision the Court expressly over-ruled the *Labour Trilogy* on the following grounds.

First, characterizing the right to bargain collectively as “modern rights” and not “fundamental freedoms” was held not to “recognize the history of labour relations in Canada.”³⁴¹ The Court declared that “collective bargaining, despite early discouragement from the common law, has long been recognized in Canada. Indeed, historically, it emerges as the most significant collective activity through which freedom of association is expressed in the labour context.”³⁴²

Second, the Court noted that the right to engage in collective bargaining was also supported by “international conventions” as “part of the protection of freedom of association.”³⁴³

Dickson C.J. had stated in his dissent in the *Alberta Reference*:

...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.

In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada’s international obligations under human rights conventions.³⁴⁴

The Court in *B.C. Health Services* cited this approach with approval.³⁴⁵

Third, the Court noted that guaranteeing collective bargaining under the auspices of s. 2(d) was compatible with and enhanced *Charter* values, as mentioned *supra*.

As the Supreme Court noted in *Fraser*:

After *Dunmore*, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of

³⁴¹ *Ibid.* at para. 25.

³⁴² *Ibid.* at para. 66. “Early discouragement from the common law” may be one of the more notable understatements that has come from the Court.

³⁴³ *Ibid.* at para. 79. See also fn 16.

³⁴⁴ *Alberta Reference*, *supra* note 13 at paras. 59-60.

³⁴⁵ *B.C. Health Services*, *supra* note 41 at para. 70.

association, and that this right extends to realization of collective, as distinct from individual, goals. Nor could there be any doubt that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, there could be no doubt that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments.³⁴⁶

The use of international law in *B.C. Health Services* and *Fraser* has been subject to much commentary.³⁴⁷ However, it seems clear that while international law does not necessarily bind Canadian courts in interpreting the *Charter*, it is nonetheless an important source of guidance in the level of protection the *Charter* demands.

It should be noted that while the application of freedom of association to trade union rights generally is therefore no longer in question, its application to the right to strike specifically remains an open question. As noted previously, the majority in *Grain Workers* stated that the *Labour Trilogy* remains good law and that the right to strike is not guaranteed by the *Charter*. The Saskatchewan Court of Appeal in *Saskatchewan Federation of Labour* came to a similar conclusion.³⁴⁸

Unlike freedom of conscience and freedom of association, however, freedom of association would appear to have little application to *individual* sympathetic action. For example, the fact that an individual is refusing to cross a picket line does not seem sufficient to ground a claim that that individual is acting "in association" with the strikers for the purpose of

³⁴⁶ *Fraser v. Ontario*, *supra* note 195 at para. 32.

³⁴⁷ E.g. most recently Brian Langille and Benjamin Oliphant, "From the Frying Pan Into the Fire: *Fraser* and the Shift from International Law to International "Thought" in *Charter* Cases" (2012), 16(2) C.L.E.L.J. 181; Kevin Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2012), 16(2) C.L.E.L.J. 233; Sonia Regenbogen, "The International Labour Organization and Freedom of Association: Does Freedom of Association Include a Right to Strike?" (2012), 16(2) C.L.E.L.J.385.

³⁴⁸ Indeed, the appeal turned on the Court's conclusion in this regard. While the Court overturned the lower court's ruling *vis a vis* the right to strike, the Court did not deal with the approach taken by the Court of Queen's Bench, nor the basis upon which the lower court recognized a right to strike. Rather, the Court of Appeal held that *Dunmore*, *B.C. Health Services* and *Fraser* had not overturned the *Labour Trilogy* and that it fell to the Supreme Court to do so: *Saskatchewan Federation of Labour* (C.A.), *supra* note 14 at para. 60.

freedom of association. The worker's right to refuse would be embodied in freedoms of conscience or expression in that case. When considering freedom of association, therefore, I am speaking only of *collective* sympathetic action.

ii. *Freedom of Association as an Individual Right*

Despite the significant changes to the courts' treatment of freedom of association post-*B.C. Health Services*, the Supreme Court has consistently held that section 2(d) (and the other section 2 rights) is a right held by individual workers. This principle was first expressed by McIntyre J. in the *Alberta Reference*:

While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." (L. J. MacFarlane, *The Theory and Practice of Human Rights* (1985), p. 82.)³⁴⁹

In his dissent, in the *Alberta Reference*, Dickson C.J. (with Wilson J.) argued, *inter alia*, that such an interpretation would render freedom of association superfluous – "the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms."³⁵⁰ The freedom was "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;"³⁵¹ it did not protect "associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage."³⁵²

³⁴⁹ *Alberta Reference*, *supra* note 13 at para. 152.

³⁵⁰ *Ibid.* at para. 84.

³⁵¹ *Ibid.* at para. 87.

³⁵² *Ibid.* at para. 88.

In a subsequent case Wilson J. summarized the Court's s. 2(d) jurisprudence thusly:

[T]his Court has been unanimous in finding on more than one occasion and in a variety of contexts that the purpose which s. 2(d) is meant to advance is the collective action of individuals in pursuit of their common goals.³⁵³

Lavigne dealt with the constitutionality of the use of compulsory union dues for purposes unrelated to collective bargaining. While the Court was unified in the result, that such use of compulsory dues was constitutional, what is significant for the purposes of this discussion is that a majority of the Court (Wilson J. and two other judges dissenting) held that inherent in the freedom of association is a freedom *from* association - that section 2(d) protected the individual's right not to be compelled to associate.³⁵⁴ La Forest J. and two other judges held that while the use of union dues for purposes beyond the immediate workplace concerns of the bargaining unit violated infringed workers' section 2(d) rights, this infringement was justified under section 1.³⁵⁵ McLachlin J. (as she then was) held that freedom of association included a freedom from compelled association, but that the use of union dues complained of in *Lavigne* did not constitute "ideological conformity" and therefore did not infringe upon s. 2(d).³⁵⁶ *Lavigne's* principle that there is a "freedom not to associate" was confirmed in a subsequent case where a statutory requirement of union membership as a condition for hiring in Quebec's construction industry was narrowly upheld under s.1.³⁵⁷

The Court has also recognized that there will be activities, such as collective bargaining, where the nature of the activity is inherently collective.

³⁵³ *Lavigne*, *supra* note 37 at p. 43 *per* Wilson J.

³⁵⁴ For an early discussion of the *Lavigne* case, see Brian Etherington, "Lavigne v. OPSEU: Moving Towards or Away From a Freedom to Not Associate?" (1991), 23 Ottawa L. Rev. 533.

³⁵⁵ *Lavigne*, *supra* note 37 *per* La Forest J. at pp. 112ff.

³⁵⁶ *ibid.* *per* McLachlin J. at pp. 132ff.

³⁵⁷ *Advance Cutting & Coring*, *supra* note 37.

There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. . . . The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.³⁵⁸

Dickson C.J.'s reasons in the *Alberta Reference* were accepted and built upon in

Dunmore, where the majority held:

As I see it, the very notion of “association” recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual’s right speak (see *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be “the lawful activities of individuals”. Rather, the law must recognize that certain union activities — making collective representations to an employer, adopting a majority political platform, federating with other unions — may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d)... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.³⁵⁹

Freedom of association, like all of the section 2 freedoms, has at its heart protection of the individual's human dignity and self-fulfilment. As discussed *supra*, however, the statutory prohibition on sympathetic action only comes into play when *collective* action is taken. The freedoms of conscience and expression may themselves protect individual workers, but it is *association*, I submit, that is the greatest challenge to the statutory definition of a "strike" and to

³⁵⁸ *Alberta Reference*, *supra* note 13 at para 89, *per* Dickson C.J.

³⁵⁹ *Dunmore*, *supra* note 129 at 1041-1042.

the peace obligation, because the peace obligation *does* prohibit associational activity *qua* associational activity.

iii. *Freedom of Association, Collective Action and "Substantial Interference"*

In *Fraser*, the Supreme Court noted:

It follows that *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements (C.A. reasons, at para. 80). What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.³⁶⁰

The right to sympathetic action is not itself reliant on the *Wagner Act* model of labour relations; sympathetic action takes place under many different labour relations schemes. I submit, however, that the peace obligation does make it "impossible to meaningfully exercise the right to associate", insofar as it prohibits collective exercise of workers' fundamental rights *entirely*. A blanket prohibition on collective conscience or expression, or on associative activity in itself, necessarily infringes upon freedom of association.

I also submit that the inherent focus on goals within the workplace is not a necessary part of a right to sympathetic action grounded in freedom of association. Workers who undertake sympathetic action almost by definition do *not* have in mind the achievement of goals within their own workplace. To rely overmuch on the goals, however worthy, of sympathetic action, in my view leads to an interpretation of freedom of association that is too closely tied to the labour context and leads to a problematic interpretation. It maintains a tortured distinction between

³⁶⁰ *Fraser*, *supra* note 195 at para. 47.

association in the labour and non-labour context, and between fundamental freedoms in the labour and non-labour contexts; yet eliminating the distinction between labour and non-labour expression was seen as eminently desirable by the Court in *Pepsi-Cola*.³⁶¹

Even the "substantial interference" standard set out in *B.C. Health Services* and *Fraser* treats s. 2(d) very differently from ss. 2(a) and (b).

B.C. Health Services established that the *Charter* does not protect against *all* legislative interference with the right to collectively bargain, but only that which

substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(d) be breached. [emphasis added]³⁶²

In this regard the more recent cases did not fully incorporate Dickson C.J.'s dissent in the *Alberta Reference*, where he stated:

In my view, these decisions illustrate an internal balancing of the implied freedom of association with the public interest at the point of definition of the freedom itself. The cases in which a line was drawn to exclude strike activity from the scope of constitutionally protected associational activities are indicative of the strength of the countervailing concerns (i.e., the public interest) which would find recognition under the Charter in s. 1 rather than in defining the scope of s. 2(d). When this balancing phenomenon is considered in conjunction with the implied or derivative status of freedom of association, the hesitation of courts to extend freedom of association to include the right to strike in the public sector is understandable.³⁶³

That said, as Brian Etherington has noted in the context of the right to strike generally:

However, if the Supreme Court of Canada were to adopt a very broad notion of the right to strike as protected associational activity, as Dickson C.J. did in the Labour Trilogy, all restrictions on the right to strike could be held to violate s. 2(d), and therefore to be

³⁶¹ *Pepsi-Cola*, *supra* note 184 at para. 80ff.

³⁶² *B.C. Health Services*, *supra* note 41 at para. 109.

³⁶³ *Alberta Reference*, *supra* note 13 at para. 55.

unconstitutional unless they could pass scrutiny under s. 1. Indeed, Dickson C.J.'s close examination of all aspects of the restrictions on strike activity and of the substituted interest arbitration mechanism in his dissent in the Alberta Reference, 16 and his analysis of the restrictions imposed in the two companion cases in the Labour Trilogy, provide a taste of the detailed second-guessing of legislative choices that could ensue from recognition of a broad and unrestricted right to strike.

[...]

I believe it is likely that the Supreme Court's pragmatic inclinations will lead it to recognize a fairly limited right to strike - one that will require legislatures either to allow strikes or to provide a suitable substitute in the form of some other form of bargaining impasse resolution that gives access to a meaningful process of collective bargaining. Under this model, the right would be violated only where strike activity was totally prohibited or so severely restricted as to effectively deny access to meaningful collective bargaining...³⁶⁴

There is no compelling theoretical or logical reason, however, that freedom of association should be treated any differently from the other fundamental freedoms. I submit that it is inappropriate for the Court to impose a further initial hurdle - to prove not merely interference, but *substantial* interference - in a claim based on freedom of association. The very factors that would be considered in determining if the interference is substantial - the context, the balance of power between labour and employers, the availability of alternate dispute resolution processes, etc. - should be considered under section 1. It not only provides a more logical and self-consistent approach to section 2 generally, it also fits with the logic of "emanating" or "expanding" rights as argued herein.

Even if the "substantial interference" model is retained, however, an infringement upon freedom of association is made out under existing legislation. By virtue of the absolute prohibition on collective exercise of *Charter* freedoms, the interference is more than substantial - it is absolute.

³⁶⁴ Brian Etherington, "Does Freedom of Association Under the *Charter* Include the Right to Strike After *B.C. Health Services*? Prognosis, Problems and Concerns" (2010), 15(2) C.L.E.L.J. 315 at 323-324.

iv. *Deriving Sympathetic Action from Freedom of Association*

At the same time the analysis may differ if sympathetic action is derived directly or indirectly from freedom of association. I am suggesting a *direct* derivation, but sympathetic action could be seen as *indirectly* derived from the right to collectively bargain or to strike.

The Freedom of Association Committee of the Governing Body of the International Labour Organization is an important source of international law on freedom of association, and has stated that sympathetic action is protected by international freedom of association guarantees:

534. A general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful.

538. A ban on strike action not linked to a collective dispute to which the employee or union is contrary to the principles of freedom of association.³⁶⁵

The Freedom of Association Committee does not have within its Conventions an explicit right to strike, however. Rather, the right to strike is itself a corollary to the right to organize under *Convention 87*.³⁶⁶ Similarly, the Committee refers to sympathetic action only in the context of sympathy strike action; it appears to view sympathetic action as not a right in itself, but rather derivative of a right to strike.

Perhaps ironically, while the most robust protection of sympathetic action may be found under freedom of association, it may also be the freedom under which it is most difficult to find a direct derivation from freedom of association. With the status of the right to strike *itself* still in question in Canada (its uncertain status reinforced by the Saskatchewan Court of Appeal's

³⁶⁵ *ILO Digest*, *supra* note 310 at paras. 534 and 538.

³⁶⁶ *ibid.* at 523.

decision in *Saskatchewan Federation of Labour*), a right to sympathetic action indirectly derived may rise and fall on the basis of the right to strike *simpliciter*.

I submit, however, that sympathetic action can be derived directly from freedom of association.

First, it can be understood, as argued previously, as the direct exercise of the fundamental freedoms in section 2 - not *derivative* of other freedoms, but rather the *outer emanation* of section 2 and the values and principles underlying the *Charter*.

Second, sympathetic action taken in concert seems the very essence of association: action taken in solidarity with one's fellow workers, itself in solidarity with other workers who are themselves acting in concert. It is the pursuit not only of individual moral and ethical beliefs or the expression of support but also of the economic, social, political, and democratic virtues that were set out by Dickson C.J. in *Alberta Reference* and later accepted in *B.C. Health Services* regarding collective bargaining. Sympathetic action need not be indirectly derived via collective bargaining to give voice to those virtues. It can be a direct application of those virtues and an expression of the "right to decency" in itself. It can be seen as part of the social and political discourse within society without reference to other aspects of the labour relations scheme. It is a recognition of the importance of union solidarity in Canadian labour history.

As such, I submit that a free-standing right to sympathetic action, even if the right to strike is itself not independently protected under the *Charter*,³⁶⁷ is justified.

However, I also suggest that a right to sympathetic action can also be derived from any or all of the interdependent rights identified in *Saskatchewan Federation of Labour* (Q.B.) - the

³⁶⁷ I suggest, however, that a right to strike should be recognized, at a minimum, as a necessary corollary to the already-recognized right to organize and to collectively bargain, as the ILO has done internationally.

rights to organize, to collectively bargain, and to strike. It can have, like the right to strike, a "second-order" justification "that gives it particular force and scope in the context of employment..."³⁶⁸

Freedom of association allows workers to form trade unions, which in turn provide a basis for collective bargaining. This is the means by which workers can overcome the limitations inherent in individual contracts of employment and participate in making those decisions which affect their lives and their society. To the extent that the right to strike assists workers in the achievement of these goals, it may be viewed as the logical extension of freedom of association in the workplace.³⁶⁹

As such sympathetic action can be seen as part of the "suite" of labour rights, whether as derivative of or interdependent with the rights to organize, collectively bargain, and strike. This analysis, however, does not seem to allow room for sympathetic action as expressions of other fundamental freedoms; it is an instrumental analysis. As such I submit the direct derivation model is to be preferred, given the role of conscience and expression described earlier.

v. *Association and the Peace Obligation*

Unlike the freedoms of conscience and expression, association directly challenges both the statutory definition of a "strike" in Canadian law and the prohibition on mid-term strikes - which when taken together renders collective sympathetic action inherently illegal. As an absolute and automatic prohibition, the peace obligation is, I submit, necessarily an infringement of workers' freedom of association. Further, because the prohibition is statutory, the *Charter* applies directly; as such, the analysis herein would require that the peace obligation must be relaxed or removed to conform to principles of freedom of association.

The same holds true under provincial human rights legislation. Where freedom of association is protected at the provincial level, statutes that violate freedom of association - such

³⁶⁸ Novitz, *supra* note 9 at 68.

³⁶⁹ *ibid.* at 68-69.

as trade union legislation which includes the peace obligation - may be vulnerable to challenge under human rights legislation as well as the *Charter*.

For reasons given earlier, I do not view the "substantial interference" standard as a bar to finding infringement and as such the analysis must proceed to justification under section 1, discussed *infra*.

vi. *Association and the Common law*

Association does not present a direct challenge to the law of tort or of contract. This is not only because the *Charter* does not directly apply to the common law; the same would hold true even if considered under provincial legislation. Even if workers exercise sympathetic action collectively, they may run afoul of the peace obligation whether or not they are unionized, but in terms of the common law their "offence" is no greater in terms of refusal of work - they may be disciplined, dismissed, or sued for breach of contract individually.

It is not clear, however, that the industrial torts are entirely out of the picture, and it is possible that workers may find themselves facing lawsuits from a (one assumes former) employer if they undertake collective sympathetic action. For instance, the old tort of conspiracy to injure *may* have joined restraint of trade on the dustbin of labour history,³⁷⁰ but other torts remain that can have an impact on strikes and strikers. The Supreme Court in *RWDSU v. Pepsi-Cola* noted that torts such as trespass, intimidation, nuisance, defamation, and inducing breach of contract can be used to protect property interests and access to private premises.³⁷¹ The *Charter* does not grant immunity to criminal or tortuous conduct, just as freedom of expression does not

³⁷⁰ E.g. Saskatchewan *Trade Union Act*, *supra* note 71, s. 28; *RWDSU Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 1998 CanLII 12389 (Sask. CA) at 23.

³⁷¹ *RWDSU v. Pepsi-Cola* (SCC), *supra* note 184 at 73. The Court notes that the tort of intimidation is less apt in labour relations situations, as picketing has become so familiar that it is not as intimidating as it once was: para. 95.

grant immunity to defamation claims. As Harry Arthurs notes, “[a]nyone familiar with the common law or criminal law of picketing will recognize how drastic a restriction lies concealed within this apparently modest *caveat*.”³⁷²

It is also possible that sympathetic action may ground liability for the *strikers themselves*, even if the sympathizers are not themselves sued. For instance, the very purpose of a strike is to convince people not to do business with the employer while the strike is ongoing, and it is not clear that the tort of inducing breach of contract would not apply if, for instance, the sympathetic action caused the sympathizers' employer to choose not to do business with the struck employer. This makes this tort distinct from the conspiracy to injure (eliminated by statutory reform but arguably also untenable at common law if a right to strike is constitutionally protected) defamation (which, as set out above, may well apply regardless of the strength of the right to strike) and intimidation (less applicable now that picket lines are commonplace). Inducing breach of contract between an employer and a supplier or customer is a potential outcome to the general economic pressure which is integral to most strikes. Liability could accrue to the primary strikers (as the cause of the sympathetic action) or the sympathizers (as the ones who put pressure on the secondary employer).

The *Charter* values underlying freedom of association, therefore, would seem to have the most impact on the industrial torts when considering sympathetic action. The freedoms of conscience and expression would be the freedoms that would more directly shape the common law regarding penalties to individual workers.

³⁷² Arthurs, "One Shoulder Shrugging", *supra* note 30 at 382.

Section 1 - Limits Justifiable in a Free and Democratic Society

None of the foregoing freedoms are absolute, a principle expressly recognized in section 1 of the *Charter*, which "guarantees the rights and freedoms set out in [the *Charter*] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The test to be applied under section 1 was first set out in *R. v. Oakes*³⁷³ and has remained essentially unchanged, though it has been refined in subsequent decisions. The *Oakes* test is a two-step analysis:

First, are the legislative objective or objectives of the legislation pressing and substantial?

Second, does the legislation satisfy the criteria for *proportionality*? This is a broad question that can be divided into three narrower questions:

- 1) Is the impugned law rationally connected to its objective?
- 2) Can the objective of the law be achieved by less restrictive means? And,
- 3) Is there an overall proportionality between the objective of the impugned law and its deleterious effects?³⁷⁴

i. Pressing and Substantial Objective

In the first step of the inquiry, the focus is on the law's objective and not its effects; while

The objective of a law can be inferred from its effect, [it] cannot be determined solely by reference to its effect. Otherwise, any law that has the effect of infringing on a *Charter* right could be said to have the infringement as its objective. The effect of the challenged law is best considered at the fourth step of the *Oakes* analysis, which concerns the proportionality between the object of the law and its deleterious effects.³⁷⁵

³⁷³ [1986] 1 S.C.R. 103.

³⁷⁴ *Saskatchewan Federation of Labour* (Q.B.), *supra* note 14 at para. 150.

³⁷⁵ *ibid.* at para. 134.

As discussed in Part I, Canadian labour relations is marked by strict restrictions on the use of the strike and, hence, on sympathetic action. The model has as one of its central concerns the limitation of economic harm to third parties to the strike. The Supreme Court recognized this concern as a pressing and substantial objective early in the *Charter* era. In *Dolphin Delivery* the Court held:

It is reasonable to retrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others.³⁷⁶

Dickson C.J. in his dissent in *Dairy Workers* found that the prevention of economic harm to third parties was a pressing and substantial objective under section 1.³⁷⁷ Notably, Wilson J. disagreed on this point, arguing *inter alia* that economic harm to third parties, in itself, was not necessarily a pressing and substantial concern:

Industry and the public accept a certain amount of damage and inconvenience as the price of maintaining free negotiation in the work place. Such damage and inconvenience cannot therefore constitute the "pressing and substantial concern" which the Court held in *Oakes* was required in order to justify government intervention. Otherwise every work stoppage would give rise to a "pressing and substantial concern" and government intervention would be the rule rather than the exception. There has to be more to it than that.³⁷⁸

Similarly in *Pepsi-Cola* the Court recognized there would inevitably be *some* damage to third parties in any labour dispute, but that they should be protected from *undue* suffering:

...[A]lthough McIntyre J.'s comments [in *Dolphin Delivery*] reflect a concern with the interests of third parties to labour disputes who may incur collateral damage, they should not be read as suggesting that third parties should be completely insulated from economic harm arising from labour conflict. As Cory J. noted in *KMart*, *supra*, the objective of the restraint on picketing in *Dolphin Delivery* was to ensure that third parties did "not suffer unduly from the labour dispute over which it has no control"...Therefore, third parties are to be protected from undue suffering, not insulated entirely from the repercussions of

³⁷⁶ *Dolphin Delivery*, *supra* note 130 at 591.

³⁷⁷ *Dairy Workers*, *supra* note 13 at paras. 31-32, *per* Dickson C.J.

³⁷⁸ *ibid.* at paras. 59 and 66, *per* Wilson J.

labour conflict. Indeed, the latter objective would be unattainable. Even primary picketing imposes costs, often substantial, on third parties to the dispute, through stoppages in supplies or the loss of the primary employer as a customer...Indeed, labour disputes in important sectors of the economy may seriously affect a whole town or region, even the nation itself...

...[T]he protection of innocent third parties from the economic fallout of labour disputes, while a compelling consideration, is not absolute. Such economic harm to third parties is anticipated by our labour relations system as a necessary cost of resolving industrial conflict.³⁷⁹

In *Grain Workers* Evans J.A. confirmed the Canadian Industrial Relations Board's ruling that "the purpose of the broad statutory prohibition of mid-contract strikes is to avoid the social and economic costs of unpredictable interruptions to production and services," and that this was a "pressing and substantial objective" for the purposes of s. 1.³⁸⁰

As the very point of sympathetic action is to expand the impact of a strike, the same principles would seem to apply and limiting the unpredictability of sympathetic action as well as limiting the economic harm to third parties are likely "pressing and substantial objectives." The analysis must then turn to whether the prohibition on sympathetic action is *proportional*.

ii. *Proportionality: Rational Connection*

Similarly, it would seem that the statutory prohibitions on sympathetic action are rationally connected to the objectives identified above. In *B.C. Health Services* the Court noted that it is "not particularly onerous" to establish a rational connection between legislation and that legislation's objective.³⁸¹ The connection does not need to be directly proven; it can be inferred "on the basis of reason or logic".³⁸² In both *Grain Workers* (*per* Evans J.A.) and *BCTF* the

³⁷⁹ *Pepsi-Cola*, *supra* note 184 at paras. 44-45.

³⁸⁰ *Grain Workers*, *supra* note 4 at para. 61.

³⁸¹ *B.C. Health Services*, *supra* note 41 at para. 148.

³⁸² *RJR-Macdonald Inc. v. Canada (Procureur Général)*, [1995] 3 S.C.R. 199.

prohibition on mid-contract strikes was found to be rationally connected to the objective of preventing unpredictable work stoppages and interruption of services.³⁸³

If the objective of legislation is to limit the impact of strikes, then a bar on sympathetic action would appear to be rationally connected to that objective.

iii. Proportionality: Minimal Impairment

In both the "pressing and substantial objective" inquiry and the "rational connection" inquiry, the analysis would seem to apply regardless of which freedom is involved. However, when dealing with "minimal impairment" and "proportionality" aspects of the inquiry, the right involved may change the analysis.

A s. 1 approach that varies depending on the right concerned may be described as "pluralistic" as opposed to "monistic".³⁸⁴ The "monistic" approach sets a single standard that applies to all *Charter* infringements, i.e. the standard does not differ based on which *Charter* right has been infringed.³⁸⁵ The "pluralistic" approach, on the other hand, potentially applies a different standard for each *Charter* right. Each standard would reflect the underlying structure of section 1 but would also take into account the context and underlying values of the *Charter* right in question.³⁸⁶ The Supreme Court has arguably applied a "pluralistic" approach to the freedoms under section 2 by adding "substantial interference" as a criterion for demonstrating infringement of freedom of association in the context of trade union rights.

However because the *Charter* rights in question here all exist as fundamental freedoms under section 2, a "monistic" approach may be warranted:

³⁸³ *Grain Workers*, *supra* note 4 at para. 63; *BCTF*, *supra* note 14 at para. 55.

³⁸⁴ Brian Slattery, "The Pluralism of the Charter: Revisiting the *Oakes* Test" in L. Tremblay and G. Webber (eds), *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Montréal: éditions Thémis, 2009) 13 at 13.

³⁸⁵ *ibid.*

³⁸⁶ *ibid.*

...[T]he fundamental freedoms in section 2 – freedom of conscience, freedom of expression, freedom of peaceful assembly, and freedom of association – are all set out in ringing terms that apparently do not brook internal limitation. Consider the wording of s. 2(b), which declares roundly that everyone has “freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication.” Arguably, the question whether this fundamental freedom has been infringed is analytically distinct from the question whether such an infringement is “reasonable”, and the latter question is governed by the uniform criteria set out in section 1.³⁸⁷

The approach of "emanating freedoms" that was mentioned earlier also suggests a uniform standard, i.e. a "monistic" approach to s.1. Infringement should be the initial question (absent, as argued previously, any filter such as "substantial interference"), followed by a potential justification of that infringement under s.1. Certainly in the context of sympathetic action, I have argued that the individual freedoms trigger different interests and express themselves in different ways, but they are not ranked in *importance*, only *character*. However when considering minimal impairment and the detrimental versus salutary effects of legislation, that character may affect the result.

Indeed, the Supreme Court has tended to reject internal limits to section 2. For instance in *B.(R.) v. Children's Aid Society*,³⁸⁸ the majority held that parents had a right under s. 2(a) to refuse to have a blood transfusion given to their child, but that the limits on that right were justified under s. 1 on the basis of protecting the child's welfare. The minority argued that there was an internal limit to freedom of religion that was reached when the child's welfare was endangered;³⁸⁹ however this approach was rejected by the majority.³⁹⁰ The *B.(R.)* decision also reinforces the principle implicit in *Pepsi-Cola* that the mere fact that one's fundamental freedom may have an impact on another's welfare (physical welfare in *B.(R.)*, economic welfare in *Pepsi-*

³⁸⁷ *ibid.* at 15.

³⁸⁸ [1995] 1 S.C.R. 315 ("*B.(R.)*")

³⁸⁹ *ibid.* at para. 215: "In our view, the best way to ensure this outcome is to view an exercise of parental liberty which seriously endangers the survival of the child as falling outside s. 7."

³⁹⁰ *ibid.* at paras. 86-87.

Cola) does not, in itself, present an internal limit to that freedom. The balancing of interests takes place under section 1.

Similarly when engaging in section 1 analysis of limits on protected expression under s. 2(b), the Court examines the context of the expression, often not to the benefit of those claiming infringement: “the jurisprudence reveals that a contextual approach has been consistently applied to restrict the scope of 2(b), not to expand it”.³⁹¹ Indeed, while the Court has found that freedom of expression applies to limits on posting election results on the Internet,³⁹² election spending,³⁹³ advertising to children,³⁹⁴ or the publication of public opinion poll results within three days of an election,³⁹⁵ the Court has not shied away from accepting limits on expression (as in *Harper* and *Bryan*).

In particular, as one works back "inwards" through the emanating circle of section 2 freedoms, one can see a greater infringement on the integrity of the individual. This is not because the freedoms are necessarily more important the more "internal" they become, but they are certainly more *individual*. So, for instance, under the current law, freedom of association is certainly infringed by the existing bar on collective sympathetic action. However, freedom of expression and conscience are not directly infringed; it is only their collective application that is forbidden. On the other hand, a law that would vest the right to engage in sympathetic action only in trade unions rather than individual workers (which would not be in keeping with the approach taken by Canadian courts to freedom of association but which the ILO has said is

³⁹¹ Cameron, "Due Process", *supra* note 24 at 258.

³⁹² *R. v. Bryan*, 2007 SCC 12.

³⁹³ *Harper v. Canada (Attorney-General)*, [2004] 1 S.C.R. 827.

³⁹⁴ *Irwin Toy*, *supra* note 148.

³⁹⁵ *Thomson Newspapers Co. v. Canada (Attorney-General)*, [1998] 1 S.C.R. 877.

acceptable³⁹⁶) might adequately protect the freedom of association while not providing adequate protection to the more individual freedoms of conscience and expression. Similarly the existence of alternate dispute resolution mechanisms may protect freedom of association in the context of the right to strike,³⁹⁷ but might not satisfy the expressive or conscientious interests of ss. 2(a) and (b). The "proportionality" aspect of the *Oakes* test therefore is not a "one size fits all" exercise even if the "monistic" approach is accepted.

While the "freedom not to associate", as described by the Court, appears to have as its core a resistance to "ideological conformity", prohibition on collective sympathetic action is the opposite problem - not *forced* association, but *forbidden* association. Indeed, if anything, the "ideological conformity" that the current state of the law enforces is that of the capitalist state and the "efficiency paradigm". While no right is absolute, neither is the ability of the state to infringe upon it; as Wilson J. stated in *Morgentaler*:

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both.³⁹⁸

Indeed for reasons that will be discussed further in Part III, I submit that the unified s. 2 approach to sympathetic action would mandate that strike discipline in the context of sympathetic action is *not* justifiable and would offend the prohibition on "ideological conformity" that *all* of the s. 2 freedoms entail.

³⁹⁶ *ILO Digest*, *supra* note 310 at para. 524: "It does not appear that making the right to call a strike the sole preserve of trade union organizations is incompatible with the standards of Convention No. 87. Workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination."

³⁹⁷ E.g. *Saskatchewan Federation of Labour (Q.B.)*, *supra* note 14 at paras. 206ff.

³⁹⁸ *Morgentaler*, *supra* note 239 at para. 224, *per* Wilson J.

At the same time the prohibition on *association* leaves individual workers profoundly vulnerable in their *individual* exercise of conscience and expression. As the Supreme Court has recognized, there is a qualitative difference between individual and collective action. While the peace obligation may only be an infringement of association *de jure*, it is an infringement of conscience and expression *de facto*, insofar as it renders the solitary exercise of those freedoms impotent. It is analogous to the Court's recognition in *Dunmore* that positive action by the State may be necessary where the practical realities render the exercise of a fundamental freedom (in that case, association) unreasonably difficult or impossible.

Therefore, the current state of the law regarding sympathetic action:

- 1) Offends freedom of *association* outright by forbidding the collective exercise of sympathetic action;
- 2) Offends freedom of *expression* by unreasonably limiting its exercise through restriction on collective action but can also *de facto* force *unwanted* expression upon workers by requiring them to cross a picket line, as recognized by Evans J.A. in *Grain Workers*; and
- 3) Offends freedom of *conscience* by *de facto* forcing those committed to trade union principles to act against their conscience.

As the very words "minimal impairment" would suggest, an absolute prohibition on the exercise of a *Charter* right is likely to fail when lesser measures are available. For example:

- An absolute ban on Sikh students carrying a *kirpan* was held to offend s. 2(a). A lesser measure, where the *kirpan* was sewn into the bearer's clothing to prevent easy access, was substituted by the Court (*Multani*).

- An absolute ban on advertising during children's programmes was held to offend s. 2(b) (*Irwin Toy*).
- An absolute prohibition on strike action by public servants, without recourse to alternate dispute resolution or adequate input from public sector unions regarding what services were affected, was held to offend s. 2(d) (*Saskatchewan Federation of Labour* (Q.B.)).³⁹⁹

As discussed previously, because the law in this case is prohibitive, it is not necessary to consider the imposition of positive obligations such as the duty to bargain in good faith (as in *Fraser*). It is also notable that in the case of sympathetic action, unlike the right to strike, it is difficult to see what alternative measures might be used to resolve the dispute. Sympathizers do not have access to arbitration or conciliation, for instance, even if the primary strikers do.

However, particularly in the labour context, governments are given a certain amount of discretion to make legislative choices and develop legislative schemes. The Courts will not enforce a particular statutory scheme.⁴⁰⁰ As LeBel J. noted in *Advance Cutting & Coring*, "the effects of legislative choices, especially in the realm of social and economic policy remain hard to assess."⁴⁰¹

Nonetheless, I submit there are clearly lesser measures available to governments beyond the blanket prohibition. These will be discussed in more detail in Part III, but they include:

- Allowing workers to "contract out" of the peace obligation;

³⁹⁹ This portion of the ruling was of course overturned by the Saskatchewan Court of Appeal, but the Court of Appeal stated specifically that it was taking no position on the right to strike: *Saskatchewan Federation of Labour* (C.A.), *supra* note 14 at para. 67. It remains to be seen if the Supreme Court of Canada will hear an appeal or how the Supreme Court will rule on the strike prohibition.

⁴⁰⁰ *Fraser*, *supra* note 195 at para. 47.

⁴⁰¹ *Advance Cutting & Coring*, *supra* note 37 at para. 268.

- Inserting a statutory exemption for sympathetic action, along the lines of the Manitoba exemption, into the "peace obligation", either collectively (or individually for government employees, to whom the *Charter* applies directly); or
- Amending the definition of "strike" to allow for sympathetic action, or bringing sympathetic action fully into the definition of "strike" and allowing unionized workers to engage in sympathetic action on similar terms to primary strikes.

There are a number of ways the economic impact and social disruption of strikes, and of sympathetic action, can be contained without absolute prohibition of sympathetic action. In particular, the "bright line" analysis used by the B.C. Court of Appeal in *BCTF* and by Evans J.A. in *Grain Workers* seems to overstate the delicacy of the balance within labour relations legislation. The suggestions above are not unprecedented nor impossible to implement.

On that basis, I submit that the current statutory prohibition does not minimally impair the freedoms in question and as such must be amended or removed.

iv. Proportionality: Detrimental vs. Salutory Effects

Given the argument that the "peace obligation" fails at the "minimal impairment" stage the measure of detrimental effects of the peace obligation versus its salutary effects is not necessary.

Nonetheless, I submit that the detrimental effects - the infringement both *de jure* and *de facto* on the freedoms set out in ss. 2(a), (b), and (d) of the *Charter* - outweigh the salutary effects of the legislation.

PART III
SUGGESTIONS FOR REFORM

Statutory Reform

i. The Peace Obligation

The main reform I suggest is to the Canadian definition of "strike". This serves as the main bar to the traditional exercise of sympathetic action.

The existing labour relations regime does not *require* that sympathetic action be contained within the definition of a "strike" or, indeed, that there be any statutory definition of a "strike" at all. As discussed in Part I, British Columbia operated for a number of years with a statute that allowed for protest strikes and sympathetic action while regulating primary strikes. Saskatchewan operated for decades without a statutory definition of "strike". However, there appear to be a range of legislative choices available that would address the prohibition on sympathetic action without leaving the existing Canadian model topsy-turvy.

a. Negotiated Exceptions

Perhaps the approach that would be most in keeping with the underlying premises of Canadian labour relations would be to allow parties who have a collective bargaining relationship to negotiate a clause in their collective agreement permitting workers to refuse to cross a picket line. This is hardly an original concept; many collective agreements already include such a clause (indeed, the collective agreement in *Grain Workers* did so) and some jurisdictions have given full effect to such clauses in the past⁴⁰² though the current approach seems to be that such clauses will immunize workers from *discipline* but not *statutory penalty*.

The late Professor Geoffrey England suggested an innovative approach: clauses in collective agreements that provide that the employer will not *schedule* work where that would

⁴⁰² E.g. *Canada Post Corp. v. C.U.P.W.* (1983), 5. C.L.R.B.R. (N.S.) 280

force employees to cross a picket line.⁴⁰³ If there is no work to refuse, then there can be no strike.⁴⁰⁴ However, I submit that such an approach should not be necessary; unionized workers should be entitled to negotiate a clause that outright exempts them from the "peace obligation". This is in keeping with the idea of autonomy within labour relations - though at least one commentator⁴⁰⁵ argued as far back as the late 1970's that the concept of autonomy was endangered and that we would eventually "stop paying lip service to the pristine ideal of labour and management autonomy".⁴⁰⁶ It is difficult to argue that that evaluation was wrong; however, the Supreme Court's rulings (however convoluted) that collective bargaining is constitutionally protected would seem to give that concept of autonomy some new life - not to the extent of giving collective agreements constitutional status *per se*, as Professor Peter Hogg contends,⁴⁰⁷ but rather recognizing that there is constitutional value to that autonomy.

It is perhaps a great irony of Canadian constitutional law that the fear of the "strike weapon" has led to convoluted decisions to justify constitutionalizing collective bargaining, where loosening strike laws may have prevented the need for such decisions in the first place. In terms of uncertainty and unintended impact of a strike, this approach would also allow employers to negotiate clauses where unions would agree *not* to undertake sympathetic action, or to only do so under certain conditions, such as providing advance notice, or even to provide limited services - along the lines of a negotiated "essential services agreement" - rather than a full refusal. While I argue that sympathetic action is a function of fundamental constitutional

⁴⁰³ England, "Statutory Definition of 'Strike'", *supra* note 18. See also Adams, *Canadian Labour Law*, *supra* note 66 at 11-5ff.

⁴⁰⁴ See e.g. *Re Freelance Erectors*, [1972] O.L.R.B. Rep. 818.

⁴⁰⁵ Harry Arthurs, "Free Collective Bargaining in a Regulated Society" in F. Bairstow (ed.), *The Direction of Labour Policy in Canada* (Montreal: McGill University Industrial Relations Centre, 1977) 110.

⁴⁰⁶ *ibid.* at 112.

⁴⁰⁷ Hogg, *supra* note 215 at 44-9.

freedoms, that does not mean parties cannot negotiate self-imposed limits to those freedoms, particularly in a unionized environment where there is greater parity of bargaining power. At the very least, the negotiated approach may breathe some life into the right to sympathetic action. After all, as it stands now, the employer gets that commitment from unions for free, and unions and employers are *forbidden* from recognizing a right to sympathetic action. Under the proposed model, an employer will need to bargain its own peace obligation, and the union can choose to accept or reject that proposal as it wishes.

Allowing parties to regulate their own relationship via collective bargaining seems fully in keeping with constitutional principles and with the analysis of s. 2 freedoms argued herein. It seems perhaps most in keeping with the interests inherent in section 2(d) in particular. It also, unlike the option of treating sympathetic action as a full strike discussed *infra*, does not have any inherent tie to the right to strike itself.

The "negotiated" approach is not without risks, however. In the context of the right to strike, it has been argued:

...Just as political citizenship requires that all citizens having [*sic*] certain rights, such as the right to vote, so too does industrial citizenship require that all union members have the same rights. However, by giving up the right to strike, unions also undermine the basis for their defence of free collective bargaining, as both of these rights rest upon an acceptance by the state that workers have the right to form and act as independent unions as part of their rights to industrial citizenship. by giving some of these rights away, unions are in danger of unwittingly undermining their capacity to defend their other rights, opening the door for further erosion of workers' freedom of association and the basis for industrial citizenship...⁴⁰⁸

This does not mean that unions *could not* negotiate away their right to strike or sympathetic action, however, just that they *should not*. This could be addressed by including the right to sympathetic action as a matter that cannot be bargained to impasse; it is something a

⁴⁰⁸ Yates, *supra* note 49 at 132.

union can offer to give up, but not something that can be wrested from them under threat of lockout.

b. Sympathetic Action as a Full "Strike"

A second alternative is to treat sympathetic action as a full "strike" under labour relations legislation. It is already subject to the restrictions on mid-contract strikes and as such is inevitably illegal; there is no corresponding power or immunity under the law as it stands, unlike true strikes. This approach, however, would likely be unworkable and render the "peace obligation" entirely meaningless unless it were tied to supporting an already legal strike.

Much like the collectively bargained approach, collective sympathetic action would be allowed provided certain statutory conditions were applied, such as a strike vote authorizing the action and a period of advance notice to the employer (and possibly the primary employer and the Minister of Labour as well). It would potentially, in the public sector, fall under the various "essential services" statutes around the country - services are no less essential⁴⁰⁹ just because workers are striking in support of other workers.

This approach would also rob sympathetic action of its immediacy, unless unions were to co-ordinate ahead of time. If, say, forty-eight hours' notice were required to engage in sympathetic action, that is potentially forty-eight hours where a picket line is up but workers are required to cross. Nonetheless, this approach lessens, but does not remove, the peace obligation. I submit it would balance the interests of workers as well as third parties in a manner that does not offend the *Charter*.

⁴⁰⁹ However broadly "essential" may be defined in Canadian labour legislation.

c. *Sympathetic Action Exemption*

A third option which would fully respect the *Charter* rights engaged would be to either exempt sympathetic action from the definition of a "strike" itself, or incorporate provisions similar to the Manitoba sympathetic action exemption. The former option has been used in the past and there is no compelling public policy reason why that could not be instituted or re-instituted now.

In the latter option, however, to fully respect *Charter* freedoms, and particularly freedom of association, certain changes would be required to the Manitoba model.

For reference, the Manitoba statute reads, at s. 15(1):

An employee who is in a unit of employees of an employer in respect of which there is a collective agreement in force and who refuses to perform work which would directly facilitate the operation or business of another employer whose employees within Canada are locked out or on a legal strike is not by reason of that refusal in breach of the collective agreement or of any term or condition of his employment and is not, by reason of that refusal, subject to any disciplinary action by the employer or the bargaining agent that is a party to the collective agreement.

As an exclusively individual protection, this would seem to protect workers' freedom of both conscience and expression. However it does not immunize workers from the peace obligation or penalties for engaging in a "strike". Therefore the provision should be expanded to include an employee *or group of employees* - a true exemption for meaningful sympathetic action. (The fact that the provision does not allow workers to engage in sympathetic action for fellow workers at another branch of the *same employer* would seem to potentially infringe the s. 2 freedoms and potentially even s. 15 of the *Charter*.) This could, again, be subject to certain conditions to minimize the disruption of sympathetic action.

d. Union Picket Discipline and Sympathetic Action

As I alluded to in Part II, however, I do not believe that either the "autonomy" approach nor the "full strike" approach would allow unions to impose "sympathy strike discipline" upon workers who do *not* wish to undertake sympathetic action. This is because, in my view, one cannot argue on the one hand that sympathetic action triggers fundamental moral and ethical values, and on the other hand argue that one should be forced to conform to values that one does not believe in.

At the same time, concern about the ability of individuals to cross a picket line (their own or someone else's) or perform struck work or handle "hot cargo" without fear of penalty seems to be a paper tiger. Unions can expel workers from their union if that worker crosses a picket line, for instance, but in a "closed" or "union" shop environment, that can no longer result in the forced dismissal of that worker. Similarly, Saskatchewan is the sole jurisdiction in Canada, by virtue of section 35 of its *Trade Union Act*, that allows a union to fine members who cross that union's own picket line. Other jurisdictions have ruled such fines void, for example on the basis of "unconscionability".⁴¹⁰ A union is certainly not permitted to use physical force to prevent a member from crossing the picket line, and one can only ask what impact expulsion from a union would be to a worker willing to cross a picket line in the first place. In the end, this fear seems overblown, or at least a battle that has, for the most part, been lost. There would also seem to be a corresponding argument that a strong right means that the common law in this regard must adapt to allow for union discipline, or at least to uphold statutory provisions like s. 35 of the *Trade Union Act*; but in the end, union membership is a contract, and a union member may choose to remain a union member, with all of the obligations that entails, or may resign from the

⁴¹⁰ E.g. *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809.

union and cross the picket line.⁴¹¹ The current state of the law where union discipline has been found to be “unconscionable” is that workers may remain union members *and* cross the picket line with impunity. Where union *membership* is a condition of employment, it would seem that stripping workers of union membership for refusing to participate in sympathetic action would be a violation of those workers' freedoms of conscience and expression, just as forcing workers to cross a picket line when they do not wish to would be.

The Law of Tort and Contract

I argued in Part II that the laws of tort (particularly the industrial torts) and the law of contract should be interpreted so as to conform to *Charter* values, and to provide greater freedom for workers to engage in sympathetic action without fear of discipline. This would entail "reading in" *Charter* rights in all contracts of employment, and consigning the industrial torts to irrelevance. I will not repeat those arguments here. However I submit certain statutory amendments would be necessary to fully promote *Charter* values (and coincidentally in at least three Canadian jurisdictions, conformity with human rights legislation), even with the presumption that workers *are* entitled to engage in sympathetic action without fear of discipline.

A presumption that sympathetic action cannot be the subject of retribution by the employer may be sufficient, but statutory protection - whether as part of provincial human rights legislation, employment standards legislation, or labour relations legislation - would provide greater protection and a more reliably *Charter*-compliant employment law regime. The "Manitoba option" mentioned above is perhaps the simplest possibility, and has the advantage that it already exists in one jurisdiction and need not be invented from whole cloth.

⁴¹¹ *Ibid.*, per Juriansz J. in dissent.

The "contractual" model presents difficulties in the non-unionized sector. If there were equality of bargaining power within the non-unionized sector,⁴¹² it would certainly be entirely proper to allow employers to freely negotiate a commitment from their employees not to undertake sympathetic action. However, given the inherent inequality of the bargaining process, this employer power to over-ride a constitutional right seems open to abuse. At the same time, employees often sign contracts that limit their right to exercise their other freedoms; dress codes, for instance, interfere with freedom of expression, but are common in a number of industries. For certain non-profit organizations, conformity to a particular ethic or religion can be required of employees; in some jurisdictions this must be a *bona fide* occupational requirement⁴¹³, in other jurisdictions not⁴¹⁴, but it can be an implied or express part of the contract of employment. The main concern must be, particularly given the history and value of sympathetic action in the labour context, that employers' superior bargaining power does not render workers' rights illusory. It seems likely that if there is found to be a presumption in favour of sympathetic action at common law, contracts of employment will contain standard clauses rebutting that provision. Unlike in the unionized context, an assurance that this is not a matter that can be *required*, but only *volunteered*, to be relinquished, would seem to have little effect in the non-unionized sector.

Another option would be a statutory provision setting out that no contract can include a clause preventing a worker from undertaking sympathetic action, perhaps softened by a proviso that a worker can, in emergency circumstances, be required to perform work that could normally

⁴¹² I should note that the equality of bargaining power within the *unionized* sector has perhaps been overstated by the Courts as well - see *Plourde v. Wal-mart*, 2009 SCC 54, where it was suggested that a UFCW Local in Québec had bargaining power equivalent to Wal-mart, one of if not *the* largest corporation in the world.

⁴¹³ See *The Saskatchewan Human Rights Code*, *supra* note 134, s. 16(10).

⁴¹⁴ See the British Columbia *Human Rights Code*, RSBC 1996, c. 210, s. 41.

be refused on the basis of sympathetic action - similar to the provisions regarding overtime in some employment standards legislation.

However when viewed in the overall context of the freedoms in question and the power dynamics in the workplace, the "Manitoba model" seems the safest choice to protect the rights of non-union workers to engage in sympathetic action.

Conclusion

While I submit sympathetic action is a matter worthy of protection under the fundamental freedoms in section 2 of the *Charter*, there is no absolute answer to what that means in terms of public policy. Parliament and the Legislatures must have the freedom to craft labour relations regimes that meet the requirements of the times and of their particular jurisdiction. However these concerns are perhaps less urgent or profound than they seem at first blush, as what meets the requirements of the times and of a particular jurisdiction has seemed remarkably uniform across Canada for decades. Nonetheless I submit that two things are clear: the absolute ban on sympathetic action under Canadian labour law violates the *Charter* and must be removed; and the hostility of the law of tort and the law of contract to sympathetic action is not in keeping with *Charter* values. Whether through adjudicative interpretation or statutory reform, the law must adapt to reflect these truths.

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