"ONE MORE BATTLE TO FIGHT": TRADE UNION RIGHTS AND FREEDOM OF ASSOCIATION IN CANADA*

SIMON RENOUF**

Three key decisions of the Supreme Court of Canada in 1987 considered the availability of the Charter's guarantee of freedom of association as legal protection for trade union rights in Canada. The cases decided that there is no constitutional protection for the legal right to strike, but did not set out the limits of constitutional protection for union rights. This paper examines several decisions from superior courts and courts of appeal since the trilogy, (particularly a 1988 decision of the Court of Appeal for the Northwest Territories) and discusses the availability of Charter protection for other trade union interests, including organizing and certification rights. It is argued that there are several grounds for testing standard Canadian collective bargaining legislation under the Charter. Assuming that a prima facie breach of the Charter can be established, the paper examines a sample of collective bargaining statutory provisions in accordance with the principles established by the courts for the application of s. 1 of the Charter, concluding that some, but not all, of such provisions would survive a vigourous application of the Charter.

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* "One More Battle to Fight" (song title) from T. Phillips Thompson, *The Labor Reform Songster*, 1892.

** Simon Renouf is a third year student in the Faculty of Law, University of Alberta. He will be articling in Edmonton with the firm of Pringle and Associates.

I. INTRODUCTION

Three key decisions of the Supreme Court of Canada in 1987 considered the availability of the Canadian Charter of Rights and Freedoms'[1] guarantee of freedom of association as legal protection for trade union rights in Canada.[2] The result of those decisions was a definitive statement that the right to strike for Canadians is not protected by the Charter. Beyond that point, however, the judgments seem to have sown confusion. What is the impact of the 1987 trilogy on other trade union rights in Canada? Le Dain J. in the *Alberta Reference* wrote: "The rights for which constitutional protection is sought — the modern rights to bargain collectively and to strike . . . are not fundamental rights or freedoms. They are the creation of legislation. . . ."[3] Arguably this means that no trade union rights will receive Charter protection. However, as was pointed out by Marshall J. of the Supreme Court of the Northwest Territories in *Re P.I.P.S.C.*,[4] the Supreme Court of Canada judgments do not define the limits of organizational rights of individuals when combining in a trade union association. While the Supreme Court of Canada's 1987 trilogy appears to stand for the proposition that no rights relating to collective bargaining or trade union organization will receive Charter protection, a closer reading reveals the judgments cannot support such a conclusion.

In this paper I shall discuss the actual effect of the 1987 trilogy, and examine an array of trade union rights which the Charter might be held to protect. I will then address the question of limitations on the process of union certification in Canada illustrated by the *P.I.P.S.C.* case in the Supreme Court of the Northwest Territories and the Court of Appeal for

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1. As enacted in Canada Act 1982 (U.K.), c. 11, hereafter referred to as 'the Charter'.
2. *Reference Re Public Service Employee Relations Act* (Alta.) (1987) 87 C.L.L.C. 12,149 (¶ 14,021) (S.C.C.) (hereafter referred to as the *Alberta Referenced*), *Public Service Alliance of Canada* v. *The Queen in Right of Canada* (1987) 87 C.L.L.C. 12,189 (¶ 14,022) (S.C.C.) (hereafter referred to as *P.S.A.C.*), *Retail, Wholesale and Dep't. Store Union, Local 544* v. *Gov't of Sask.* (1987) 87 C.L.L.C. 12,201 (¶ 14,023) (S.C.C.) (hereafter referred to as the *Dairyworkers* case).
3. *Alberta Reference, supra* n. 1 at 12,151.
4. *Re Professional Institute of the Public Service of Canada and Commissioner of the Northwest Territories et. al.* (1987) 43 D.L.R. (4th) 472 (N.W.T.S.C.) (hereafter referred to as *Re P.I.P.S.C.*).

the Northwest Territories.[5] I will then turn to the question of whether the Charter can be used to support a right to certification, and a right to equal certification procedures. This will involve consideration of an approach to union rights applying sections 2 and 15 of the Charter in tandem. I will conclude with a discussion of how section 1 of the Charter ought to be applied to any statutory limitations of Charter rights in the labour relations field, and by way of illustration, I will examine several typical statutory provisions which limit or control the acquisition of union certification rights.

II. WHAT THE 1987 TRILOGY SAID

Not least of the difficulties with the *Alberta Reference* is that a close reading indicates that the judgment which attracted the greatest degree of judicial support (that of LeDain J.) contains virtually no analysis and was written after, and as a response to, two comprehensive analyses of the Charter principles and case law applicable to the issue. LeDain J.'s opinion reads as if it were intended as a brief concurring statement, yet it effectively represents the judgment of the court. Various internal references within the three sets of reasons indicate that the order in which the judgments were circulated were: 1.) the reasons of Dickson C.J.C., which attracted the support of Wilson J., 2.) the reasons of McIntyre J. which make reference to the Dickson judgment, and 3.) the reasons of LeDain J. (concurred in by Beetz and LaForest JJ.) which refer to the reasons of both Dickson C.J.C. and McIntyre J. (Chouinard J., the seventh member of the court which heard the appeal, did not take part in the judgment).

As mentioned above, the case clearly stands for the proposition that in Canada the right to strike is not afforded constitutional protection. Only Dickson C.J.C. and Wilson J. would have found that there is, *prima facie* protection for the right to strike. Dickson C.J.C. analyzed Commonwealth, Canadian, and U.S. judicial decisions, as well as the effect of Canada's international legal obligations. The impact of these various sources was mixed, with only the latter clearly pointing towards constitutional protection of the right to strike. The Chief Justice construes section 2(d) of the Charter broadly, rejecting immediately any "frozen rights" theory, citing *Big M Drug Mart* [6] as authority for the proposition that "the meaning of a provision of the Charter is not to be determined solely on the basis of pre-existing rights or freedoms."[7] The Chief Justice also sternly

5. *Professional Institute of the Public Service of Canada* v. *Commissioner of the Northwest Territories and Northwest Territories Public Service Association* [1988] N.W.T.R. 223 (C.A.) (hereafter referred to as *P.I.P.S.C.* v. *N.W.T.*).

6. *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295.

7. *Alberta Reference, supra* n. 1 at 12,177.

rejects the view that rights and freedoms cannot be protected by the Charter if they are subject to statutory regulation. Such a view[8]

> is premised on a fundamental misconception about the nature of judicial review under a written constitution.
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> The Constitution is supreme law. Its provisions are not to be circumscribed by what the legislature has done in the past, but, rather, the activities of the legislature — past, present, and future — must be consistent with the principles set down in the Constitution.

The proper place for the assessment of legislative policy is in section 1, and not in the definition of the right or freedom itself.

The Chief Justice holds that section 2(d) normally embraces the right to do collectively that which one is permitted to do as an individual. But this is not the exclusive touchstone to determine the content of the right:[9]

> 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.

Dickson C.J.C. finds such a situation in the case of the right to strike, in that a strike is qualitatively different from refusal to work by an individual. Legislation which attempts to deny the right to strike has as its purpose "the attempt to preclude associational conduct because of its concerted or associational nature."[10] Such a purpose, the Chief Justice concludes, is in conflict with section 2(d).

McIntyre J.'s analysis of freedom of association proceeds according to a descriptive method, setting out six possible approaches on a continuum of possibilities. A number of the possibilities canvassed by McIntyre J. parallel the approaches considered by the Chief Justice, with the first approach being essentially the Chief Justice's "purely constitutive" approach, the second being the "derivative" U.S. approach, and the third being the approach outlined by American scholar Reena Raggi:[11] "the principle that an individual is entitled to do in concert with others that which he may lawfully do alone. . . ."[12]

As part of his continuum, McIntyre J. also considers three broader approaches: the fourth is the "Kerans" approach, ascribed to the method proposed by Kerans J.A. in *Black* v. *Law Society of Alberta*,[13] which held that freedom to associate included association "with others in the exercise of Charter-protected rights and also those other rights which — in Canada — are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education or gain a livelihood."[14] The fifth approach, advanced by the Ontario Divisional Court in *Broadway Manor Nursing Home* [15] would extend constitutional

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8. *Id.*
9. *Id.* at 12,180.
10. *Id.*
11. Reena Raggi, "An Independent Right to Freedom of Association" (1977) 12 *Harv, C.R.C.L.L. Rev.* 1.
12. *Alberta Reference, supra*, n. 1 at 12,154.
13. [1986] 3 W.W.R. 590 (Alta. C.A.).
14. *Id.* at 612.
15. *Re Service Employees' International Union Local 204 and Broadway Manor Nursing Home* (1983) 44 O.R. (2d) 392.

protection to all activities which are essential to the lawful goals of an association, and the sixth and final approach discussed by McIntyre J. is a broader approach suggested by Bayda C.J.S. in the *Dairyworkers* [16] case: "Where an act by definition is incapable of individual performance, [the individual] is free to perform the act in association provided the mental component of the act is not to inflict harm."

In assessing these six approaches McIntyre J. notes that freedom of association is not a new right in Canada. In contrast to the dynamic approach advocated by the Chief Justice, McIntyre J. adopts an approach not unlike the U.S. originalist method of constitutional construction:[17]

> I do not seek to limit the effect of [the Charter's] guarantee to the law as it stood before adoption. I do, however, suggest that the Charter guarantee, which by itself does not in any way define freedom of association, must be construed with reference to the constitutional text and to the nature, history, traditions and social philosophies of our society. This approach makes relevent consideration of the pre-Charter situation and the nature and scope of the rights and obligations the law had ascribed to associations, in this case trade unions, before the adoption of the Charter.

McIntyre J. holds that the fourth, fifth and sixth approaches outlined above are invalid, and that at least the first two are valid. After some discussion he holds that the third approach (i.e., whatever action an individual can *lawfully* pursue as an individual, freedom of association ensures he can pursue with others) is correct. He holds that this approach cannot protect the right to strike because a strike is *not* merely an analogy for an individual's termination of his contract of employment. Further, McIntyre J. holds that "[r]estrictions on strikes are not aimed at and do not interfere with the collective or associational character of trade unions."[18]

In contrast to the extensive reasons provided by both Dickson C.J.C. and McIntyre J., LeDain J. provides only a brief explanation for his conclusion that the Charter does not include a guarantee of the right to bargain collectively or the right to strike. LeDain J. construes freedom of association as "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."[19] Such a freedom, he argues, "is not to be taken for granted. . . . It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes."[20] Yet,[21]

> the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer — are not fundamental rights or freedoms. They are 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.

The use of a section 1 analysis to effect such a balance at this stage is inappropriate because it engages the Court in a review of legislative policy for which it is not really equipped. What is surprising about this final sentiment (which attracts the support of half the Court in the *Alberta*

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16. *Retail, Wholesale and Dep't. Store Union, Local 544* v. *Gov't of Sask.* (1986) 19 D.L.R. (4th) 609, 85 C.L.L.C. 12,275 (¶ 14,054) (Sask. C.A.) at 620-1 (D.L.R.).
17. *Alberta Reference, supra* n. 1 at 12,155-6.
18. *Id.* at 12,159.
19. *Id.* at 12,150.
20. *Id.*
21. *Id.* at 12,151.

Reference) is that it represents a direct contradiction to the position taken by the Supreme Court of Canada (and mandated by the Supreme Court of Canada as the appropriate role for other superior courts) in virtually all Charter decisions both before and since.

It is submitted with respect that the words of LeDain J. were not intended to be taken literally. It is clear that LeDain J. wished to express in direct terms his rejection of Charter protection for a right to strike. It is argued that the passage quoted above is incapable of being raised as authority for the view that the area of labour relations is somehow immune to Charter review. The apparent allusion by LeDain J. to the principle of judicial deference extended to decisions of labour relations tribunals in administrative law proceedings seems out of tune with the general approach taken by the Court to judicial review under the Charter.

The 3 - 2 - 1 split in the decision means that the *Alberta Reference* case may be of greater significance for what it rejects, than for what it accepts as to the meaning of freedom of association. Yet there are some positive conclusions which can be drawn from the case. Some of those are illustrated by the following table:

Proposition	Le Dain, Beetz, Laforest JJ.	McIntyre J.	Dickson C.J.C., Wilson J.	Total Yes/No
Freedom of Association *at least* includes:				
(a) the right to strike.	No.	No.	Yes.	2/4
(b) the right to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal.	Yes.	Yes.	Yes.	6/0
(c) freedom to engage collectively in those activities which are constitutionally protected for each individual.	No.	Yes.	Yes.	3/3
(d) the right of the individual to do in concert with others that which he may lawfully do alone.	No.	Yes.	Yes.	3/3

It is submitted that the *Alberta Reference* cannot be taken as authority for the view that the Charter can never apply to labour relations issues. Instead it can be seen to rest on a much narrower foundation: the simple declaration that the right to strike is not protected by the Charter. The two related questions of what comprehensive approach to freedom of association will be adopted by the Supreme Court of Canada and which trade union interests (if any) will be held to be protected remains undecided. It is possible that *P.I.P.S.C.* v. *N.W.T.*, if it reaches the Supreme Court of Canada, will provide at least part of the answer to these questions.

It has been noted that the *Alberta Reference* was merely the first case of a trilogy of Supreme Court of Canada cases which dealt with the right to strike. The reasons issued in the three cases were released concurrently, without substantial elaboration on the judgments noted above. A signifi-

cant area of departure relates to the section 1 Charter issue in *P.S.A.C.*,[22] with respect to which the Chief Justice held that the federal "six and five" legislation (the Public Sector Compensation Restraint Act)[23] was largely capable of being upheld under section 1, while Wilson J., in dissent, held that the measures adopted were unfair and arbitrary, and were not carefully designed to achieve the objectives in question. In the *Dairyworkers* case[24] the same result occurred, with Wilson J. holding that the Saskatchewan government's response was insufficiently tailored to the situation which the legislation purported to address. In the *Alberta Reference* the Chief Justice also held that portions of the Alberta public service and police collective bargaining statutes were capable of withstanding section 1 scrutiny.

III. TRADE UNION RIGHTS

There are many ways in which the state can affect rights of trade unionists, and many issues arising in the Canadian labour relations system which we have not been in the habit of addressing in Charter terms, such as: the right of an individual to combine with others to form a union; the right to a process of registration or incorporation to give legal rights to the association; the right to certification or some other form of recognition, carrying with it state and employer obligations, freedom from interference (by the state or employers) in the internal affairs of a trade union; the right of union members to determine their own structures and processes; freedom from discriminatory treatment; restrictions on the practice of voluntary recognition; freedom from statutory or regulatory monopoly, i.e. the right to displace an incumbent recognized union on the basis of known, objective factors; the right to bargain (subject to recognition); the right to form or join union federations (national or international); and the right to recognition for participation in national or international tripartite machinery or bodies. There are many other such rights that are the hallmarks of a free collective bargaining process, and which are monitored on an international basis by the International Labour Office.[25] Is it possible that none of these rights are protected in Canada under our Charter of Rights and Freedoms?

We can appreciate the difficulty which LeDain J. perceived: virtually all aspects of labour relations legislation must necessarily be subject to section 1 scrutiny if we are to accept that section 2(d) includes any trade union rights at all. While the choice LeDain J. advocates may not be the one most consistent with a vigorous enforcement of Charter values, it clearly has the pragmatic value of isolating a complex and politically sensitive area of public policy from Charter-based judicial review. The lawyer's instinctive

22. *Supra* n. 1.

23. S.C. 1980-81-82-83, c. 122.

24. *Supra* n. 1.

25. These and other internationally recognized trade union recognition rights are discussed in detail in Alan Gladstone and Muneto Ozaki, "Trade Union Recognition for Collective Bargaining Purposes" (1975) 12 *Int'l. Labour Rev.* 163.

response may be to argue (as Dickson C.J.C. does so eloquently) that no area of public life can be immunized from judicial review in a society which, through the adoption of a written constitution, has irrevocably committed itself to the rule of law. There is, nevertheless, a practical attraction for both the constitutional conservative and the trade unionist in the notion that an area of public law which has developed in a slow and virtually negotiated fashion should be left alone, free to evolve to meet the needs of its participants, and safe from the effects of judicial review by courts holding a generally uninformed and unsympathetic view of those needs.

As is apparent from the foregoing this writer feels a wistful empathy for the frustration of LeDain J. arising from the idea that the courts should be asked to measure a system of legislation developed over a century through a pragmatic interaction of politics and economics against the sweeping principles of the Charter. One is tempted to argue that the Charter simply ought *not* to apply. But any such hope is likely to be disappointed. There is no likelihood, in spite of the judgments in the *Alberta Reference*, that an immunity from Charter review can last. The march of the Charter into the realm of labour law was only delayed by the *Alberta Reference*, not halted.

David Beatty, writing before the 1987 trilogy was issued, argued in *Putting the Charter to Work* [26] that the entire scheme of Canada's labour relations system should be reassessed according to Charter values. Beatty himself proposes a model under which large portions of the legal system regulating labour relations in Canada would be scrapped in favour of a more "liberal" model based on the structure Beatty sees as presently in place in West Germany. Beatty's analysis and conclusions are vulnerable to criticism on a number of grounds including inadequate Charter analysis, political wishful thinking and faulty comparative labour law, yet such views add an air of reality to the fear expressed by LeDain J. and the concurring members of the Supreme Court of Canada in the *Alberta Reference* that entering into a thorough Charter-based review of the web of political compromises represented by Canada's labour relations system could potentially trap the courts in a morass of unresolveable section 1 litigation.

Whether one sympathizes with LeDain J.'s reluctance to embark on a full-scale review of the minutiae of Canada's labour relations system, or with Beatty's enthusiasm for the brave new world of judicial review, it can fairly be predicted that neither extreme is likely to prevail, and the courts will be required to apply the Charter to at least some elements of our labour law. One recent indication of direction from the Supreme Court, which would appear to confirm this observation, is the majority judgment authored by Madame Justice L'Heureux-Dubé in *Hills* v. *A.G. of Canada*.[27]

In *Hills* the appellants were office employees represented by a local of an international union at a steel plant in Ontario. When they were temporarily

26. David Beatty, (1987). Beatty's theory is discussed in further detail in Part VI of this article, *infra*.

27. (1988) 48 D.L.R. (4th) 193.

laid off as a result of a strike by a different local of the same international union, they claimed and were denied Unemployment Insurance Commission benefits. The central issue (not relevant to this discussion) was the interpretation of section 44 of the Unemployment Insurance Act, 1971.[28] The Court was able to draw on ordinary principles of statutory interpretation to resolve the issue in favour of the appellants, but in doing so did two things which are relevant to the present discussion: 1) considered the history, structure, rights and obligations of trade unions in Canada, and 2) considered the meaning of section 2(d) of the Charter as an aid to interpretation of the statute.

Concerning the place of the trade union in Canadian law, L'Heureux-Dubé J. accepts the traditional view that a trade union occupies a special place; that it is an organization *sui generis*. L'Heureux-Dubé J. links this argument to the Charter:[29]

> [The] Appellant, while not relying on any specific provision of the Charter, nevertheless urged that preference be given to Charter values in the interpretation of a statute, namely freedom of association. I agree that the values embodied in the Charter must be given preference over an interpretation which would run contrary to them.

L'Heureux-Dubé J. then quotes from the U.S. case of *General Motors* v. *Bowling*:[30]

> ... to favor one form of labor organization — or disorganization — over another would not be neutral. The court should not lightly impute to the legislature a policy of discouraging various workers at a plant from pooling their resources in one large union....

L'Heureux-Dubé J. adds: "The interpretation I propose avoids this result."[31] If the Charter requires that the government not favour one form of union organization over another, because failure to do so would not be neutral, then the impact of freedom of association on labour relations statutes can be examined in a different light. The focus shifts away from the central issue in the *Alberta Reference*: "what acts or objectives of an association will receive protection?" to a different question: does the statutory or governmental involvement have the effect of discouraging or favouring one form of association over another? If this view is correct, then the formulation implied in the majority judgment in *Hills* is broader than that of Dickson C.J.C. in the *Alberta Reference*, in that it would colour governmental *inducement* as well as *prohibition*, and positive as well as negative acts which would affect the individual's right to act in concert with others. This is a formula which is apt to address the problem raised in the recent case of *P.I.P.S.C.*, to which the focus of this paper now turns.

IV. *RE P.I.P.S.C.* (TRIAL)[32]

The case of *Re P.I.P.S.C.* arose from a transfer of responsibility for certain nursing services from the government of Canada to the government

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28. S.C. 1970-71-72 c. 48.
29. *Hills*, *supra* n. 27 at 226-7 (citations omitted).
30. *General Motors Corp.* v. *Bowling*, 426 N.E. (2d) 1210 (1981), as cited in *Hills*, *id.* at 227.
31. *Hills*, *id.*
32. *Supra* n. 4.

of the N.W.T. Prior to the transfer, the employees had been members of the federal public service whose collective bargaining rights were regulated under the Public Service Staff Relations Act.[33] Under that Act, the nurses had been represented by the Professional Institute of the Public Service of Canada, the applicant at trial. One result of the transfer was that the relevant collective bargaining legislation would now be the Northwest Territories Public Service Act.[34] Section 42 of that Act restricts collective bargaining under its terms to an "employees' association" which is defined as "an association of public service employees incorporated by an Ordinance [Act] empowering it to bargain collectively."[35] The applicant union was not so incorporated. It launched an application for a declaration that section 42(1) of the ordinance was inconsistent with the Charter and of no force and effect. This application was heard before Marshall J. in May, 1987, and reasons for judgment were released in September of that year.

The statutory requirement of prior legislative approval is unusual in Canada. Counsel for the applicant, Catherine MacLean, later told a newspaper: "There may not be a large number of other cases that would turn on these facts. In fact, one of the points that we could [have made] when we were making our arguments is that this legislation was unique."[36] While this comment is generally true, there are three Alberta statutes which create statutory monopoly bargaining agents for employees: the Colleges Act,[37] the Technical Institutes Act,[38] and the Universities Act.[39] These Acts either create or continue "as corporations" faculty associations at Alberta's public universities, technical institutes, and colleges and provide a statutory monopoly for such associations as the exclusive collective bargaining representatives of employees designated by College, Technical Institute, or University governing boards as "academic staff members." It is difficult to see how such legislation could be unaffected by a ruling against section 42 of the N.W.T. Ordinance.

In his reasons for judgment, Marshall J. notes that only two associations, a teachers association and the respondent, N.W.T. Public Service Association, had to date been incorporated or recognized by the territorial statute. Marshall J. finds that the government of the N.W.T. "has refused to pass the necessary legislation that would allow the Institute to be *considered* to enter into a collective agreement with the commissioner under section 42(2)."[40] The effect of this refusal was that the transferred employees were not even able to apply for representation by the Institute.

In considering whether this statutory requirement is in contravention of section 2(d) of the Charter, Marshall J. looks at the 1987 trilogy, especially

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33. R.S.C. 1985, c. P-35, as am.
34. R.S.N.W.T. 1974, c. P-13 as am.
35. *Id.* s. 42(1)(b).
36. D. Brillinger, "N.W.T. Union Incorporation Procedure Offends Charter" (1987) 7:29 *The Lawyers Weekly* 17.
37. R.S.A. 1980, c. C-18, as am.
38. S.A. 1981, c. T-3.1, as am.
39. R.S.A. 1980, c. U-5, as am.
40. *Supra* n. 4 at 474 (emphasis in original).

the judgments in the *Alberta Reference*. The Government of the N.W.T. argued that its statute is protected by the finding of LeDain J. in that it is "no more, no less, than legislation limiting who may bargain collectively,"[41] and that collective bargaining rights are not protected by the Charter. Counsel for the respondent association conceded that the impugned sections of the legislation create a "statutory monopoly," but argued that such provision is not in conflict with the Charter. Marshall J. holds that the case is distinguishable from the *Alberta Reference* in that the Supreme Court of Canada had dealt with "whether a particular activity of an association, in pursuit of its objectives, was constitutionally protected or left to be regulated by the legislature. Here, in contrast, Marshall J. holds the issue is not the activity of the Association but its recognized existence, or, to use the words of the impugned statute, 'incorporation'."[42] This raises a different issue from the 1987 trilogy because, Marshall J. writes, "the impugned legislation reaches a measure or stage farther back, or once more removed, in the growth and development of operational alliances of individuals."[43] Marshall J. sees three stages of association: ". . . individuals first associate. The next step involves the coming into being of the association or alliance, the status of corporation, or the establishment of status. . . . Next, the body now established takes action to achieve its collective aims."[44] Marshall J. holds that the majority view in the *Alberta Reference* could not support constitutional protection for the third stage, but *could* support such protection for the first two stages. In particular, Marshall J. draws attention to the dictum of McIntyre J. that freedom of association includes "freedom to associate for the purposes of activities which are lawful when performed alone," and "that the group can exercise the constitutional rights of its members on behalf of those members."[45]

Marshall J. also suggests, although the issue was not argued in this case, that both the association and the individual member could also raise a Charter right to equality under section 15 "in being considered at least for certification and by an independent board."[46] The degree to which freedom of association interacts with principles of equality and fairness will be discussed later in this paper. Marshall J. notes briefly that freedom of expression may also be involved in this case. Marshall J. concludes, following this analysis, that section 42(1) of the Ordinance offends section 2(d) of the Charter and, subject to section 1, is of no force and effect.

The section 1 analysis follows the *Oakes* [47] model, and the statute fails: "There is no evidence that the government's objective of orderly and representative collective bargaining could not be achieved by a system of independent certification based on objective criteria, as has been estab-

41. *Id.* at 475.
42. *Id.* at 476.
43. *Id.*
44. *Id.* at 477.
45. *Id.*
46. *Id.*
47. *Oakes* v. *The Queen* [1986] 1 S.C.R. 103.

lished in other jurisdictions."[48] This rationale is noteworthy for two reasons. Firstly, this approach, if followed elsewhere, would almost certainly ring the death-knell for a statutory collective bargaining monopoly like those created under Alberta's University and College statutes (discussed above), at least in the face of a challenge from a competing organization. Secondly, Marshall J. suggests that the generally accepted certification process prevalent in other Canadian jurisdictions will not only survive scrutiny under section 1, but will serve as a model of what courts will deem acceptable. This view, if followed, would provide a reassuring middle-ground between the "hands off" approach advocated by LeDain J. and the "everything is up for grabs" approach advanced by David Beatty.

V. *P.I.P.S.C.* v. *N.W.T.* (COURT OF APPEAL)[49]

The judgment of the Court of Appeal is problematic for a number of reasons. Firstly, the Court of Appeal does not directly take issue with the conclusions reached at the trial level. Secondly, the Court of Appeal is less than clear in its statement of the model of freedom of association which it applies. Finally, the judgment purports to fashion a novel and controversial form of Charter remedy which may, in fact, have the effect of denying the applicant any remedy at all.

One approach presented to the Court of Appeal for consideration was that because historically there has been little need for a fully developed certification process for the public service in the Northwest Territories, the statute in effect created a process under which the entire Legislative Council (i.e. the Territorial Legislature) was empowered to determine issues normally considered by a labour relations board in the context of a union certification application. Kerans J.A. wrote that the objections expressed to this approach (i.e. that the Legislative Council was manifestly not a fit body to decide employer/employee disputes because it *is* the employer of the public service, and that it would not be subject to judicial review for fairness), while not relevant to the interpretation issue, would cause such a scheme to fail under a section 1 test because of the unavailability of judicial review: "Section 1 cannot be invoked to validate a scheme whereby a Charter limit may be regulated by somebody immune from judicial review."[50] In the Court's view, much of the difficulty with the position advanced by the Territorial government was with the use of the term "incorporated," which would exclude trade unions or other employee organizations which have already come into existence and thus could not be "incorporated." Kerans J.A. accepted the view that a certification scheme "of sorts" was in place for the public employees. But the government, at appeal, also argued that the term "incorporated" could be interpreted as including the term "recognized." This view was unacceptable to the Court: Kerans J.A. wrote: "It is not my function to make words dance."[51]

48. *Supra* n. 4 at 478.
49. *Supra* n. 5.
50. *Id.* at 228.
51. *Id.*

One of the more puzzling aspects of this case arises with respect to this issue. The Territorial government argued that if the Court did not accept the interpretation of "incorporated" as including "recognized," the Court should *modify the statute* to add the word "recognized." Kerans J.A. expressed the obvious response to this suggestion: that the option of amendment had been available to the Legislative Council from the beginning. Why should the courts be asked by the government to perform legislative changes that the Legislature was unwilling to undertake? Kerans J.A. wrote: "The courts ordinarily should not do the work of the legislative institutions of this country for them."[52] Yet the Court held that there were exceptional circumstances in this case, including a potential Charter infringement, which would cause the section to be struck down in the absence of judicial amendment. This warranted, the court held, the judicial addition to the statute of the word "recognized".

The Court admitted the use of judicial amendment as a Charter remedy was controversial in this case. It is submitted that thre are two quite separate questions which must be addressed on this point: first, whether there is an available Charter remedy of judicial amendment, and second, whether the amendment proposed by Kerans J.A. in this case would be effective to overcome the statute's repugnance with respect to section 2(d) of the Charter. The broader issue of the meaning of section 2(d) will be set aside for a moment to permit a digression on the issue of the remedy of judicial amendment.

A. THE REMEDY OF JUDICIAL AMENDMENT (A DETOUR)

There are three brief points to be made on the subject of the remedy proposed by the Court of Appeal: the authorities cited by the Court, other authorities which may be relevant, and the role of judicial discretion in such cases. In his reasons, Kerans J.A. wrote that he accepts one exception to the general rule that the courts should not do the work of the Legislatures for them:[53]

> . . . that is in the rare case where the alteration meets, beyond a doubt, all of these four criteria: (1) the problem arose only by reason of legislative oversight; (2) the change is that which the Legislature would have made had it addressed the issue, which almost always means that it is a straightforward alteration; (3) no harm is done by the proposed change to legal rights created by the legislation; and (4) harm will be done to legal rights created by the statute if the change is not made.

Kerans J.A. found that all criteria were met in this case. The technique proposed by the Court is said to have "some support" in *Phoenix Assurance*, a pre-Charter decision of the Ontario Court of Appeal[54] affirmed by the Supreme Court of Canada, and in the recent case of *Hills* [55] in which the Supreme Court of Canada held that statutes should be interpreted in light of Charter values. With respect, it is submitted that

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52. *Id.* at 228-9.

53. *Id.* at 229.

54. *Minister of Transport for Ontario* v. *Phoenix Assurance Co. Ltd.* (1973) 39 D.L.R. (3d) 481 (Ont. C.A.); *aff'd* [1975] 1 S.C.R. *vi*, 54 D.L.R. (3d) 768.

55. *Supra* n. 27.

neither of these cases can be said to support judicial statutory amendment. *Phoenix Assurance* was a case in which a section of a statute (repealed by the time of trial) required an insurer to notify the registrar of motor vehicles of the cancellation of insurance coverage of a motor vehicle. The effect of non-compliance was that the insurance company would remain liable under the policy. The term "cancellation" was held to extend to the "substitution" of one vehicle for another, since in both cases the insurance coverage of a vehicle was terminated. While the statute in question in *Phoenix* was subject to an unusually broad interpretation, the Ontario Court of Appeal did not base its judgment on any notion of a judicial power to amend legislative enactments. The rationale for its decision was founded on traditional statutory interpretation grounds. As noted above, the Supreme Court of Canada merely adopted the reasons of the Ontario Court of Appeal in a brief judgment dismissing the appeal. In *Hills*, L'Heureux-Dubé J. writing for the majority, also based her judgment expressly on traditional principles of statutory interpretation. Having come to her ultimate conclusion through the application of those principles, L'Heureux-Dubé J. added the words quoted earlier.[56] Clearly, there is no hint in this passage of a licence to engage in the practice of judicial amendment to statutory enactments.

It might be argued that the approach adopted by the Court of Appeal is simply an example of the Charter remedy of "reading in," one of a range of innovative Charter remedies favoured by some commentators.[57] In my submission, the approach adopted by the Court goes well beyond any examples of "reading in" to date. In fact, in *Hunter* v. *Southam*,[58] the Supreme Court of Canada appeared to throw a wet blanket on the enthusiasm of those who would favour a high degree of judicial intervention in the wording of statutes:[59]

> In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

Rogerson[60] notes that the approach required by the above passage has not always been followed strictly, but where courts have used the remedy of "reading in" (she cites the example of the Ontario Court of Appeal judgment in *Finlay and Grellette*)[61] they have taken care to stress that they are not adding words to the statute but rather giving a reasonable interpretation to Parliament's language. A more controversial step was

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56. *Supra* n. 29.
57. *See*, for example, Carol Rogerson, "The Judicial Search for Appropriate Remedies under the Charter" in Robert J. Sharpe, *Charter Litigation* (1987), and Dale Gibson, *The Law of the Charter: General Principles* (1986).
58. [1984] 2 S.C.R. 145.
59. *Id.* at 168-9.
60. C. Rogerson, *supra* n. 57 at 282.
61. *R.* v. *Finlay and Grellette* (1985) 52 O.R. (2d) 632 at 656.

taken by the Alberta Court of Queen's Bench in *Re Edmonton Journal and A.G. Alberta* [62] where Dea J. interpreted the Juvenile Delinquents Act by reading the mandatory word "shall" as the permissive word "may." This approach, notes Rogerson, was expressly disapproved of by the British Columbia Trial Division in *Canadian Newspapers*.[63] In that case McKay J. wrote:[64]

> With great respect I am unable to agree that what the learned judge did [in *Re Edmonton Journal*] was to "read down" s. 12(1). It appears to me that he, in effect, legislated a rather major change. I agree with what Mr. Justice Martin said in *R.* v. *Oakes* . . . that we are not entitled to rewrite the statute under attack when considering the applicability of the provisions of the Charter.

Dale Gibson,[65] on the other hand, is quite enthusiastic about "reading in." As an example of the approach he favours, Gibson cites a provision of Manitoba social legislation that on its face appears to restrict a benefit to a mother only. Assuming that such a restriction is in contravention of the Charter, Gibson asks whether the provision should be struck down, thereby denying the social benefit (equally) to fathers and mothers, or whether the courts should read in the words "or father." Not surprisingly, Gibson argues for the latter approach. Yet surely this falls far short of the degree of judicial intervention seen in *Re Edmonton Journal* or in *P.I.P.S.C.* v. *N.W.T.* In fact, Gibson's example is closer to the interpretive approach favoured by L'Heureux-Dubé J. in *Hills*. Gibson's example would merely require the courts to interpret the word "mother" as "parent," using the Charter as an aid to statutory interpretation in the familiar process of attempting to discover the true intention of the Legislature. Even Gibson would not appear to advocate the use of judicial amendment to override that intention.

A final comment on Kerans J.A.'s judicial amendment is with respect to the application of judicial discretion in the use of this remedy. It is submitted that if this remedy is to be used (and it will be clear from the foregoing that this writer has serious doubts on that question) at the very least its use should be restricted to those cases where judicial amendment can assist the individual in his or her dispute with the state. It seems inequitable in the extreme and contrary to all our notions of responsible government, that counsel for a government should be permitted to ask the courts to effect a statutory amendment. If anyone has the power to seek legislative approval for such an amendment it is the government, yet in the *P.I.P.S.C.* case it was the government itself which asked for the remedy. As Kerans J.A. notes, the government in this case had the opportunity to take the matter before the Territorial Council and did not do so. If the change is merely one of housekeeping, can we say that the courts are so less busy than the Legislatures that they are the appropriate forum for tidying up legislative loose ends? I would suggest that the government's failure to take its proposed amendment before the Legislature should raise a presumption

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62. (1983) 146 D.L.R. (3d) 673.
63. *Re Canadian Newspapers Co. Ltd. and The Queen* (1983) 1 D.L.R. (4th) 133.
64. *Id.* at 142.
65. D. Gibson, *supra* n. 57 at 190-1.

either that the proposed change is *not* one of mere housekeeping, or that the government fears that the Legislature might use the opportunity afforded by "opening up" the statute to propose other, more sweeping reforms. In either case, the courts should decline to allow themselves to be used by governments keen to avoid the normal partisan rough and tumble of parliamentary democracy.

B. THE COURT OF APPEAL (CONTINUED)

In his reasons in *P.I.P.S.C.* v. *N.W.T.*, Kerans J.A. concludes that in the absence of his proposed judicial amendment the statute would offend section 2(d) of the Charter, but only with respect to the implied restriction on organizational structure: the requirement for incorporation. Kerans J.A. does *not* find, as Marshall J. did, that the statutory monopoly accorded to the Public Service Association offends the Charter. On the contrary, in support of the proposed remedial amendment to the statute, Kerans J.A. stresses that the change would not affect the statutory monopoly position enjoyed by the Association: "further legislative action would be required — which is always a possibility — for it to lose its exclusive role."[66]

On the "certification" issue Kerans J.A. notes that any suggestion that the nurses would lose their right to "belong" to the applicant would certainly overstate the case. Any law which purported to deny them the right to join the union of their choice would offend section 2(d) of the Charter, but this is not the effect of the typical labour statute in Canada. Kerans J.A. recognizes that "[w]hat might be denied the employees under this scheme is the right to *change* agents or establish smaller bargaining units with separate agents."[67] But the Court sees the process of certification as a form of licencing, and the applicant's position amounts to a claim that freedom of association includes the right to get a licence to do something, or to a fair licencing process. The Court holds that the answer to this proposition is in the judgment of the Supreme Court of Canada in the *Alberta Reference*, and quotes LeDain J.'s words cited earlier to the effect that collective bargaining rights are mere creatures of statute. Kerans J.A. adds:[68]

> It seems to me that it must follow that the right to certification is another example of particular activity in pursuit of the goal of collective bargainding that is a mere creation of statute.
>
> The seeking of a licence is not an organizational activity; rather, it is common pursuit of a goal.

Kerans J.A. links this observation with McIntyre J.'s six approaches to freedom of association, and holds that approaches two and three are of no assistance to the applicant in arguing for a right to certification. Thus, it is only the statutory condition of "incorporation" which offends the Charter. He then applies the remedy of statutory amendment discussed above.

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66. *Supra* n. 5 at 229.
67. *Id.* at 230.
68. *Id.* at 231.

While the Court of Appeal decision removes the statutory requirement for incorporation as a pre-condition to recognition, it leaves in place the system by which a bargaining agent may be recognized *only* by a further act of the Legislature. The existing statutory monopoly is maintained, as is the statutory exclusion of the applicant. In short, the effect of the judgment is to remove one pre-condition to recognition (incorporation), while permitting the Legislative Council, a body said to be immune from judicial review, to impose any requirement, reasonable or unreasonable, as a condition of recognition. There would appear to be no restraint on the power of the Legislature to terminate the recognition of the existing bargaining agent or even refuse to recognize any bargaining agent at all. Can it be said that the Charter would provide no protection against such an arbitrary system? Apparently this is the view of the Court of Appeal.

VI. IS THERE A RIGHT TO CERTIFICATION?

In the wake of the 1987 labour trilogy and the Supreme Court of Canada's rejection of a concept of "protected objects" it appears that only two approaches to labour law occupy the horizon of policy choices. The two approaches identified to date are the "hands off" stance advocated by LeDain J. in the *Alberta Reference*, and an approach calling for a high degree of judicial involvement exemplified by David Beatty. Beatty[69] urges a generic approach to Charter rights that stresses that the values of individualism and individual fulfillment are at all times to be preferred to collective values or activities. For Beatty, trade unionism is desirable only to the extent that it is directed towards enhancing individual fulfillment, and is subject to attack as soon as it strays beyond that limit. His analysis of the collective bargaining system is thus based not on section 2(d) rights, but on a broader concept of "equal freedom" that is derived from the Charter as a whole. This idea of "equal freedom" is, for Beatty, a statement of fundamental societal values: "the ethical principles which underlie our new constitutional order."[70]

The concept of "equal freedom" is sufficient for Beatty's purpose, which is to locate the discussion of all Canadian labour law within the context of justification under section 1 of the Charter. For him any restraint upon the individual's freedom to select his or her own bargaining agent, or to be forced into a collective bargaining relationship with other workers will necessarily constitute a *prima facie* violation of "equal freedom." In contrast with the "hands off" approach of Le Dain J., Beatty (writing before the release of the 1987 trilogy) advocates an "everything-is-up-for-grabs" approach, under which every element of the labour relations system must be justified under section 1 in order to survive. This view provides a dramatic illustration of the floodgates concern to which LeDain J. alluded.

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69. *Supra* n. 26.

70. *Id.* at 4. Beatty's footnote to this phrase acknowledges Ronald Dworkin's *Law's Empire* as providing an explanation of the concept of underlying ethical principle.

There is, unquestionably, a risk attached to the Beatty approach, yet because it is based on an integrated view of Charter rights alleged to create a new, individualistic ethos in Canada, it fails to deal with the state of Charter litigation as it stands today. Further, Beatty's comparative law methodology is deeply flawed, and his conclusions are slanted in favour of a novel approach to Canadian labour relations (not only labour law) which would neither achieve the goals Beatty claims to have set, nor conceivably find a place on Canada's political agenda. In practice, a more real threat to Canada's labour relations system than Beatty's somewhat ethereal treatise is the use of section 2(d) to argue for a right to disassociate from union security and dues payment provisions.[71]

Assuming that such attacks will inevitably arise notwithstanding any tactical efforts that can be mustered by the trade union movement in support of the Le Dain "hands off" approach, it seems logical to pursue the question, on the other side of the spectrum, of whether the Charter can be used to support any fundamental trade union rights. Clearly the approach adopted by the Northwest Territories Court of Appeal in *P.I.P.S.C.* v. *N.W.T.* would not do so, while by contrast the judgments of Marshall J. in *Re P.I.P.S.C.* and Rosenberg J. in the interesting Ontario case of *Hutton* [72] are apt to provide a full and vigourous protection of freedom of association applied to collective bargaining.

There are two distinct ways of addressing trade union recognition rights under the Charter. First, is there a right to equality of treatment among all employees (and the unions which they may belong to or favour) in the pursuit of recognition or certification? Secondly, is there a right to some kind of recognition or certification process to ensure, through the protection of certain irreducible minimum standards for legislation, that collective bargaining can occur? Clearly the Northwest Territories legislation that was the subject matter of the *P.I.P.S.C.* case would be unable to meet the first of these tests, since under that law the applicant (P.I.P.S.C.) was denied any means or path to become a recognized bargaining agent, while the incumbent bargaining agent enjoyed a statutory monopoly. Such a monopoly, like the Alberta statutes affecting college, technical institute, and university faculties, is a clear failure to provide equality of process. But the second test might reach beyond obvious examples like statutory monopolies to impugn systems which raise unreasonable (but equal) barriers to recognition or certification. It seems likely that the two tests could operate both alternatively, and together. Some statutory provisions might offend section 2(d) by denying collective bargaining altogether, while other provisions might offend section 15 by preventing equal competition between groups of employees seeking to represent the overall group. Whether any given provision offended either section might not necessarily be determinable on the face of the statute, but might require consideration of the effects of the provision.

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71. This issue has been lucidly discussed by Keith Ewing in "Freedom of Association in Canada" (1987) 27:3 *Alta. L. Rev.* 437.

72. *Hutton* v. *Ontario (A.-G.)* (1987) 46 D.L.R. (4th) 112 (On.t H.C.) (discussed *infra* in Part VII of this article).

Statutory barriers could take many forms, for example, placing upon the applicant union an inordinately high requirement for employee support, obstructive voting procedures, obstructive bargaining unit definitions, or oppressive organizational or structural limitations. Additionally, some of these barriers would offend against the equality requirement if they permitted collective bargaining, but served unfairly to protect an incumbent trade union. A further example of a provision which would offend the equality guarantee would be a statute creating an excessive period of protection (during which no displacement application could be made) for the benefit of the incumbent union.

It is submitted that there are valid grounds for combining sections 2 and 15 of the Charter in this way; however, it is acknowledged that in order to bring section 15 to bear in the struggle for equal and effective collective bargaining rights there would have to be judicial recognition that the scope of section 15 extends beyond the protection of the individual's right to be free from personal discrimination and encompasses the protection of larger classes and more diverse grounds of distinction. This is an area of some controversy in Canada today, and is touched on in the next section of this paper.

VII. SECTION 15

Sections 2 and 15 were considered together, and led to a finding in favour of a right to a collective bargaining process in *Hutton* v. *Ontario (A.-G.)*.[73] In *Hutton* two groups of Ontario Provincial Police officers (one representing the ranks of staff sergeant and lower, the other representing commissioned officers) both sought declarations that statutory restrictions on their collective bargaining rights offended sections 2(d) and 15(1) of the Charter. The Court examined the various legislative provisions affecting the provincial police officers in comparison with legislation regulating the collective bargaining systems applicable to municipal police officers in Ontario. Applying the approach to section 15 mandated by the Ontario Court of Appeal in *R.* v. *Ertel*,[74] Rosenberg J. weighed the distinctions between the various groups of police officers to determine whether those distinctions were so unfair as to be discriminatory having regard to the purpose and effect of the legislation. The Court held that discrimination contrary to section 15 was made out and that section 1 of the Charter was of no avail to the respondent government in that there was "no legislative objective for the difference in bargaining rights indicated or established"[75] and no social concerns giving rise to the legislative difference. Since there was *no* objective, there was no way of testing whether the means chosen were reasonable.

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73. *Id.*

74. (1987) 35 C.C.C. (3d) 398, 58 C.R. (3d) 252 (Ont. C.A.), leave to appeal to S.C.C. refused (1987) 36 C.C.C. (3d) *vi*. Arguably, *Ertel* has been effectively overruled by the Supreme Court of Canada's decision in *Andrews* v. *Law Society of British Columbia* unreported, 2 February 1989, S.C.J. No. 6 at 19955-6.

75. *Hutton, supra* n. 72 at 126.

Finally, Rosenberg J. considered whether a complete prohibition against collective bargaining would be in contravention of section 2(d) of the Charter. After considering the 1987 trilogy, and quoting particularly the judgment of McIntyre J., Rosenberg J. concluded:[76]

> Accordingly, the Supreme Court of Canada appeared to be evenly divided on the question of whether or not collective bargaining received any protection under s. 2(d) of the Charter. Since they are so divided and since in any event their reasons are obiter, I prefer the approach of McIntyre J. and would hold that the complete prohibition against collective bargaining of the commissioned officers is contrary to s. 2(d) of the Charter and for the reasons previously stated is not justified by s. 1 of the Charter.

Rosenberg J. added that some of the restrictions on the content of collective bargaining, while they offended section 15, did not offend section 2(d).

The analytical approach to s. 15 adopted by Rosenberg J. in *Hutton*, while following the then state of the law in Ontario, is clearly not in keeping with the approach taken subsequently by the Supreme Court of Canada in *Andrews* v. *Law Society of British Columbia*.[77] However, it can be argued that the limitation of section 15's attack on discrimination based upon personal characteristics will continue to permit attacks on legislation like that complained of in *Hutton*. In *Andrews*, Mr. Justice McIntyre wrote:[78]

> The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not ony that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

These comments leave open the limits of section 15. It is noteworthy that this first test of section 15 before the Supreme Court of Canada strikes down as discriminatory a distinction based on citizenship, an "analogous ground" rather than on one of the grounds enumerated in section 15(1). Admittedly, the Supreme Court of Canada expressly approved the test enunciated by the United States Supreme Court in *Carolene Products*,[79] which requires that the distinguishing characteristic, in order to qualify as a ground for discrimination, must be a characteristic shared by a "discrete and insular minority" lacking significant political power. This will no doubt make it difficult to argue that distinctions based on personal status which are recognized or created by labour legislation are in contravention of section 15. However, while the number of such distinctions might be very small, the category is not closed, and *Andrews* does not entirely shut the door on the possibility that status-based employment distinctions may

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76. *Id.* at 128.

77. *Supra* n. 74.

78. *Id.* While McIntyre J. dissented in the result, his Lordship's approach to the definition of s. 15(1) was adopted by the entire *Andrews* court.

79. *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938).

offend section 15 of the Charter. In consequence, we cannot and should not ignore the role of section 15 in contributing to the assessment of the constitutionality of labour law.

VIII. SECTION 1

As we have seen, courts considering the application of the Charter to labour law are faced with an unappealing choice of policies. On one hand is the approach exemplified by David Beatty and the "freedom not to associate" litigants, an approach which holds that virtually any labour statute would *prima facie* offend the principle of "equal freedom", and would therefore submit every legal detail of the collective bargaining system to section 1 scrutiny. On the other hand is the Le Dain "hands off" approach, which would effectively import a judicially created "notwithstanding clause" into all labour legislation, and thus insulate all labour law, no matter how oppressive or discriminatory, from Charter review. It is submitted that one of the advantages of combining the operation of sections 2 and 15 is that it would avoid this "all-or-nothing" dilemma, by permitting a measured response to the difficulties which will inevitably arise in the labour law field, and which should reduce the need for judicial creativity under section 1 of the Charter to manageable proportions.

As a further balm for those who panic at the thought of the immensity of the judicial task in attempting to apply the Charter to labour law issues, I note that in applying section 1 to those provisions which have been held *prima facie* to offend sections 2(d) or 15(1) the courts are almost certain to apply the *Oakes* [80] test in a manner that is sensitive not only to the rights of individuals, but also to the rights of legislatures to select from a range of policy options. Much of Beatty's thesis, forecasting the demise of Canadian labour law, is predicated upon a view that section 1 will give rise to "the doctrine of the reasonable alternative"[81] under which, all other things being equal, where there are competing policy alternatives which can accomplish a valid social objective, "one of which derogates from our constitutional commitments less than the others, *that alternative would have to be chosen by the legislature* to accomplish its purpose."[82] Such a principle would indeed lead to the judicial oligarchy which Beatty seems to prefer to the messiness of mere democracy. This writer expects that the extreme view that legislatures should be confined to the one "correct" policy choice is unlikely to be accepted in Canada. For example, in the *Alberta Reference*, while Dickson C.J.C. held that the right to strike is *prima facie* protected by section 2(d) of the Charter, he also held that the prohibition against striking by firefighters was legitimate, and although the compulsory arbitration process was not above criticism, it was, in the Chief Justice's view, essentially fair and effective, and was therefore a legitimate legislative choice. The "essential services" distinction accepted by the Chief Justice in the 1987 trilogy itself represents an imperfect

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80. *Supra* n. 47 at 138-40.

81. Beatty, *supra* n. 26 at 66.

82. *Id.* Emphasis added.

limitation on the right to strike, but one which the Chief Justice was prepared to permit the legislature to select. The concept of fairness is one with which the courts are already familiar, and is one which is simply not amenable to the quasi-mathematical precision that Beatty's requirement of the one correct choice would dictate. In the realm of certification, it can no doubt be argued that some certification procedures are more fair than others, but, I submit, provided that the system selected by the legislature is *not unfair*, it should be capable of surviving the minimal impairment component of the *Oakes* test. In an area like labour relations where there is substantial variation in forms which have developed in other free and democratic societies, it can be anticipated that the courts will be loath to express preference for one generally valid system over another generally valid system, even if one of those systems may, at the margin, impair individual rights to a greater extent.

Further support for this view can be drawn from the majority judgment (per Dickson C.J.C.) in *Edwards Books*.[83] There, the Court held that:[84]

> . . . in regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. . . .

And further, Dickson C.J.C. wrote:[85]

> Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the Charter of Rights, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concerns for the drafters of such legislation.

Subject to the foregoing comments, it is expected that courts assessing labour legislation under section 1 will apply the ordinary *Oakes* test.

A. APPLICATION OF THE TEST

I will now return to the analysis of the questions raised by section 2(d) or by the combined operation of sections 2(d) and 15(1) of the Charter. Is there a right to collective bargaining? Are there standards for a collective bargaining regime below which a Canadian statute would be found to be in violation of the Charter?

For the purpose of applying these questions, we will now take as an example certain elements of the certification procedure provided under a fairly representative Canadian labour statute, the Alberta Labour Relations Code.[86] For facts, I shall assume that in a particular workplace, which, for simplicity shall be deemed to constitute a single bargaining unit, there are employees belonging to two separate unions: Union A and Union B. Union A has obtained certification and has entered into a collective agreement covering all employees. That collective agreement will expire December 31, 1990. Union B has attracted the membership of some

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83. *Edwards Books and Art Ltd.* v. *The Queen* [1986] 2 S.C.R. 713, 87 C.L.L.C. 12,001 (¶ 14,001).

84. *Id.* at 12,020 (C.L.L.C.).

85. *Id.* at 12,021.

86. S.A. 1988, c. L-1.2.

employees and the support of others. Those employees have calculated that they are now in the majority, and wish to replace Union A with Union B.

In this example, under the Labour Relations Code, those employees do have an opportunity to attempt to displace Union A. (It should be noted in passing that this was not an opportunity afforded to the members of P.I.P.S.C. in the *Re P.I.P.S.C.* case, nor would this opportunity be provided under the remedial amendment ordered by the Northwest Territories Court of Appeal.) Under the Alberta Code, Union A enjoys exclusive representation rights with respect to the employees in the bargaining unit, and is entitled to require the employer to bargain with it in good faith for the purposes of entering into a collective agreement. Under section 30 of the Code, Union B may apply to the Labour Relations Board for certification, and if successful may displace Union A as the exclusive bargaining agent. However, such an application is subject to a requirement of timeliness, and must be accompanied by evidence of at least forty per cent employee support (s. 31). Certification can only follow if the employees in the bargaining unit vote (in an election conducted by the Labour Relations Board) in favour of Union B (s. 31). Union B's application will be timely only during the last two months prior to the expiry of the collective agreement between the employer and Union A (s. 35).

There are several elements in this process which arguably impair the rights of members and supporters of Union B both by permitting Union A to conduct collective bargaining on their behalf, and by preventing them from conducting collective bargaining through the association of their choice, Union B. Some of these elements are: (a) the concept of exclusivity (under which only one trade union can represent a bargaining unit at any given time); (b) the "timeliness" requirement, which in our example means that the employees must wait until November 1990 before being able even to attempt to replace Union A; (c) the requirement that Union B must demonstrate support among 40% of the bargaining unit members in order to be considered for certification; and (d) the majority vote requirement.

Let us assume that there are sufficient limitations in this system to enable us to demonstrate to a court that *prima facie* this system violates either section 2(d) or section 15(1) of the Charter. We could argue that some provisions of the statute subject the employees to burdens so oppressive that we are able to characterize them as colourable attempts to prohibit collective bargaining while seeming to permit it. Alternatively, we could argue that the unequal treatment accorded to the similarly situated members of Unions A and B is sufficiently unfair or irrational to fall foul of the test of "discrimination" set out in *Ertel* [87] and is thus *prima facie* in conflict with section 15. If such assumptions are valid, how would the section 1 analysis proceed? For convenience I have considered the four elements of our example together for a discussion of Part 1 of the *Oakes* test, and then separately for a consideration of the proportionality components of the test.

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87. *R.* v. *Ertel*, *supra* n. 74.

1. Sufficiently Important Objective

In defending the labour legislation in question here, it is submitted that the state could point to three important and legitimate objectives for statutory regulation of our labour relations system. The government can legitimately argue that labour legislation is directed towards: (a) the advancement of working peoples' economic aspirations and the advancement of economic justice generally through the collective bargaining process; (b) the fulfillment of Canada's international human rights obligations; and (c) the creation of labour peace, a stable labour relations climate, and the avoidance of unfair union competition and employer interference.

The first objective scarcely needs elaboration. The inherent value of trade-unionism as a method for enhancing the economic well-being of Canadian workers is something that Canadian courts appear to accept readily. The reasons of Dickson C.J.C. in the 1987 trilogy, and the judgment of L'Heureux Dubé J. in *Hills* all stress the unique place of unions and collective bargaining in the Canadian economic fabric.

The second objective, while perhaps less widely appreciated, is equally valid as an objective of provincial legislation. Trade union rights are protected by several international conventions to which Canada, with the consent of the provinces, has subscribed. In particular, Canada has ratified a number of conventions of the International Labour Organization (I.L.O.), the most important of which for the purpose of this discussion are the Freedom of Association and Protection of the Right to Organize Convention, 1949 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1951 (No. 98).[88] Alberta's public service collective bargaining law was held not to be in conflict with these Conventions in 1980 in the pre-Charter case of *A.U.P.E.*;[89] however, in that case the courts did carefully construe the I.L.O. conventions as well as other Canadian international obligations including the Treaty of Versailles and the United Nations Covenant on Economic, Social, and Cultural Rights. While the Court in *A.U.P.E.* found that there was no right to strike for public service employees, it did not refuse to consider the international law, but rather subjected the various documents to searching construction and analysis. In lengthy reasons accompanying the trial judgment, Sinclair C.J.Q.B. did not reject the notion that such international conventions were binding on a Canadian court, nor did the Court refuse to interpret or apply the revelant international law (although I.L.O. recommendations were held not to be binding). The Alberta statute was allowed to stand in part because it was found *not* to be in conflict with Canada's international obligations.

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88. These conventions are discussed in detail in International Labour Office, *Freedom of Association*, (3d ed., Geneva, 1983); Michael Bendel, "The International Protection of Trade Union Rights: A Canadian Case Study" (1981) 13 *Ottawa L. Rev.* 169; and in Susan Corby "Limitations on Freedom of Association in the Civil Service and the I.L.O.'s Response" (1986) 15 *Industrial Law J.* 161. *See also* P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983) 201.

89. *Re Alberta Union of Provincial Employees and the Queen* (1980) 120 D.L.R. (3d) 590, [1981] C.L.L.C. 14,089 (Alta. Q.B.), 130 D.L.R. (3d) 191 (C.A.).

Similarly, Canada's international human rights obligations were considered by Dickson C.J.C. in the *Alberta Reference* case where the Chief Justice held that such international conventions serve a two-fold purpose in Canada: as obligations made by Canada to the international community, and as a persuasive source for interpretation of the Charter.

The international obligations alluded to here are not solely authority for restraint on governmental action, but also require an active role by governments in fashioning and policing a functioning collective bargaining system. Alan Gladstone and Muneto Ozaki,[90] in a thorough international survey of recognition practices, describe an important role for government involvement in trade union registration, recognition, and certification procedures, and in the establishment of rights for trade unions so recognized. Other areas for state regulation widely accepted in the international community are the regulation of exclusive representation, bargaining unit determination, determination of representative character, withdrawal of recognition, enforcement of recognition, and the availability of the tool of recognition strikes.[91] It will be apparent to the reader that all of the above topics form the subject matter of the standard Canadian labour statute, either directly or through delegation to a labour relations board.

The third valid governmental objective of statutory regulation of labour relations generally and union recognition specifically, is the fostering of labour peace and the avoidance of recognition strikes, other labour unrest, and unfair and discriminatory employer practices that could result from a lack of regulation. Such disruption marked the historical period before provincial governments in Canada reached the conclusion that some kind of labour legislation was necessary.

The three foregoing objectives, if accepted by the courts as sufficient to explain the purposes of the legislation,[92] would, it is submitted, fulfill the requirements of the first part of the *Oakes* test. They clearly disclose a valid governmental objective.

2. Proportionality

The second part of the *Oakes* test is proportionality, which in turn is broken down into three subsidiary components: measures must be carefully designed to meet their objective, and may not be arbitrary, unfair, or based on irrational considerations; the means must impair rights or freedoms as little as possible (subject, as discussed above, to a degree of

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90. *Supra* n. 25.

91. All of which are discussed in *id.*

92. While it is beyond the scope of this paper to discuss how these three valid governmental objectives should, in the course of Charter litigation be brought to the attention of the court, clearly one method is through the use of a statutory preamble. Given this fact it is regrettable that the preamble to the new Alberta Labour Relations Code has been drfted in such a way as to obscure rather than illuminate the Legislature's valid objectives. It appears that in this case the Alberta government was unable to hold in check its need for ideological self expression. In this writer's opinion, the interests of the legislation would have been better served through the use of a succinct and convincing statement of the Legislature's objectives, rather than the rambling political manifesto with which the legislation opens.

latitude granted to governments, particularly in matters of business regulation); and finally, there must be proportionality of effect. With respect to these portions of the *Oakes* test, the four elements of labour law raised in our hypothetical case will be examined separately.

(a) Exclusivity

(i) Rational Connection

The principle of exclusivity is one which was seriously attacked by Beatty, but it is, in this writer's view, a component of our labour relations system that is able to withstand Charter challenge. There is a clear and rational connection between the granting of exclusive (but not permanent) representation rights to one trade union and all three of the general objectives of the labour relations scheme outlined above. First, exclusivity provides unions with the basic bargaining strength they need to act as effective countervailing forces to the power of employers. Any system of representation with less than exclusive representation provisions must either undermine that bargaining force, or simply use the union system as an adjunct grafted onto some other kind of bargaining structure which itself wields exclusive bargaining authority (for example, the West German system of Works Councils).

Exclusivity is also fully in accord with Canada's international human rights commitments. The I.L.O.'s Committee on Freedom of Association has expressly approved Canadian and U.S. models of exclusivity as acceptable means of ensuring trade union rights.

Finally, exclusivity is directly related to the object of enhancing labour peace and harmony. It is advantageous to employers in that it permits them to deal with just one union, and avoids the potential disruptions inherent in ongoing competition between unions.

(ii) Minimal Impairment

This standard, as discussed earlier, requires that the courts consider alternative measures available to the legislature and to approve only that measure which least impairs individual rights. However, this strict interpretation will not necessarily be applied in practice, particularly with respect to regulatory legislation, and the legislature will be permitted some latitude in choosing from among various means so long as they are not unfair. Beatty has argued that alternative systems, such as the "most representative union" system in place in Belgium, France, and Switzerland, as well as other European countries, or the works council systems in place in West Germany and the Netherlands, are less intrusive of individual rights than is the typical Canadian exclusivity system. It is submitted that this view is simply not accurate, and is based on incorrect comparative law. For example, the choice of "most representative union" in France is a ministerial decision made according to ill defined and to Canadian eyes, potentially irrelevant considerations. As Forde[93] has written, the criteria

93. M. Forde, "The European Convention on Human Rights and Labour Law" (1983) 31 *Am. J. Comp. L.* 301 at 324-5.

for selection as "most representative" set out in France's Code de Travail are: "numerical support, independence, contributions, experience and age of the union, and patriotic stance during the [Nazi] occupation." Of these, only the first would be regarded as relevant, or even a proper matter for investigation before a Canadian labour relations board.

Regarding the West German system of works councils, a brief answer is that they are not trade unions, and that they do not provide a form of collective bargaining. Nevertheless they do occupy a position in relation to the individual employee not dissimilar to that of a union under our exclusivity system. One major difference in terms of individual rights is that the individual employee is not provided a vehicle of the sort available under most Canadian labour statutes, of altering the status quo. Unlike the Canadian worker, the German worker is offered no way of replacing the bargaining agent. It is simply a distortion of reality to suggest that the German system is more respectful of individual rights.

(iii) Justifiability of Effect

It is submitted, briefly, that the concept of exclusivity is one which directly fosters the three proposed objectives of the labour relations system. Because there is no conflict between its objectives and its effects, it will necessarily pass this test.

(b) Timeliness

(i) Rational Connection

The system must provide an opportunity for employees to replace their bargaining agent or it would effectively constitute a permanent statutory monopoly (of the sort in place in the *P.I.P.S.C.* case). However, the functioning of the system demands a degree of stability in bargaining relationships. The statutory requirement that employees cannot seek to replace a bargaining agent during the term of a collective agreement, except for its last two months (in the case of a collective agreement of two years or less; different rules apply to longer agreements) is therefore rationally connected to the three objectives of the labour relations system identified earlier, especially the third objective of collective bargaining stability.

(ii) Minimal Impairment

It is under this heading that the timeliness requirement might well run into difficulty. In our example the employees who have lost their faith in Union A are being required to wait more than a year before they will be permitted to do anything about it. The question is, are there alternative mechanisms which would also enhance labour relations stability but which would be less restrictive of the equality of employees in the two groups? The answer appears to be that a complete abandonment of the timeliness principle would fail to meet the valid governmental objectives of the legislation. On the other hand, an extreme extension of the waiting period (e.g. a provision which prevented employees from initiating a displacement application for a period of five years from date of certification) would in

my view fail to meet the minimal impairment test. On balance the 2-year maximum waiting period (which itself reflects a typical collective agreement duration) would probably be seen as reasonable.

(iii) Justifiability of Effect

The two-year period of protection for an existing bargaining agent is proportional to the needs of the collective bargaining system. A period a great deal longer (like the five-year example suggested above) would almost certainly be a disproportionately severe limitation, even in light of the benefits of stability. Given the potentially volatile nature of collective bargaining, the sense of stability derived from such a limitation would almost certainly be illusory. If an oppressively long waiting period were required, unrest would be more likely to develop, and the provision would thus act to defeat the very purposes of the statute.

(c) The 40% Support Requirement

(i) Rational Connection

It would be hard to argue that there is no rational connection between a requirement that an applicant for certification demonstrate a significant degree of employee support and any of the three purposes of labour legislation discussed earlier. In particular, this requirement would appear to be closely connected to the objective of providing working people with effective countervailing power in the workplace.

(ii) Minimal Impairment

Given that the 40% support requirement is, in Alberta, matched with a requirement for majority support in a mandatory, Labour Relations Board conducted vote (under s. 32 of the Code), it may represent an obstacle to union organizing, or employee initiated displacement proceedings. The requirement would be more easily justified in a regime where an expression of employee support is an *alternative to* rather than a *precondition for* a vote. That is, in fact, the case under most other Canadian labour statutes, and was the case under the Alberta Labour Relations Act, the precursor to the present Code. Nevertheless, this writer expects that a reasonable level of employee support will be regarded as within the range of permissable legislative requirements. However, a requirement for a demonstration of employee support greater than 50% would certainly create an unfair and unnecessary obstacle to employee choice, and ought not to meet the minimal impairment test.

(iii) Justifiability of Effect

It is difficult to imagine that the requirement of 40% support would be regarded as disproportional to the valid purposes of the legislation. However, it is submitted that a figure greater than 50% would not be acceptable.

(d) The Majority Vote Requirement

(i) Rational Connection

As with (c) above, the rational connection of a majority support requirement to the valid purposes of the legislation is obvious.

(ii) Minimal Impairment

Perhaps surprisingly, there is a sound argument that the requirement for a vote, *in addition to* a demonstration of popular support is an excessive and burdensome requirement placed on individuals favouring a new bargaining agent. As Paul Weiler[94] has definitively demonstrated, one of the great advantages that the Canadian labour relations statutory schemes have enjoyed over their U.S. counterpart is in the absence of unfair employer practices, and the general erosion of labour peace which surround certification votes in the U.S. Weiler argues convincingly that the traditional Canadian system of certification upon proof of majority support[95] is far more successful at enhancing the goals of worker representation and stability than is the U.S. requirement for a vote in all cases. Unfortunately, the new Alberta statute seems to be going in the wrong direction in this area, with Alberta abandoning the successful Canadian model and embracing the unsuccessful U.S. model. Given the disruptive effect on the purposes of the labour legislation of the use of the automatic vote model, it is arguable that this is one policy choice that might not be protected by the *Edwards Books* brand of judicial deference to the legislature.

(iii) Justifiability of Effect

For the reasons given above, the requirement for a vote in every case may hinder the attainment of the valid purposes of the legislation rather than contribute to the legislation's goals. It is submitted that only a system under which a body like the Labour Relations Board could order a vote in cases of *bona fide* doubt as to the degree of union support should survive the test of proportionality of effect.

IX. CONCLUSION

The foregoing review of some of the many provisions of the Alberta Labour Relations Code under section 1 of the Charter is intended to serve as an example of the approach to Charter analysis which is possible using sections 2(d) and 15(1) of the Charter to open the door to judicial scrutiny of labour relations statutes.

An attempt has been made to find middle ground between two competing approaches to the problem of labour law and the Charter: the "hands off" approach exemplified by the reasons of LeDain J. in the *Alberta Reference* and the "everything is up for grabs" approach advocated by David Beatty. In attempting to clear this middle ground I have

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94. Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA" (1983) 96 *Harvard L. Rev.* 1769.

95. Typically, Canadian statutes reserve to the Labour Relations Board the power to order votes in cases where there are competing unions, or in certain other circumstances. In practice, votes are the norm in displacement applications.

reviewed a number of recent judicial statements concerning the Charter's application (or non-application) to labour law issues, particularly concerning the threshold issues of whether there is a right to union representation, a right to collective bargaining, and a right to certification.

Given the rapid state of flux in the law in this area, and the need for an elaboration of the breadth of section 2(d) from the Supreme Court of Canada, many of the conclusions reached in this paper are necessarily tentative. Notwithstanding a recent and authoritative decision of the Court of Appeal for the Northwest Territories to the contrary, I conclude that at least some existing statutory provisions are potentially vulnerable to Charter review, including statutory bargaining agent monopolies such as those for public employees in the Northwest Territories and university, technical institute, and college faculties in Alberta.

In conclusion, I argue that major elements of the typical Canadian labour statute can survive even strict Charter scrutiny, that our courts should uphold as constitutionally valid such keystone provisions in our labour law as certification, exclusivity, and the supervisory role of the labour relations boards, but that provisions designed to obstruct or hinder union organizing or employee displacement rights may well fall foul of the Charter. The role of Charter litigation in labour law should be a reasonable balance between the "hands off" and the "everything is up for grabs" approaches which have dominated discussion to date. This balance can best be maintained when the courts bear in mind the egalitarian and redistributive objects which are the only legitimate purposes of labour law.