

# The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada

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*Answering the critics of the Supreme Court of Canada's judgment in B.C. Health, the author argues that the Court laid the foundation for a principled and durable doctrine protecting constitutional labour rights, one that goes directly to the heart of the matter — the inequality of workers' power in the employment relation. In the author's view, two paths could lead from B.C. Health to the recognition of Charter protection for a right to strike: one that treats the right as an accessory to collective bargaining, and one that upholds the right directly on the basis of the Charter values of equality and participation. The author supports the latter approach, contending that constitutional rights should be defined in relation to fundamental values, in a way that is not contingent on time-bound or fact-sensitive assessments about the role of strikes within a particular collective bargaining regime. Although a Charter right to strike may involve the courts in difficult choices about when to defer to legislative policy decisions, and courts may lack the institutional capacity to deal effectively with labour law issues, the author points out that judges can look to ILO standards for expert guidance. Noting that the U.S. experience in this area might be of considerable use to Canadians, the author concludes by providing an overview of American case law concerning a constitutional right to strike.*

## 1. INTRODUCTION

Given the importance of the question, one might expect that the United States Supreme Court would have issued an authoritative opinion or opinions concerning the status of the right to strike under the U.S. Constitution. But the Court has squarely addressed the merits of the claim only once, in 1923. That decision, *Charles Wolff*

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*Packing Co. v. Court of Industrial Relations*, recognized the right and overturned key provisions of an anti-strike law.<sup>1</sup> For reasons discussed below, however, *Wolff Packing* never gave rise to a viable constitutional doctrine. Instead, the Court subsequently upheld a variety of restrictions on strikes without ever confirming or denying the existence of the right. Most recently, in the 1988 case of *Lyng v. Auto Workers*, the Court assumed that the right existed but held that the statute at issue (which denied food stamps to the families of striking workers) did not violate it.<sup>2</sup>

U.S. law concerning the right to strike is characterized by a sharp disjuncture between theory and practice. The government has repeatedly claimed that international human rights norms, including the right to strike, are adequately protected by U.S. statutory and constitutional law.<sup>3</sup> Authoritative U.S. legal texts are full of statements that seem to recognize the fundamental character of the rights to organize and strike, for example the Supreme Court's assertion in 1937 (recently quoted by the Supreme Court of Canada as support for a constitutional right to bargain collectively) that unions "were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he

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1 262 U.S. 522, at pp. 540-544 (1923).

2 485 U.S. 360, at p. 368 (1988) (reasoning that "the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right"). For a detailed discussion of the cases, see Part 4, below.

3 L.A. Compa, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (Ithaca: Cornell University Press, 2000), at pp. 46-47. With regard to the International Covenant on Civil and Political Rights, ratified by the United States in 1992, the State Department maintained that the U.S. Constitution "guarantee[s] freedom of assembly in all contexts, including the right of workers to establish and join organizations of their own choosing." Asked whether the ICCPR altered or amended U.S. labour law, the White House responded that it did not, explaining that the ICCPR's "general right of freedom of association, including the right to form and join trade unions . . . [is] fully contemplated by the First Amendment to the U.S. Constitution." *Ibid.*, at p. 42.

was nevertheless unable to leave the employ and resist arbitrary and unfair treatment.”<sup>4</sup> In this same opinion, the Court referred to the right to organize as “fundamental.”<sup>5</sup> Similar statements abound in labour statutes as well as in court opinions.<sup>6</sup> In practice, however (with the sole exception of the *Wolff Packing* case), the Supreme Court has upheld restrictions on the right to strike without considering their effect on the ability of workers to influence their conditions of employment. The Court has, for example, approved the privilege of employers to permanently replace economic strikers, upheld a flat prohibition on secondary strikes, and sustained outright bans on public employee strikes.<sup>7</sup> The Freedom of Association Committee of the International Labour Organization has concluded that each of these outcomes violates international standards.<sup>8</sup> Scholars have suggested that the permanent replacement rule, in particular, has contributed to a drastic decline in strike activity in the U.S.<sup>9</sup> Instead of enabling workers to deal with corporations on a basis of equality, the threat of a strike now serves management both in negotiations, where employers are more likely to threaten permanent replacement than unions are to threaten a strike, and in organizing drives, where the threat of

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4 *Health Services and Support-Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391, at para. 84 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, at p. 33 (1937)).

5 301 U.S. 1, at p. 33.

6 See *infra*, text accompanying notes 71-72.

7 *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, at pp. 345-346 (1938); *United Brotherhood of Carpenters & Joiners v. NLRB*, 341 U.S. 707 (1951); *Postal Clerks v. Blount*, 325 F.Supp 879 (D.D.C.), affirmed 404 U.S. 802 (1971).

8 Compa, *supra*, note 3, at pp. 31, 211-213; Committee on Freedom of Association, *Freedom of Association: Digest of Decisions and Principles*, 5th (revised) ed. (Geneva: ILO, 2006), at paras. 576, 581, 587.

9 J.B. Lambert, “*If the Workers Took a Notion*”: *The Right to Strike and American Political Development*, at pp. 1-5, 151-154 (Ithaca: ILR Press, 2005); S.F. Befort, “Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment” (2002), 43 B.C.L. Rev. 351, at pp. 440-441.

permanent replacement is “Exhibit Number One” against unionizing.<sup>10</sup> I have suggested elsewhere that it is time for U.S. courts to bring our practice in line with our theory, and to begin protecting the constitutional right to strike.<sup>11</sup>

In a sense, none of this is salient to the question whether the right to strike is protected under the Canadian constitution. In the *B.C. Health* case, the Supreme Court of Canada departed decisively from the U.S. model by recognizing and enforcing a constitutional right to bargain collectively.<sup>12</sup> Unless *B.C. Health* is to be overruled, Canada is already committed to a doctrine of constitutional labour rights that has been — in that one decision alone — far more firmly grounded and thoroughly explained than any parallel doctrine developed in the courts of the United States. Nevertheless, the American experience might be of considerable use. The U.S. has a long history of deriving new constitutional rights from abstract provisions in old constitutional texts. Viewing the right to strike through the lens of this history highlights certain features of the decision in *B.C. Health*, and leads to some observations about the debates over a constitutional right to strike in Canada.

The remainder of this essay is divided into three parts. Part 2 suggests that in light of U.S. experience, *B.C. Health* appears to provide a strong foundation for a principled and durable doctrine protecting constitutional labour rights. Part 3 discusses two possible paths from *B.C. Health* to the right to strike, and addresses the problem of implementation in light of concerns that the courts will be forced to choose between legislating an entire judicial labour code,

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10 J. Cutcher-Gershenfeld, “The Social Contract at the Bargaining Table: Evidence from a National Survey of Labor and Management Negotiators” (1999), 50 *Lab. L.J.* 214; C.L. Estlund, “The Ossification of American Labor Law” (2002), 102 *Colum. L. Rev.* 1527, at p. 1538.

11 J.G. Pope, “Contract, Race, and Freedom of Labor in the Constitutional Law of ‘Involuntary Servitude’ ” (2010), 119 *Yale L.J.* 1474, at pp. 1540-1565 (available online at [http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1476521](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1476521)).

12 *B.C. Health*, *supra*, note 4. Compare *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, at p. 464 (1979) (holding that a state government has no obligation to hear grievances or demands advanced by unions).

on the one hand, and providing only weak protection for the right on the other. Finally, Part 4 provides a brief summary of American case law concerning the constitutional right to strike.

## 2. *B.C. HEALTH AS A FOUNDATION FOR CONSTITUTIONAL LABOUR RIGHTS*

In sharp contrast to the U.S. decisions, *B.C. Health* squarely addressed the constitutional status of workers' freedom of association. The majority opinion of McLachlin C.J. and LeBel J. went straight to the heart of the matter — power in the employment relation — and provided a clear justification for the right to collective bargaining. Rejecting eighteenth-century individualism (exemplified in the U.S. by Edward Corwin's argument against a constitutional right to strike, to the effect that “[w]hen men act in concert, liberty is power”<sup>13</sup>), the Supreme Court of Canada protected the right of collective bargaining precisely *because* it gives workers a degree of “control” and “influence” sufficient to offset “inherent inequalities of bargaining power in the employment relationship.”<sup>14</sup> The Court valued collective bargaining not primarily because of its economic benefits for workers (a linkage that has contributed importantly to the desuetude of constitutional labour rights in the U.S.), but because it promotes the fundamental values of dignity, liberty, autonomy, equality and democracy that underlie the *Canadian Charter of Rights and Freedoms*.<sup>15</sup> It augurs well for the long-term acceptance of the decision in *B.C. Health* that it is explicitly linked to principles adopted at the international level and accepted by the government of

13 E.S. Corwin, *Total War and the Constitution* (New York: Alfred A. Knopf, 1947) (quoting Edmund Burke, *Reflections on the Revolution in France* (1790)).

14 *B.C. Health*, *supra*, note 4, at paras. 82, 84, 85.

15 *Ibid.*, at paras. 82, 86, 26; R.J. Adams, “From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining” (2008), 12 *Just Labour* 48, at pp. 51-52. Compare *Carpenters & Joiners Union, Local 213 v. Ritter's Caf e*, 315 U.S. 722, at p. 724 (1942) (upholding a restriction on picketing partly on the ground that labour law consists of balancing “the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest”).

Canada.<sup>16</sup> I have suggested elsewhere that the United States should draw on *B.C. Health* for guidance in the area of constitutional labour rights.<sup>17</sup>

Some Canadian critics have offered a more negative appraisal, arguing that *B.C. Health* provides — at best — a shaky foundation for labour rights. It is said that the justices got their history wrong, that the Court's contextualized approach to the freedom of association will yield *ad hoc* and unprincipled jurisprudence, and that the Court elevated organizational rights over the individual worker's freedom to associate with others. Viewed in light of the U.S. experience, however, the critics may be demanding too much — or even, in some cases, the wrong things — from the judgment in *B.C. Health*.

### (a) The Use of History in *B.C. Health*

Critics have charged that the Court erred in deriving the right of collective bargaining partly from Canadian traditions predating modern labour statutes. There was, they argue, no legally enforceable collective bargaining right until the 1943 federal Order in Council modelled on the American Wagner Act.<sup>18</sup> Given the expertise of the critics, I have no reason to believe this is not true as a matter of fact. But I wonder if the critique engages the argument of the judgment's authors. McLachlin C.J. and LeBel J. were, I think, making a broad cultural claim — that “collective bargaining was recognized as a fundamental aspect of Canadian society” — not a precedential claim that a particular form of collective bargaining was enshrined in law.<sup>19</sup> They were writing a new chapter in the history of workers' rights under the *Charter*, and they were fitting it not into an imaginary one true tradition, but into a story that highlights “the traditions from

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16 *B.C. Health*, *supra*, note 4, at para. 79; R.J. Adams, “The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille” (2008), 14 C.L.E.L.J. 317.

17 See, e.g., Pope, *supra*, note 11, at pp. 1526, 1554.

18 J. Fudge, “Conceptualizing Collective Bargaining under the *Charter*: The Enduring Problem of Substantive Equality” (2008), 42 Sup. Ct. L. Rev. (2d) 1, at p. 9; B. Langille, “The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It” (2009), 54 McGill L.J. 177, at p. 192.

19 *B.C. Health*, *supra*, note 4, at para. 41.

which [the country] developed” while repudiating “the traditions from which it broke.”<sup>20</sup> It may be true that the freedom to bargain collectively was honoured mainly in the breach, just as it is true that the U.S. tradition of free speech coexisted with the equally venerable tradition of riding dissenters out of town on a rail. But one of these traditions has been celebrated and embraced, while the other has been disapproved. That the majority opinion in *B.C. Health* chose the tradition of labour freedom over that of suppression seems cause for celebration and reinforcement.

**(b) *B.C. Health’s* Contextualized Approach to the Freedom of Association**

Under *B.C. Health*, the level of protection for association varies according to the importance of the particular activities involved. Collective bargaining warrants protection in part because of its importance “both historically and currently . . . to the exercise of freedom of association in labour relations.”<sup>21</sup> This contextualized approach has been criticized as lacking content and discipline, and even as “chilling” in its failure to recognize that “rules must be basic and universal.”<sup>22</sup>

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20 The quoted language is from Justice John Marshall Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, at p. 542 (1961), often cited as an accurate summary of the appropriate role of tradition in the derivation of fundamental rights under the U.S. Constitution. See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at pp. 850, 852 (1992) (affirming protection for the right to obtain an abortion, quoting Harlan J.’s *Poe* dissent, and declining to embrace the tradition of prohibiting abortion on the ground that the woman’s “suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture”). But see *Michael H. v. Gerald D.*, 491 U.S. 110, at p. 127 (1989) (Scalia J., joined by Rehnquist J., maintaining that courts should look “to the *most specific* level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified” [emphasis added]).

21 *B.C. Health*, *supra*, note 4, at para. 30.

22 J. Cameron, “The Labour Trilogy’s Last Rites: *B.C. Health* and a Constitutional Right to Strike,” in this issue of the C.L.E.L.J.; Langille, *supra*, note 18, at pp. 185, 203.

It may be true that s. 2(d) of the *Charter* provides a baseline of protection that does not distinguish between book clubs and trade unions (or, presumably, between trade unions and golfing associations).<sup>23</sup> I doubt, however, that — whatever the stated doctrine — courts will treat all forms of association the same. Labour protest entails highly visible short-run costs that can be and are routinely exaggerated to fan fears of economic and social paralysis.<sup>24</sup> If judges do not perceive an affirmative value in the exercise of group power by workers, it is unlikely that they will find the courage and determination to protect it in the face of political pressure. By focusing on the affirmative social value of labour protest, *B.C. Health* may provide a more effective foundation for the right to strike than a non-contextual freedom of association. It seems odd, if not impossible, to embark on a universalist project of ensuring that workers enjoy the *same* freedom to associate in striking that, for example, anglers enjoy to associate in fishing.

The American doctrine of free speech illustrates the pull of contextualism. If any rights guarantee calls for an across-the-board approach, it would seem to be free speech. The ban on censorship, after all, indicates a fundamental distrust of government as an evaluator of speech. Yet U.S. doctrine gradually evolved an explicit hierarchy, with political speech at the top, artistic and miscellaneous speech in the middle, commercial speech further down, indecent speech lower still, obscenity and fighting words at the “unprotected” bottom, and labour picketing — somehow — even lower than that.<sup>25</sup>

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23 *Ibid.* See also S. Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven: Yale University Press, 1992), at pp. 25-26.

24 Under the Taft-Hartley Act, for example, courts may enjoin strikes that “imperil the national health” for a period of 80 days. Judges have granted 80% of all requests for such injunctions. Yet, when delayed strikes finally happen, the actual harm turns out to be diminutive in comparison to the disastrous predictions accepted by courts “in the full glare of public opinion.” M.H. LeRoy & J.H. Johnson IV, “Death by Lethal Injunction: National Emergency Strikes under the Taft-Hartley Act and the Moribund Right to Strike” (2001), 43 *Ariz. L. Rev.* 63, at pp. 71, 120-121.

25 On labour picketing, see A. Hyde, “Exclusion Is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven To Be a Bad Deal for American Trade Unions and Constitutional Law,” in this issue of the *C.L.E.L.J.* For documentation on the hierarchy of values, see J.G. Pope, “The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole” (1984), 11 *Hastings Const. L.Q.* 189, at pp. 192-200.



Given the strong pressures for regulation, it seems inevitable that courts will provide stronger protection for forms of expression and association that are understood to serve constitutional values. In this respect, *B.C. Health* provides what has been lacking in the American constitutional jurisprudence of labour rights.

**(c) *B.C. Health* and the Problem of Organizational versus Individual Rights**

Brian Langille has suggested that *B.C. Health* puts the organization, not the individual, at the heart of the freedom of association. He contends that the decision protects only activities that are “incapable of being performed by an individual” and thus are “inconceivable on the individual level.”<sup>26</sup> Langille worries “that the Court has detached collective bargaining from its obvious individual-bargaining analogue and will do the same for the right to strike.”<sup>27</sup>

It seems to me, however, that Langille has given *B.C. Health* an unnecessarily negative reading. McLachlin C.J. and LeBel J. were rejecting, in their own words, “the notion that freedom of association applies *only* to activities capable of performance by individuals.”<sup>28</sup> This move reflected the fact that the right of collective bargaining, as opposed to the right to strike, necessarily involves more than individuals doing “together with others what you are free to do as an individual,” which is Langille’s preferred account of the freedom of association.<sup>29</sup> While workers may join together in ceasing work and commencing a strike (a common occurrence with or without unions), it is rarely practical for each and every worker to bargain simultaneously with the employer. Instead, workers typically select representatives or form an organization — the union — that can formulate and present to management a coherent set of bargaining proposals. The inevitable result is to exclude certain proposals favoured by some workers. The workers whose preferences have been rejected are associating with their fellows for purposes of collective bargaining, but they are not simply *bargaining* together with their co-workers; to

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26 *B.C. Health*, *supra*, note 4, at para. 28; Langille, *supra*, note 18, at pp. 185-186.

27 *Ibid.*, at 188.

28 *B.C. Health*, *supra*, note 4, at para. 28 [emphasis added].

29 Langille, *supra*, note 18, at p. 185.

the contrary, their demands never reach the employer. Accordingly, McLachlin C.J. and LeBel J. *expanded* the concept of freedom of association to cover not only individuals who together perform a given lawful activity (Langille's concept), but also individuals who participate in a democratic organization that "express[es] a majority viewpoint" in carrying out that activity.<sup>30</sup> On this reading, their view is entirely compatible with Clyde Summers' observation, quoted by Langille, that the purpose of freedom of association "is not merely to grant power to groups, but to enrich the individual's participation in the democratic process by his acting through those groups."<sup>31</sup> Far from severing the link between individual workers' freedom of association and the right to bargain collectively, then, *B.C. Health* makes it possible for workers to exercise their freedom through an organization.

It is important to note that the point made by McLachlin C.J. and LeBel J. does not presume or constitutionalize the system of exclusive representation. Any union — whether it represents all employees in an enterprise or only its members, and whether it is the only union or one of two or more — uses some kind of process to determine the majority viewpoint of its membership or represented constituency. No modern system of collective bargaining relies simply on workers' doing together what they could lawfully do as individuals.

### 3. *B.C. HEALTH AND THE RIGHT TO STRIKE*

Viewing the Canadian debate from the outside, it appears to me that the U.S. experience might be useful with regard to the derivation of the right to strike and the question of the judiciary's institutional competence to define and protect the right.

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30 *B.C. Health*, *supra*, note 4, at para. 28. See also J. Fudge, "Brave New Words: Labour, the Courts and the Canadian Charter of Rights and Freedoms" (forthcoming, 2010), 28 Windsor Y.B. Access Just. (available online at [http://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1522545](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1522545)) (observing that collective bargaining "is an exercise in solidarity in which individual interests are not simply aggregated but transformed in the process of democratic deliberation").

(a) **Two Paths from *B.C. Health* to the Right to Strike**

There are two paths from *B.C. Health* to the right to strike, and the choice between them might be of considerable importance. First, the right could be justified as an essential accessory to the right of collective bargaining. Brian Etherington has succinctly marked out this path: “Virtually every serious judicial consideration of [the role played by strikes and lockouts in collective bargaining] has concluded that the strike is the only substantial economic weapon available to employees and that the right to bargain collectively is only an illusion if the right to strike does not go with it.”<sup>32</sup>

Second, the right to strike could be justified directly by the same considerations advanced by McLachlin C.J. and LeBel J. to support the right of collective bargaining. This second, direct path was taken by the U.S. Supreme Court in *Wolff Packing*.<sup>33</sup> The Court invalidated the wage-fixing provisions of a state law that prohibited strikes in key industries and established an industrial court to resolve the underlying disputes. The strike prohibition figured prominently in the Court’s reasoning. “[W]hile the worker is not required to work, at the wages fixed,” the Court explained, “he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.”<sup>34</sup> This reasoning does not hinge on the presence or absence of collective bargaining; it relies directly on the concern for effective equality and participation that underpinned *B.C. Health*’s justification for the right to collective bargaining.<sup>35</sup>

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31 Langille, *supra*, note 18, at p. 186, quoting “Freedom of Association and Compulsory Unionism in Sweden and the United States” (1964), 112 U. Pa. L. Rev. 647, at p. 647.

32 B. Etherington, “Does Freedom of Association under the *Charter* Include the Right to Strike after *B.C. Health*? Prognosis, Problems and Concerns,” in this issue of the C.L.E.L.J.

33 *Supra*, note 1.

34 *Ibid.*, at p. 540.

35 *B.C. Health*, *supra*, note 4, at paras. 82, 84, 85 (reasoning, e.g., that collective bargaining enables workers to “gain a voice to influence the establishment of rules that control a major aspect of their lives”).

Indeed, a strong case could be made that the right to strike precedes — chronologically and logically — the right to bargain collectively. Chronologically, the strike is an elemental form of labour protest that tends to antedate collective bargaining. Early trade unions unilaterally enacted rules specifying labour rates and prohibiting members from working for less, with the effect that an employer's failure to pay union rates would trigger a strike. Collective bargaining came later.<sup>36</sup> Logically, the *Charter* values of dignity, personal autonomy, and liberty — which have been central to the case for labour rights in the United States as well<sup>37</sup> — appear to be more directly served by the right to strike, an activity engaged in by workers themselves, than by collective bargaining through union representatives. As recounted below, American unionists stressed the fundamental right of the individual worker to withhold his or her personal labour, and argued that unless that right could be exercised in association with others, it could not serve its purpose of empowering workers to avoid exploitation and domination.<sup>38</sup> On this view, the right to strike provides a procedural solution (in the sense that judges need not be involved in assessing substantive outcomes) to the problems of effective worker participation and actual equality of employees and employers.

It appears, then, that the right to strike rests directly on *Charter* values, and need not be reduced to the status of an accessory to the collective bargaining right. This direct approach avoids two serious

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36 D. Montgomery, *The Fall of the House of Labor: The Workplace, The State, and American Labor Activism, 1865-1925* (New York: Cambridge University Press, 1987), at pp. 9-13; D. Rodgers, *The Work Ethic in Industrial America 1850-1920* (Chicago: University of Chicago Press, 1974), at pp. 165-166; B. Soffer, "A Theory of Trade Union Development: The Role of the 'Autonomous' Workman" (1960), 1 *Lab. Hist.* 141, at pp. 152-153.

37 See, e.g., *AFL v. American Sash Co.*, 335 U.S. 538, at pp. 542-543 (1949), where Frankfurter J., concurring, observed that the "industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence, the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers, but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence."

38 See *infra*, text accompanying notes 66-70.

problems with the accessory approach. First, the accessory approach defines the right to strike in relation to an institutional framework constructed by government to accommodate a variety of interests, some of which may be hostile to the right itself.<sup>39</sup> For example, the typical collective bargaining system is designed to maximize continuity of production, an interest overtly contrary to the right to strike. If the initial definition of the right is shaped to facilitate the functioning of such a system, then this adverse interest will limit the right at its conception, thereby avoiding the requirement — set forth in s. 1 of the *Charter* — that limits on a right be “demonstrably justified in a free and democratic society.” Second, the accessory approach defines the right based on time-bound and fact-sensitive judgments about the role of strikes within a particular regime of collective bargaining. In Canada today, that would produce the ironic result of constitutionalizing the Wagner model just when many labour experts are condemning it as hopelessly obsolete.<sup>40</sup> Industry does not stand still. When conditions and practices change, as they inevitably will, courts following the accessory approach will be forced either to modify their definition or to watch as it becomes antiquated.

In contrast, the direct approach follows the general pattern of constitutional rights jurisprudence (reflected in s. 1 of the *Charter* and in the U.S. requirement that restrictions on constitutional rights be narrowly tailored to serve an important or compelling governmental interest), according to which those rights are defined in relation to the constitutional text and fundamental values, with contingent and fact-sensitive judgments entering the analysis at the stage of assessing restrictions on the right. This approach defines the right at a level

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39 On this view, the issue before the Supreme Court of Canada is whether to “constitutionalize” the particular “legal definition of ‘strike’ ” that has developed in relation to the prevailing regime of Canadian labour law. “[The] claim is that when the Supreme Court of Canada goes about constitutionalizing a right to strike, it will have to be concrete about what it is constitutionalizing,” and that “the best articulation we have” is “what is permitted both under Canadian statutes and at common law.” B. Langille, “What Is a Strike?”, in this issue of the C.L.E.L.J.

40 See Fudge, *supra*, note 30 (noting the “paradox of [the *B.C. Health* court’s] embrace of Fordist labour rights in a post-Fordist economy”); Langille, *supra*, note 39 (calling for an alternative approach in order to avoid the “serious and unnecessary sin of constitutionalizing the Wagner Act model”).

of generality and simplicity that can enable it to endure over time and to be understood by the people. The right itself is conceived in grand and relatively timeless terms; limitations on the right must be justified as necessary to serve important governmental interests in particular contexts. This approach is consistent with that of *B.C. Health*, which seeks not to constitutionalize a particular system of labour relations, but to enforce minimum standards modelled on those developed by the ILO for application to a wide variety of different systems.<sup>41</sup>

**(b) Concerns about Deference and “Constitutionalizing” Industrial Relations**

Critics have suggested that if the Supreme Court of Canada recognizes a constitutional right to strike, it will be confronted with two unhappy choices: (1) providing only weak protection for the right, or (2) having to draft a “complete judicial labour code” and undertaking complex and virtually continuous judicial oversight of strikes.<sup>42</sup> The first would render the right virtually meaningless; the second would embroil the courts in difficult policy choices better made, in the view of critics, by legislators or labour experts.<sup>43</sup>

These are real dangers, and the critics make a telling point about the institutional limitations of courts as makers of labour law. It appears to this outside observer, however, that the fears are overblown. The danger of judicial over-reaching accompanies the recognition of *any* new constitutional right. Speech, for example, is integral to a vast range of human activity, and the right of free speech has entangled courts in a correspondingly wide variety of intricate

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41 *B.C. Health*, *supra*, note 4, at paras. 79 and 91.

42 Langille, *supra*, note 39; Cameron, *supra*, note 22.

43 See Cameron, *supra*, note 22 (noting the recent tendency of the Court to pull back on judicial review and allow a wider scope for “democratic limits” on *Charter* rights); H. Arthurs, “Constitutionalizing the Right of Workers to Organize, Bargain, and Strike: The Sight of One Shoulder Shrugging,” in this issue of the C.L.E.L.J. (suggesting that labour experts would do a better job than courts at formulating labour law); Etherington, *supra*, note 32 (predicting that courts will make law based on competing experts’ affidavits, and questioning the utility of that process).

policy judgments. Because the right is thought to be important, however, the courts have not flinched from their duty to enforce it. It may be true, as the critics warn, that recognition of a constitutional right to strike will open the door for workers and unions to challenge a number of restrictions on strikes, just as the belated recognition of free speech rights by the United States Supreme Court invited challenges to anti-sedition laws, press censorship, obscenity regulation, the tort law of defamation, rules governing the use of public property, electronic media regulation, and a host of other laws.<sup>44</sup> But if, as I believe (and as *B.C. Health*'s critics appear to accept), *B.C. Health* is correct about the vital importance of workers' freedom of association, then the mere fact of difficulty cannot justify retreat. As McLachlin C.J. and LeBel J. wrote, "to declare a judicial 'no go' zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far"<sup>45</sup> — so far, perhaps, as to raise the suspicion that blanket deference might mask a selective judicial lethargy where workers' rights are concerned.

Turning to the problem of institutional capacity, *B.C. Health* provides what appears to be a workable solution. Instead of relying on their own policy judgments, courts can turn to the standards and opinions of experts associated with the International Labour Organization. According to the Court, the *Charter* provides "at least the same level of protection" as ILO standards.<sup>46</sup> These standards, in turn, reflect a comparative law methodology that should allow the courts to focus on "preserving the functions that collective bargaining machinery serve, rather than the specific industrial relations mechanism employed."<sup>47</sup>

Consider, for example, the question whether public employee strikes can be banned if interest arbitration is provided as a substitute. Under ILO standards, the right to stage a strike cannot — as a general matter — be extinguished merely by providing interest arbitration as a substitute: "In as far as compulsory arbitration prevents

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44 Although the First Amendment's guarantee of free speech was ratified in 1791, the Supreme Court did not begin to enforce it until the 1930s.

45 *B.C. Health*, *supra*, note 4, at para. 26.

46 *Ibid.*, at para. 79.

47 A. Blackett, "Mutual Promise: International Labour Law and *B.C. Health Services*" (2009), 48 *Sup. Ct. L. Rev.* (2d) 365, at p. 400.

strike action, it is contrary to the right of trade unions to organize freely their activities and could only be justified in the public service or in essential services in the strict sense of the term.”<sup>48</sup> The issue then becomes whether the affected employees are (1) “public servants exercising authority in the name of the State” (for example, judges and customs officers) or (2) “in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).”<sup>49</sup> The question of compensatory measures such as interest arbitration arises only in those categories of employment. This approach accords with general principles of constitutional law and with the rationale of *B.C. Health*. It is in the nature of constitutional rights that they cannot be traded away for something else. If they could, then restrictions could be justified by the simple expedient of pointing to some *quid pro quo* obtained in legislative bargaining. Under a narrow, economic view of workers’ rights, it might be possible to justify a strike ban by pointing to an arbitration procedure that promised to produce fair wages, benefits and conditions. But the rationale of *B.C. Health* precludes such a trade-off. As the judgment makes clear, workers’ freedom of association implicates the *Charter* values of dignity, liberty, autonomy, equality and democracy — values that go beyond material gain.<sup>50</sup>

#### 4. A BRIEF SUMMARY OF U.S. LAW GOVERNING THE CONSTITUTIONAL RIGHT TO STRIKE

As recounted in *B.C. Health*, Canadian labour law has in the past been heavily influenced by U.S. labour law. This inevitably raises the question whether U.S. law should be influential this time around, if not as a positive example then perhaps as a negative one. Unlike the *Canadian Charter of Rights and Freedoms*, the U.S. Constitution does not mention “freedom of association” in those

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48 Committee on Freedom of Association, *supra*, note 8, at para. 565.

49 *Ibid.*, at paras. 576, 578, 579.

50 *B.C. Health*, *supra*, note 4, at paras. 82, 86, 26; Adams, *supra*, note 15, at pp. 51-52; cf. *Wolff Packing*, *supra*, note 1, at p. 540 (striking down compulsory arbitration system partly on the ground that workers were prohibited from striking).



terms. At various times, courts have recognized a constitutional right to strike under the due process clause of the Fourteenth Amendment, the involuntary servitude clause of the Thirteenth Amendment, and the speech and assembly clauses of the First Amendment, which have been held to support a constitutional right to freedom of association.<sup>51</sup> The second of these theories, which was passionately advocated and implemented by U.S. workers in the first half of the twentieth century, may be of particular interest. Assuming that the Supreme Court of Canada does not locate the right to strike in unions as opposed to workers, this theory might offer further support for the proposition that the right to strike implicates the *Charter* value of liberty, set forth in s. 7.<sup>52</sup> The theory is also noteworthy because it applies to private as well as governmental action.<sup>53</sup>

**(a) The Due Process Cases**

In the 1923 *Wolff Packing* case,<sup>54</sup> the U.S. Supreme Court addressed the constitutionality of a Kansas state law that prohibited strikes in key industries and established an industrial court to resolve the underlying disputes. An employer had challenged an order of the industrial court requiring an increase in wages. The state argued that because no worker was before the Court, the justices could not consider the Act's impact on employees. The Court rejected this argument, reasoning that because the entire statutory scheme hinged on the "joint compulsion" of both employer and employee to obey the industrial court, the impact on both was relevant. The Court specified

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51 U.S. Constitution, Fourteenth Amendment, s. 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Thirteenth Amendment, s. 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"); First Amendment ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

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

53 *The Civil Rights Cases*, 109 U.S. 3, at p. 20 (1883).

54 *Supra*, note 1.

that the strike prohibition was integral to its decision: “We are considering the validity of the Act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine against working and receiving them.”<sup>55</sup> On the latter point, the Court noted that “while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.”<sup>56</sup> Thus, the requirement of continuous production involved “a more drastic exercise of control . . . upon the employee than upon the employer.”<sup>57</sup> Such a requirement could not be forced on either in the absence of “a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.”<sup>58</sup> Accordingly, the wage-fixing provisions violated the right to contract, guaranteed by the due process clause of the Fourteenth Amendment.<sup>59</sup> As Felix Frankfurter, an influential scholar and future Supreme Court justice, observed: “the right to strike, generally, is in the *Wolff Packing Co.* case recognized as a constitutional right.”<sup>60</sup>

In *Dorchy v. Kansas*, decided three years after *Wolff Packing*, the Court cast doubt on the vitality of the right. August Dorchy had been convicted of violating the Kansas industrial court law by calling for a strike of 200 coal miners with the objective of collecting \$187.40 in wages allegedly owed to a former miner for work performed three years earlier. The Court framed the question narrowly, not as “whether the legislature has power to prohibit strikes,” but as “whether the prohibition . . . is unconstitutional as here applied” to a strike that involved a “stale claim” rather than a dispute over wages, hours, working conditions, discipline, or employment of non-union labour.<sup>61</sup> The Court answered this question in the negative, compressing its

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55 *Ibid.*, at p. 541.

56 *Ibid.*, at p. 540.

57 *Ibid.*, at p. 541.

58 *Ibid.*

59 *Ibid.*, at pp. 534, 544.

60 P.B. Kurland, ed., *Felix Frankfurter on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1970), at p. 141 (reprinting Frankfurter’s unsigned editorial in *The New Republic*, June 27, 1923).

61 *Dorchy v. Kansas*, 272 U.S. 306, at pp. 309 and 311 (1926).

entire constitutional explanation into the last sentence of the opinion: “Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.”<sup>62</sup>

As of 1926, then, it appeared that the U.S. Constitution provided some protection for the right to strike out of a concern for the ability of workers to deal “on an equality” with their employers. The right was not, however, “absolute,” and it did not apply to strikes staged for the purpose of collecting a “stale claim.” Furthermore, the cursory treatment of the issue in *Dorchy* did not bode well for the future of the right.

With the onset of the Great Depression in the 1930s, the notion of a due process right to freedom of contract began to fall out of favour. Judges became more responsive to claims that economic regulation could serve the public interest. In 1949, the Supreme Court disapproved *Wolff Packing*’s holding concerning wage-fixing and renounced “the due process philosophy enunciated in the *Adair-Coppage* line of cases.”<sup>63</sup> *Wolff Packing*’s treatment of the right to strike has never, however, been disapproved. It did not partake of the philosophy of *Adair* and *Coppage*, which invalidated legislative protections for union organizing partly on the ground that inequalities between employees and employers were not only “natural,” but “legitimate.”<sup>64</sup> To the contrary, *Wolff Packing*’s concern with equality resonated in New Deal decisions like *NLRB v. Jones & Laughlin Steel Corp.*, which upheld protections for union organizing partly on the ground that the right to organize was “a fundamental right” and that “union was essential to give laborers opportunity to deal on an equality with their employer.”<sup>65</sup> Jurisprudentially, *Wolff Packing*’s treatment of the right to strike belonged not with the due process cases, but with those decided under the involuntary servitude clause of the Thirteenth Amendment.

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62 *Ibid.*

63 *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, at p. 536 n. 6 (1949).

64 *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1, at p. 17 (1915).

65 301 U.S. 1, at p. 33 (1937) (upholding the *National Labor Relations Act of 1935*).

### (b) The Involuntary Servitude Cases

Beginning in the early 1900s, the U.S. labour movement claimed the right to strike under the involuntary servitude clause of the Thirteenth Amendment. The American Federation of Labor maintained that “[e]very human being has under the Thirteenth Amendment . . . the right to associate with other human beings for the protection and advancement of their common interests as workers, and in such association to negotiate through representatives of their own choosing concerning the terms of employment and conditions of labor, and to take concerted action for their own protection in labor disputes.”<sup>66</sup>

Labour leaders argued that the rights to organize and strike flowed from the same reasoning that the U.S. Supreme Court had applied to justify the Thirteenth Amendment right to change employers. In *Bailey v. Alabama*, decided in 1911, the Court had overturned a debt peonage law despite the fact that the plaintiff labourer had voluntarily agreed to satisfy his debt with labour. The Court explained that the Thirteenth Amendment was intended not only to abolish slavery, but also to prohibit “that control by which the personal service of one man is disposed of or coerced for another’s benefit which is the essence of involuntary servitude.”<sup>67</sup> The Court elaborated on this point in *Pollock v. Williams*, another peonage case:

[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.<sup>68</sup>

Under *Bailey* and *Pollock*, the case for the right to strike was simple and straightforward. As explained by one influential legal scholar, “it may be urged with considerable force that in terms of the purposes of the Thirteenth Amendment the strike is the modern

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66 AFL Executive Council, Text of the Anti-Injunction Bill Approved by the Executive Council of the American Federation of Labor, at p. 1 (pamphlet, 1931).

67 219 U.S. 219, at p. 241 (1911).

68 322 U.S. 4, at p. 17 (1944).

counterpart of the right to change employers.”<sup>69</sup> In an economy dominated by large corporations, the individual right to quit was not enough; only by organizing and collectively withholding their labour could workers gain sufficient “power below” to give employers the “incentive above” to avoid a “harsh overlordship.”<sup>70</sup> By 1935, both the U.S. Supreme Court and Congress had endorsed this conclusion in other legal contexts. A single employee without organization was, in the words of the Court, “helpless in dealing with an employer.”<sup>71</sup> Congress repeated the point in the *Norris-LaGuardia Act* of 1932 and the *National Labor Relations Act* of 1935, stressing the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”<sup>72</sup>

A number of lower courts overturned anti-strike injunctions and statutory strike prohibitions on Thirteenth Amendment grounds,<sup>73</sup> and in 1949, Supreme Court Justices Wiley Rutledge and Frank Murphy declared that the question of the Thirteenth Amendment right to strike was “momentous.”<sup>74</sup> But the Supreme Court has never addressed the merits of the claim. It came closest in 1940 in *U.A.W., Local 232 v. Wisconsin Employment Relations Board*, which held that the Thirteenth Amendment did not prohibit a state from outlawing intermittent, unannounced strikes. The Court explained that because the state had not made “it a crime to abandon work individually . . . or collectively,” there had been no “purpose or effect of imposing

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69 A. Cox, “Strikes, Picketing and the Constitution” (1951), 4 Vand. L. Rev. 574, at p. 577.

70 *Ibid.*; Pope, *supra*, note 11, at pp. 1552-1557.

71 *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, at p. 209 (1921); see also *Wolff Packing*, discussed *supra*, text accompanying notes 54-60.

72 *Norris-LaGuardia Anti-Injunction Act* §2, 29 U.S.C. 102 (1994); *National Labor Relations Act* §1, 29 U.S.C. §151 (1994).

73 See, e.g., *United States v. Petrillo*, 68 F.Supp. 845, at p. 849 (N.D. Ill. 1946), reversed on other grounds, 332 U.S. 1 (1947). For more citations, see Pope, *supra*, note 11, at p. 1546 n. 285.

74 *AFL v. American Sash Co.*, *supra*, note 37 (Rutledge J., joined by Murphy J., concurring).

any form of involuntary servitude.”<sup>75</sup> This reasoning implied that workers might enjoy the right to abandon work collectively, but — despite various opportunities to do so — the Court has never addressed that issue on the merits.<sup>76</sup>

Meanwhile, a growing majority of lower courts held that the Thirteenth Amendment does not reach the right to strike, either because strikers cease work collectively instead of individually or because they quit work temporarily instead of permanently.<sup>77</sup> None of the lower court opinions — pro or con — contained any reasoning to explain why the right to strike was or was not necessary to negate a condition of involuntary servitude. The potentially relevant Supreme Court precedents, including *Wolff Packing*, *Bailey* and *Pollock*, were ignored or peremptorily distinguished. In sum, there is ample case law rejecting the Thirteenth Amendment right to strike, but none that addresses the substance of labour’s claim. If, as the Court once declared, “a decision without principled justification would be no judicial act at all,” then the precedential authority of these decisions is open to question.<sup>78</sup>

### (c) The Freedom of Association Cases

Unfortunately for workers and unions, the U.S. Supreme Court did not hold that the U.S. Constitution affirmatively protects the freedom of association until after the principal Thirteenth Amendment cases had been decided.<sup>79</sup> In *Lyng v. Auto Workers*, the Court was confronted with the claim that the freedom of association extended to workers who combined for the purpose of conducting a strike. The case involved a federal statutory provision that denied food stamps to

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75 336 U.S. 245, at pp. 250-251 (1949).

76 S. Kupferberg, “Political Strikes, Labor Law, and Democratic Rights” (1985), 71 Va. L. Rev. 685, at p. 734; Pope, *supra*, note 11, at pp. 1544-1546.

77 For citations, see *ibid.*, at pp. 94-95.

78 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra*, note 20. I have argued elsewhere that the issue should be reopened and resolved. Pope, *supra*, note 11, at pp. 1548-1565.

79 The freedom was implied from the First Amendment in *NAACP v. Alabama*, 357 U.S. 449 (1958).

the families of workers out on strike. The trial court had invalidated the provision, partly on the ground that it infringed the right of the affected strikers to associate with their fellow strikers and union members.<sup>80</sup> The Supreme Court, however, held that the denial of benefits did not “directly and substantially interfere” with the strikers’ freedom of association.<sup>81</sup> The Court characterized the food stamps as a gratuity: “Exercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps.”<sup>82</sup>

**(d) Decisions Concerning the Constitutional Right to Strike in the Public Sector**

It is a crime for employees of the United States government to participate in a strike.<sup>83</sup> In *Postal Clerks v. Blount*, decided in 1971, a three-judge panel of the D.C. federal district court upheld this law against a challenge based on the First Amendment freedom of association. Two judges agreed that “public employees have no constitutional right to strike.”<sup>84</sup> These judges asserted that even private employees enjoyed no right to strike until granted it by the *National Labor Relations Act* of 1935 — a proposition that conflicted not only with *Wolff Packing* but also with the original text of the Act itself, which unambiguously affirmed the pre-existing right to strike.<sup>85</sup> From that erroneous starting-point, the judges went on to conclude “that public employees stand on no stronger footing in this regard

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80 *Auto Workers v. Lyng*, 648 F.Supp. 1234, at p. 1239 (D.D.C. 1986).

81 *Supra*, note 2, at p. 367.

82 *Ibid.*, at p. 368.

83 5 U.S.C. §7311(3) (2006); 18 U.S.C. §1918 (2006); *Schapansky v. Dept. of Transp.*, 735 F.2d 477, at p. 484 (Fed. Cir. 1984).

84 *Postal Clerks v. Blount*, *supra*, note 7.

85 *NLRA*, c. 372, §13, 49 Stat. 457 (1935) (“Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike”). It is true that this pre-*NLRA* right to strike did not include protection against retaliatory discharge, but *Blount* involved a criminal prohibition against the concerted cessation of work — a violation of the right to strike in its most elemental form.

than private employees and that in the absence of a statute, they too do not possess the right to strike.”<sup>86</sup> Given the large number of federal and state decisions approving restrictions on public employee strikes, the two judges asserted that “there is a unanimity of opinion on the part of courts and legislatures that government employees do not have the right to strike.”<sup>87</sup>

This unanimity did not extend to the third judge on the panel, J. Skelly Wright, an influential jurist sitting by designation from the District of Columbia Circuit Court of Appeals. Wright suggested that the right to strike is “intimately related to the right to form labor organizations, a right which . . . is generally thought to be constitutionally protected under the First Amendment — even for public employees.” Given that “the inherent purpose of a labor organization is to bring the workers’ interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose.” Although Wright disclaimed the view that “the right to strike is co-equal with the right to form labor organizations,” he did conclude that it “is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or ‘compelling’ justification.” Under that critical standard, the government’s justification of protecting essential services was questionable: “In our mixed economic system of governmental and private enterprise, the line separating governmental from private functions may depend more on the accidents of history than on substantial differences in kind.”<sup>88</sup> Nevertheless, Wright concurred in the result on the ground that if public employees were to enjoy the right to strike “with all its political and social ramifications,” that determination should be made by the U.S. Supreme Court, “which has the power to reject established jurisprudence and the authority to enforce such a sweeping rule.”<sup>89</sup>

Instead, the U.S. Supreme Court affirmed *Blount* without opinion, and today — nearly four decades later — the federal government and most states continue to ban public employee strikes.<sup>90</sup> On the

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86 *Ibid.*

87 *Ibid.*

88 *Ibid.*, at p. 885 (Wright J., concurring).

89 *Ibid.*, at p. 886.

90 *Supra*, note 7.



other hand, whatever “unanimity” there might have been in 1971 has since collapsed. A number of states have legalized public employee strikes. According to one empirical study, the resulting experience suggests that public employee strikes “do not distort the democratic process as once was feared,” and that “legalizing public employee strikes does not cause an increase in strikes and may encourage more realistic bargaining.”<sup>91</sup> In *County Sanitation District v. Los Angeles County Employees Ass’n*, the Supreme Court of California overturned that state’s common law ban on public employee strikes, partly to avoid constitutional questions.<sup>92</sup> The Court noted “the perception that the right to strike, in the public sector as well as in the private sector, represents a basic civil liberty,” and observed that the “widespread acceptance of that perception leads logically to the conclusion that the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community.”<sup>93</sup> In a concurring opinion, Chief Justice Rose Elizabeth Bird elaborated extensively on the constitutional point and concluded that the strike ban violated the California constitution’s “guarantee of personal liberty, as informed by the ban on involuntary servitude, and the freedoms of association and expression.”<sup>94</sup>

## 5. CONCLUSION

In the light of U.S. experience, *B.C. Health* seems well-suited to support a principled jurisprudence protecting the constitutional right to strike. The judgment is impressive in its forthright admission of past error, its clear stand on the constitutional value of labour association, and its firm grounding in widely accepted international norms. The right to strike appears to serve *Charter* values even more

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91 M.H. Malin, “Public Employees’ Right to Strike: Law and Experience” (1993), 26 U. Mich. J.L. Ref. 313, at pp. 400-401.

92 38 Cal. 3d 564, at pp. 591-592, cert. denied 474 U.S. 995 (1985). The majority opinion, authored by Justice Broussard, set forth a scholarly analysis of each of the major justifications for denying public employees the right to strike. *Ibid.*, at pp. 574-583.

93 *Ibid.*, at pp. 583-584.

94 *Ibid.*, at p. 604 (Bird C.J., concurring).

directly than the collective bargaining right recognized in *B.C. Health*. As critics have warned, implementing the new right will undoubtedly involve difficult choices about when to defer to the legislative and executive branches. It is also true, again as critics have cautioned, that courts are not highly regarded as makers of labour law. Fortunately, however, guidance is available from a substantial body of international decisions that reflect both labour expertise and concerns about deference. What remains to be seen is whether the members of the Supreme Court of Canada will pull together and rise to meet the tests of commitment that inevitably follow a straightforward, courageous and principled decision like *B.C. Health*.