Liberalism, for the most part, has been opposed to unions because they are perceived to be opposed to individualism and detrimental to the free market. This paper will attempt to show how union rights, and more particularly the right to strike, can be accommodated in the liberal philosophy. As a preliminary matter, some principal tenets of liberal theory are examined: ethical individualism; the concept of liberty as negative liberty; the focus on individuals rather than groups as the locus of rights; and a desire to restrain the actions of government. The paper then proceeds to use liberal philosophy to critique decisions of the Supreme Court of Canada denying Charter protection to the right to strike. The right to strike, it is concluded, is more aptly phrased a freedom to strike. As such, government interventions to prevent strikes should be viewed and criticized by liberals as an illicit government intervention in the free market.

Le libéralisme s'oppose aux syndicats parce qu'on les regarde comme s'opposant à l'individualisme et comme nuisant au marché libre. Cet article va essayer de démontrer comment les droits des syndicats, et particulièrement le droit de grève, peuvent s'intégrer dans la philosophie libérale. Pour commencer, l'auteur examine les idées principaux de la théorie libérale: l'individualisme éthique; l'idée de la liberté comme étant la liberté négative; l'idée que les droits appartiennent aux individus et pas aux groupes; et un désir de restreindre les actions des gouvernements. L'article continue en utilisant la théorie libérale pour critiquer les arrêts de la Cour suprême du Canada qui enlève au droit de grève la protection de la Charte. Le droit de grève peut selon l'auteur mieux se caractériser comme étant une liberté de grève. Par conséquent, d'un point de vue libéral, on devrait critiquer les décisions des gouvernements d'interdire les grèves comme constituant une intervention illicite dans le marché libre.

I. INTRODUCTION

The liberals can understand everything but people who don’t understand them.

Lenny Bruce

The place of unions in various political theories has always been one of perplexity. Marx, for example, praised them on the one hand as expediting the condition of workers, and believed anything that helped workers was praiseworthy. On the other hand, he severely criticized them for alleviating only the most obvious and superficial contradictions of bourgeois society, leaving the worker more content with his lot in the capitalist order and less likely to revolt against the more philosophic, and profound, alienation that could not be alleviated by an increase in take-home pay.¹ Socialism, as we shall see, has been caught in this internal debate over the merits of unionism and statism. Liberalism, for the most part, has been opposed to unions because they are perceived to be opposed to individualism and detrimental to the free market. However, more than any other theory, liberalism has the potential for change and growth.

The word “liberal” is often used in common speech to connote someone who is generous or open-minded, such as when it is said “So-and-so is liberal-minded on gay rights” or “So-and-so is liberal with her money.” Politically, the common usage of the word, especially in North America, often implies someone who is “left-of-centre.” These are not the liberals to whom I am referring or addressing. Attempts to partition liberalism philosophically into its various sects are always difficult. Generally speaking there is a divide between the so-called welfare liberals—L.T. Hobhouse, T.H. Greene and John Maynard Keynes—and the classical, or neo-classical liberals—Friedrich Hayek, Robert Nozick and Milton Friedman. What these two groups of liberals share, in the most basic terms, is a belief that the political structure should be based upon the individual, with each individual possessing a maximum amount of liberty. What divides them is more complicated.

Questions about the extent of the state’s role in providing for individual needs, positive versus negative rights and the nature of

¹ For Marx’s views on trade unions, see Part I of the Communist Manifesto and Capital, chapter 6.
equality provoke different answers from each camp. The welfare liberals would allow for a relatively larger role for government in the form of social programmes, support both positive and negative rights, and argue for more than a political formulation of equality. Classical liberals, on the other hand, would minimize the role of government, support negative rights and adhere to a pared-down definition of equality. Classical liberals primarily define liberty in terms of how free individuals are from state interference. Carmichael characterizes the classical liberal view of liberty as "understood primarily in legal institutional terms as the extent to which each individual is free from state control. Thus individual autonomy requires that the state be kept out of the individual's life to the greatest extent possible." Welfare liberals wish to provide the necessities of life to those who cannot provide for themselves. In order to provide these necessities, the state must extend its control and interfere, primarily in the form of increased taxes, with the liberty of others. On the question of equality, classical liberals believe that as long as all the laws apply equally to all, individuals are equal. Welfare liberals are more open to the argument that certain groups within society have been disadvantaged, including women and minorities, and still have an unequal status despite the fact that legalistically all the laws apply to everyone. For the purposes of brevity, I will generally refer to classical liberals simply as liberals.

Over the past few centuries, since the formation of trade guilds, the precursors of unions, the fortunes of unions have waxed and waned. Unions reached their peak in the latter part of the nineteenth century when much pro-union legislation was passed in industrialized nations. The twentieth century has been witness to the pre-Depression height of capitalism, the turbulent years of the Depression, and then the post-Depression growth of unions. In the last decade or so there has been a marked decline in the influence of unions. Margaret Thatcher's victory in Britain in 1979 was largely due to her promise to break the unions, a promise she kept with enthusiasm. Thatcher went on to win subsequent election victories.

In 1980, another victory for the anti-unionist forces came with the election of Ronald Reagan as President of the United States, his re-election in 1984 and the continuation of Republican policies in 1988 under his successor, George Bush. These trends were matched in Canada when the Progressive Conservatives, under the leadership of Mulroney, took office and were re-elected in 1988.

The force behind these election victories was the reemergence of classical liberalism. It is no coincidence that pillars of classical liberalism, including the ideas of F. A. Hayek, regained popularity and influence during this period. The influence of classical liberal ideology can be seen in political platforms and policies, from privatization to supply-side economics. For the most part, the public has actively supported these free-market, government-constricting measures.

Much of the ideology of liberalism is now so instilled in the minds of the public that it would be impossible for it to be completely reversed. For example I believe that the Charter of Rights and Freedoms contributed significantly to the rejection of the Charlottetown Constitutional Accord, although this is a very debatable argument. The proposed amendments to the Constitution that were contained in the Accord were rejected in the 1992 referendum because much of the Charter is of liberal inspiration and, more importantly, the public perception of the Charter is of a document which entrenches their individual equality. What the Charlottetown Accord threatened to do, in the minds of English Canadians, was repeal that equality and bestow upon Quebecers special favour. If the same document had been proposed prior to the Charter, it may very well have passed a referendum. In this way, the Charter has instilled in the public an awareness of their individual rights that cannot be reversed with the comings and goings of the political parties. Regardless of whether my assessment of the failure of the Charlottetown Accord is correct, the point remains that liberal principles are still firmly entrenched in the ideology of the western, industrialized nations.

Many people who endorse the rights of unions have taken the position that liberalism is a complete anathema to the cause of unions. Much of the efforts of union members are directed at defeating liberal theories and substituting them with theories more sympathetic to their cause, usually socialist or watered-down
versions dressed up in individualist garb and labeled "modern liberalism." Over the past decade, these efforts have largely failed.

The purpose of this work is not so much to critique liberalism as it is to recognize liberalism as the dominant political theory of the times. That liberalism is here to stay, however, does not mean that unions must inevitably disintegrate into atomistic fragments. I believe it is possible to incorporate a strong argument for union rights within the liberal ethos. Labour supporters who continue to proffer socialism as their salvation do so at their own expense. Not only is the liberal-minded public unlikely to accept socialism in the foreseeable future, but it is questionable whether this will advance the cause of unions. By working within the liberal framework, unionists can more effectively build a case for their rights.

The task, then, is to show how union rights, particularly the right to strike, can be accommodated within liberalism. Critics may charge that I am tying liberalism to a Procrustean bed, but I believe that many liberals dismiss unions out of hand without giving them enough consideration. The first section of the thesis will lay the philosophical groundwork for the arguments to follow. The relationship between individuals and groups, negative rights, the role of government, and the moral imperative of liberalism will be examined. Then, in the remaining two sections, the practical applications of this theory for the Charter and the judiciary are examined. The most effective avenue for attaining union rights is through the Charter and the Supreme Court. The Supreme Court has already given its decision on the matter and it was not favourable. Much of the Court’s narrow rejection of the right to strike was due to a perception that union rights seemed too far out of line with the liberal spirit of the Charter and the times. The hope is that in applying the principles expounded in the first two chapters to these court decisions it can be shown that union rights are not out of place within a liberal context.

There are several reasons why I believe a Supreme Court decision would be most effective in securing union rights. Although the Supreme Court has already rejected the right to strike, they are able to reverse previous decisions. The alternative to a judicial remedy is to argue for government legislation, and liberals have never been fond of seeking government action. Union rights could be legislated but provincial legislation would be patchwork at best. Some employees are regulated by the federal government but the
Conservatives and Liberals are unlikely to pass such legislation and the New Democrats are unlikely to gain power. Even if wide sweeping legislation were passed, its continued existence would be at the whim of future legislators. Only a Supreme Court decision is likely to have the desired national and long-lasting effects.

The approach will be a gradual one, starting with the most defensible scenarios where unions are needed to correct market deficiencies. Building from this, I will argue that there is a need within the general economy for unions. The most contentious argument will be with regard to public sector employees. The final step will be to look at those employees whose work falls into the category of "essential services." The characterization of services as "essential services" has been used to deny the right to strike to workers ranging from dairy workers to doctors. The argument that will be presented will tie the definition of essential services to the irreplaceability of the service or good being provided.

The first task is to provide an understanding of liberalism. My presentation of liberalism is selective in the sense that I emphasize the aspects of it that relate most directly to unions. In the section that follows, unions will not be mentioned directly. The purpose is not so much to give normative arguments but rather to set the grounds for the argument to follow.

I. LIBERAL PHILOSOPHY

The Stamper mills were in absolute fact, by Jesus, contracted to supply Wakonda Pacific with lumber. No damn wonder old man Jerome or the rest of the WP bunch hadn’t been sweating the month-long walkout. The boys could strike till hell froze shut and it sure wouldn’t be hurting profits. Not as long as Stamper and his scabby kind were cutting for them!

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"Had a lotta logs to cut, Big." [said Hank Stamper]..."Ah, now, Big, don’t be like that...You know how ol’Floyd [the union president] likes to blow things up; I ain’t keeping you out of work. As a matter of fact I hear they’re jumping up and down for men out at WP. I hear there was a bunch of fellows walked out on a strike or something like that, y’know?"..."You don’t say so, Big.
My, but that’s a shame"...."If that’s how you feel about it, Big, ol' buddy, then I'm ready any time you are."

Ken Kesey, *Sometimes a Great Nation*

1. Ethical Individualism

Nozick writes, "Individuals have rights, and there are things no person or group may do to them (without violating their rights)." One implication of this is that "the state may not use its coercive apparatus for the purpose of getting some citizens to aid others." For liberals, this would mean primarily that tax dollars could not be spent on any welfare legislation from university bursaries to social assistance; however, it would also mean that Good Samaritan laws violate individual rights. But it is not only the destitute and needy whom the state assists. The government also uses tax dollars to support such things as the performing arts, the clientele of which is often very wealthy. Any legislation or use of tax dollars that assists citizens in achieving their goals or aims (outside the minimal functions of the state—protection against force, theft, fraud, etc.) is beyond the purview of the state.

Nozick’s position seems austere; yet there are others who go even further than this. There is the example of the little old lady who has fallen on the side of the road and cannot get up, whom I can help with little inconvenience and no benefit to myself. The Nozickian position would prohibit the state from forcing me to render assistance, but would not prevent me from voluntarily helping her. Egoists, however, argue that all human action is guided by self-interest. Hobbes writes, "Of the voluntary acts of every man, the object is always some good to himself," denying that anyone can act out of pure altruism.

What liberals do have in common is a belief that individuals should pursue their own self-interest without the coerced aid of others. Although self-interest may not guide all our conduct, it ought to be our primary motive, especially in economic decisions.

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In other words, I do not help the little, old lady across the road because I hope that someday she will do the same for me, or that she will tip me for helping her; but, when I purchase a new product, I ought to look for the best price and not pay the merchant an especially high price just because I am a nice guy. Likewise, if I offer an exorbitant price, the merchant is under no obligation to set a lower price. Most importantly, the government cannot set the price of the product, enact a law forcing merchants to disclose to all customers the fair price, or use tax dollars to help me purchase the product.

Liberals offer a variety of reasons for disallowing the state from assisting its citizens in achieving their ends. Some believe the state is simply inefficient at allocating resources in this way and that voluntary, free market solutions are more effective. Others believe that when the government assists its citizens, it is placed in the position of moral legislator, a dangerous and wholly inappropriate role for the state. This leaves open the possibility of empirical evidence showing the efficiency of government in these projects, and arguments that the government can legislate a Good Samaritan law without setting up a state religion. Still, liberals would be unconvinced. They argue that coerced assistance destroys the moral value of charity. An act done under force cannot have any worth. When citizens merely hand over their tax dollars to be disposed of as the government sees fit, they are being treated as a means to someone else’s ends. And, as Kant wrote, you must always “act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” The choice of whom to help is being taken away from the individual. Each individual is their own best judge of which cause needs assistance and only when they voluntarily support that cause with their own funds, and not because the greater community tells them to, is that action morally worthy.

5 Unless, of course, she wishes my repeat business and fears I will discover my error. In which case, it would be in her self-interest to tell me.

2. Freedoms and Rights

This is closely related to the liberal conception of freedom. For the liberal, freedom is primarily negative in the sense that it is a right of non-interference. Hobbes defined freedom as "the absence of opposition; by opposition, I mean external impediments of motion." Individuals have the right to do whatever it is they wish to do so long as it does not infringe upon the liberty of others. The individual cannot be coerced into doing anything she does not wish to do, nor can she be prevented from anything that does not interfere with others. Isaiah Berlin aptly defines this notion of negative liberty when he writes, "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others." Coercion, then, "implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by other human beings."

This is the only type of liberty a liberal will uphold. In contrast to this negative conception, many have argued for a positive formulation of freedom. I have the freedom from interference with my life, meaning that no one is allowed to murder me but I do not have a right to life in the sense that if I do not have the sustenance to maintain my life, I do not have the right to appropriate someone else's food. Under negative liberty, I am prohibited from killing the starving man, but I am not obliged to provide him with food. This ties in with the moral responsibility inherent within individualism because the onus is upon the individual to provide for him or herself. Most liberals would allow me to voluntarily feed the starving man, but he could never have a

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7 Leviathan, supra note 4 at 159.
9 Ibid.
11 Rousseau, for example, believed there was a natural inclination to help those in trouble, especially those who are similar to us. See The Social Contract (New York: Washington Square Press, 1967).
right-claim to my food. Some liberals, however, follow a more Spencerian line and would argue that in allowing only the economically fit to survive, this would provide for the progress of civilization. Spencer writes:

Pervading all nature we may see at work a stern discipline, which is a little cruel so that it may be very kind ... The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle ... are the decrees of a large, far-seeing benevolence ... It seems hard that widows and orphans should be left to struggle for life and death. Nevertheless, when regarded not separately, but in connection with the interests of universal humanity, these harsh fatalities are seen to be full of the highest beneficence the same beneficence which brings to early graves the children of diseased parents, and singles out the low-spirited, the intemperate, and the debilitated as the victims of an epidemic.\(^{12}\)

Aside from this extreme view, most liberals argue that the free market will in fact decrease poverty and for those who are still unable to provide for themselves, such as the sick and handicapped for example, voluntary acts of charity will be more effective than coercive government action. It should be noted that liberals will uphold this view of freedom even in the face of dire consequences.

There is a caveat to my presentation of liberalism that should be discussed. Singer gives a convincing argument that there is no significant, relevant difference between acts and omissions.\(^{13}\) The argument is that if I fail to wade into a pool to save a drowning child, then I am equally responsible for the death by my omission as I am if I had acted to push the child into the pool. The distinction is an important one because it highlights two distinct factions among adherents of classical liberalism. Some liberals defend liberty on utilitarian grounds, arguing that the more freedom a society enjoys, the better off that society is. Rule


\(^{13}\) Peter Singer, *Practical Ethics*, (Cambridge: Cambridge University Press, 1979) at chap. 7.
utilitarians, such as Hayek, might defend a rule that would compel a person to help the drowning child. For these liberals, the rule “Always help drowning children out of pools,” might be shown to maximize utility and thus would be a justifiable rule. On the other hand, there is a school of liberalism which adopts a strict natural rights approach and argues that liberty is an intrinsic good not dependent on its utilitarian value. The natural rights liberals would argue that the individual should never be coerced to render assistance to anyone. Those who take the natural rights approach argue that if liberty is extrinsic to some other primary good, happiness for example, then it leaves the way open for some serious limitations to personal liberty. Only when liberty is taken as the primary good, with all other goods extrinsic to it, is freedom secured.

There is also a debate within liberalism over what constitutes coercion. If I own the only oasis in the desert, or am the only doctor in town, would I be using coercion if I charged an unreasonable price for the water or my services as a doctor? Hayek believes this is coercive while Rothbard asserts that it is not. Other liberals get around these difficulties by appealing to the Lockean proviso. Locke defends property rights by saying that “whatsoever then he removes from the state that nature has provided and left it in, he has mixed his labour with, and joined to it something which is his, and thereby makes it his property,” but then qualifies this by saying “at least where there is enough and as good left in common for others.” This proviso by Locke avoids the difficulties of the

14 Hayek’s argument is much more complicated than I present here. He does argue that liberty can also be defended on moral grounds and he is not a strict utilitarian.

15 See e.g. Murray Rothbard, The Ethics of Liberty, (Atlantic Highlands: Humanities Press, 1982).

16 Another way of framing the distinction is to say that some liberals are deontological liberals while others are teleological liberals; but, this language does not quite get at the distinction I wish to make here.


oasis-like scenarios by providing that a person cannot monopolize a
necessary resource. Nozick agrees with the Lockean proviso in so far as "A theory of appropriation incorporating the Lockean proviso
will handle correctly the cases (objections to the theory lacking the
proviso) where someone appropriates the total supply of something
necessary for life;"20 but, he also believes "that the free operation of
the market system will not actually run afoul of the Lockean
proviso. . . . If this is correct, the proviso will not play a very
important role in the activities of protective agencies and will not
provide a significant opportunity for future state activity."21

All this being said, liberals adhere to a fairly strict conception of
negative, individual rights. Individuals set about the task of
achieving their goals, whether it is obtaining a university degree or
mere survival, with only themselves and their own wares to rely
upon. They have no claims to the property or to the assistance of
their fellow citizens. Most important is the very restrictive role this
allows for the government. The state is limited to preventing others
from interfering with my autonomy as I go about achieving my
ends and can do little to aid me in achieving these ends. Most
often, the liberal’s freedom from is freedom from government
interference.

But many of my goals simply cannot be achieved in isolation
from others. Does the liberal conception of individualism compel
me to strive only for those ends that can be accomplished by me
alone? Indeed, if liberalism meant this, it would be a very unpopular
and ineffective theory. The role groups play in liberal theory and
the ends that may be accomplished through them is the next step in
understanding liberalism.

3. Individuals v. Groups

Because individualism is one of its key components, liberalism has
often been viewed as opposed to groups. The romantic notion of
liberalism is of the strong individual, breaking away from the group
and going it on his own. The image is of John Galt walking out of
the factory,22 or Hank Stamper floating down the turbulent river on

20 Anarchy, State and Utopia, supra note 3 at 178-179.
21 Ibid. at 182.
Aside from the romanticism, nothing could be further from the truth. Liberals are no more opposed to group activities than they are opposed to playing baseball. Liberals recognize that people will associate with others of similar interests and beliefs in every form of organization from bird watching groups to churches. Liberals acknowledge that many individual goals, from sports to building a house, are best achieved through group activity.

In fact, there is much about liberal philosophy that necessitates associations. In the realm of economics, for example, the notion of specialized labour, first introduced by Adam Smith, means that individuals who previously produced a product from start to finish can form an organization, a business, specialize in one aspect of the production process and produce the product more efficiently. In Smith's pin manufacturing example, the organization of pin-makers into a factory means, "Each person... might be considered as making four thousand eight hundred pins in a day. But if they had all wrought separately and independently... they would certainly not each of them have made twenty, perhaps not one pin in a day." And, in the realm of politics, liberalism was born out of an acute awareness of the coercive powers of the state. Liberals recognized that the state's best tactic in putting down protests and revolts is to prevent its citizens from presenting a united front. As such, freedom of association has always been one of the fundamental tenets of a liberal constitution.

What, then, does the liberal mean by individualism? Historically, liberalism came about as a reaction against class privilege. Locke's *First Treatise of Government* was directed towards Sir Robert Filmer's *Patriarcha*, which argued for the divine right of kings. The *Second Treatise on Government* was directed at the consensual argument for absolute monarchy presented, for example, in Hobbes' *Leviathan*. Locke's state of nature was one of "equality, all the power and jurisdiction was reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank... should also be equal

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one amongst another without subordination or subjection."

In contrast, in Europe at the time, an individual’s rights and privileges were determined at birth. Nearly a hundred years later, another progenitor of liberalism, Rousseau, wrote, “Man is born free, yet everywhere he is in chains. Many a one believes himself the master of others, and yet he is a greater slave than they.”

The notion that some are naturally more able to govern than others was to be challenged by the liberal argument for individual equality. These arguments were based on man’s natural ability to reason. Rationality was the one trait perceived to be common to all men (and later, women). What this individualism meant was that because no group within society possesses more of this reasoning capacity than another, no special group can be singled out as the natural rulers. The legal structure was to change so that the law applied to all equally, with rights granted to everyone and not the few.

It is this formulation of individualism that leads to the mistaken belief that liberals are opposed to groups. A modern example would be liberal opposition to affirmative action programmes. Arguments about the merits of affirmative action aside, liberals oppose these measures because they bring about a hierarchical structure within society, setting up one group of citizens for favoured treatment. This is exactly the situation liberals argued against in pre-industrial Europe. What liberals do say about groups is that no one particular group should receive special privilege.

So, liberals would be opposed to women as a group receiving any preferential status, but would they necessarily be opposed to women’s organizations? For example, if a group of women formed an organization to lobby various hospitals, businesses and universities to spend more money in research on breast cancer, there would be nothing unacceptable about this to liberals. Liberals would acknowledge that if one woman tried to influence these institutions, she might have little effect, while a group of women who have pooled resources and talents might have a considerable effect.

The line would be drawn if the women’s group went to the government and argued that they needed to be exempt from laws

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against blackmail so that they may be better able to influence these institutions. The women's groups may organize as many women as possible, hold all the peaceful protests they can, make as many public speeches as possible, and even publicly announce that they will boycott a company's products unless they spend more money on breast cancer research; but, what they cannot do is have the laws apply unequally to them.

A group then, is empowered with all the rights and privileges of an individual, but nothing more. An individual is allowed to protest, make speeches and purchase whatever products she wishes for whatever reasons. However, an individual is not permitted to blackmail anyone to further her aims. All this is not to say that a group may not have more power or effect than an individual. An individual could write to a company's president saying she will boycott their products until they do more breast cancer research and this would have no effect. If, however, the same company president received a petition with the signatures of thousands of women all promising to boycott the company's products, she might reconsider her R & D budget. One person (outside of the famous) can generate little publicity, while an association can not only generate more interest on the part of the media, but can pool its resources in order to afford a potent advertising campaign.

If the organization did all this, and aimed its campaign at one major firm, it might cripple the company, even put it out of business. Yet, the liberal would have no grounds to rebuke the women's organization. As long as none of the group's activities was libelous or coercive, then the group was simply exercising its rights as individuals collectively. If the criteria for legislating against an organization, or its methods, are that the group is more effective than the individual, then liberals may just as well reprove baseball.

In Hobbes' discussion of equality, he wrote that "the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others." In confederacy with others, Hobbes tells us, individuals in the state of nature can transgress against a stronger foe. Hobbes' negative formulation leaves open the possibility of individuals acting in confederacy to protect themselves against a more powerful foe. Individuals may attempt to defend themselves, or enforce their rights against 27

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27 Leviathan, supra note 4 at 98.
transgressors, but this will only be possible with a weaker adversary or an unusually co-operative transgressor. As Nozick points out in his discussion of the state of nature, the solution to this dilemma is that:

Others may join with him in his defense, at his call. They may join with him to repulse an attacker or to go off after an aggressor. Groups of individuals may form mutual-protection associations: all will answer the call of any member for defense or for the enforcement of his rights. In union there is strength.28

The underlying recognition here is that there are power differentials in any society, even one that espouses liberal equality, and that sometimes associations are needed to correct injustices where the stronger take advantage of the less powerful.

There is very little discussion within the liberal tradition about power. Still, liberals are apt to support an association of individuals in their struggle against a superior force who has committed an injustice against them. Indeed, this is precisely the situation that gave birth to liberalism: the burgeoning petit bourgeois’ struggle against the entrenched aristocracy. Liberals were to take up the cause of various disenfranchised groups as the history of the suffrage movement in Britain demonstrates. With the support of the Whig Party, the inheritors of the liberal tradition of the Revolution of 1688, the bourgeois won the vote with the passage of the Reform Bill of 1832. The Six Points of the People’s Charter was introduced in Parliament in 1848, challenging bourgeois suffrage by demanding that workers also be given the vote. This Chartist movement did not achieve success until Disraeli sponsored the Reform Bill of 1867 giving the vote to industrial workers. And, in 1884, Gladstone, the preeminent liberal advocate of his day, sponsored his own Reform Bill enfranchising agricultural workers, virtually completing manhood suffrage. The final step in the suffrage movement came with the Reform Bill of 1918 (amended in 1928) which extended suffrage to women. In each of these reforms, groups organized themselves, lobbied and fought for suffrage with the succour of liberals. In short, as long as an association is attempting to overcome an inequality, liberals will

28 Anarchy, State and Utopia, supra note 3 at 12.
support it. However, if an association is seeking to disrupt a present equality, like the minorities’ and women’s groups which urge affirmative action programmes, liberals will disavow the association.

The difference between the suffrage issue and affirmative action proposals is that to have a group excluded from voting was to have the rules applied unequally while affirmative action programmes seek to have the rules applied unequally to different sexes and races. Liberals agree that certain groups were treated unequally in the past, but through reform the laws were amended to include the disenfranchised groups and any further measures to adjust the balance, such as affirmative action, cannot be supported. While welfare liberals are open to a less formalistic definition of equality, classical liberals believe that a legal equality is all that can be defended.

4. The Role of Government

Another example of liberals endorsing actions that overcome an inequality is their support for anti-trust laws. If Company A is abusing its monopoly position in the market for a particular good by charging an above-market price for its product, the government is sanctioned to intervene. Not only is the state to ensure that all enjoy equal liberty, but it is charged with the responsibility of overseeing the smooth operation of the free market.

Of course, there is a fine line between intruding on the free market and ensuring its smooth running. Most liberals are of the opinion that the state already intervenes far too often in the free market and they would be reluctant to call for any further intervention. Despite this, liberals generally recognize as legitimate several functions the government can and should perform in a laissez-faire economy. For example, the state should prevent industrial espionage and sabotage. If a company is stealing secrets from its competitors or using coercive tactics, the government is the appropriate agency to rectify this. Also, the state, in its role as the only legitimate bearer of coercive power, should enforce all legally binding contracts. The state may also oversee the registry and protection of patents and copyrights. Hayek, for example, has argued that current patent law, which gives the patentor exclusive rights to a patented product for a specified time, should be
changed so that anyone may use the knowledge of a patent but must pay the patentor a royalty. 29 And finally, as mentioned, the government should attempt to correct any obvious abuses of the free market by a company that has gained a monopolistic position.

This last example is perhaps the most contentious. Some more naive liberals are convinced that a laissez faire economy will never lead to monopoly situations and therefore there would never be a need for government interference. Other, more realistic liberal economists recognize the possibility of monopolies and the government’s role in preserving the free market. However, even these liberals put strict limitations on what the state can do. Firstly, the interference must be as non-intrusive as possible. If, for example, Company A gained its dominant position because of advances in productive technology, the government may lift the patent on the technology (and have competitors pay Company A a royalty, as Hayek suggests) rather than legislating price control measures. And the government should only intervene if there is no free market solution to the situation. If, for example, Company A dominates because of a tariff on its foreign competitors’ products, the government should lift the tariff.

Liberals also claim that there are several areas of the economy in which the government should not be involved. For example, minimum wage legislation has been contested by many liberals as an encroachment upon the market order that skews the price of labour and results in unemployment. 30 Other examples include legislation regulating maximum work hours, safety conditions, holidays and vacations, overtime, hours of operation, health insurance and affirmative action hiring. Businesses and workers, argue liberals, should be free to negotiate these things for themselves. In the ideal liberal economy, companies would compete for workers and would have to offer competitive wages, work hours, safety conditions, etc., in order to attract the most productive workers. At the same time, they would have to try to keep these


30 There are many liberal arguments against minimum wage legislation. The text I will be using extensively is Henry Hazlitt, Economics in One Lesson, (New York: Arlington House, 1979).
costs as low as possible in order for their own product to be competitively priced.

The moral imperative of liberalism compels individuals to accomplish the goals they set out for themselves with a minimum of assistance from the state and as little coerced help as possible. This dictate provides liberals with the basis for their negative formulation of liberty. However, liberals do not advocate that individuals accomplish all tasks alone without ever participating in group activities. It is recognized that associations are an effective means of attaining many goals. The role of the government is to ensure liberty and equality for individuals. Some liberals would also concede that part of that role involves the state in the free market. The concept of the free market is an inextricable aspect of liberalism, and an explanation of exactly how the state is to act in the free market is the next step in understanding liberalism.

III. LIBERAL THEORY IN PRACTICE: FREEDOM OF ASSOCIATION

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

Alexis de Tocqueville

1. Introduction

A full legal argument for deriving constitutional protection for the right to strike from the freedom of association would be too cumbersome in the context of this work. The aim in this section is much more modest. I would like to provide the basis for a liberal critique of the Supreme Court of Canada’s decisions in this

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The union representatives who presented their cases before the various provincial courts and eventually the Supreme Court argued variously that the right to strike was essential to the purposes of unions, that unions are a fundamental characteristic of our culture, that the governments involved acted arbitrarily in singling out unions and that for all these reasons the right to strike should be constitutionally protected under the freedom of association. The important question for liberals, however, is to what extent the government should be allowed to interfere with the freedom of association. As far as possible, I would like to concentrate on the freedom of association and leave the right to strike to the next section.

2. American Jurisprudence

Before turning to the Canadian court decisions, it is interesting to study the American jurisprudence on the topic of freedom of association and the right to strike. As Dickson C.J.C. noted, there are two key differences between the American freedom of association and the Canadian version: first, the American freedom of association is a derivative of the First Amendment's freedom of speech and the freedom to petition. The first thing to note here is a precedent for deriving one right from another. It is freedom of association that is derived from other freedoms and not the right to strike from freedom of association. However, the point remains that to the American judiciary, it is not foreign to derive a secondary right from a primary one in order to make the primary right meaningful. The second difference is that there is no equivalent in the American Constitution to s. 1 of the Charter. That is to say, there is no opening for an American court to affirm a right to strike and then recognize a reasonable limit on this right in accordance with the requirements of a free and democratic society.


33 Reference Re Public Service Employee Relations Act, ibid. at 181-183.

How would one expect the American judicial system to respond to cases involving the abrogation of union strikes? It would be fair to say that the expectation would be very low as far as the unions are concerned. Given that there is no direct reference to the freedom of association in the American constitution but that it is a derivative of another fundamental freedom it would seem unlikely that the courts would be willing to derive a further right from this right. A derivative from a derivative is not the most solid ground to build a case on. Also, given that there is no constitutional means for the court to balance this freedom, any framing of such a right would be watery and minimal at best.

Given the tremendous odds against American unions achieving a right to strike relative to their Canadian counterparts it comes as somewhat of a surprise to find that there have been several favourable decisions for unions in protecting the means to obtain their ends within American jurisprudence. As expected, the protection of union activities is limited. For example, the right to strike is limited to the private sector. Further, the United States Supreme Court writes, "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for the lawful purposes of collective bargaining." These restrictions on the right to strike in American jurisprudence are likely a result of having no recourse to limitations on fundamental freedoms for reasonable purposes such as is afforded by s. 1 of the Charter. The important points to be ascertained from the American example are that there is a greater scope given to the idea that fundamental freedoms are not to be interpreted narrowly and that there is a willingness to derive secondary rights in order to give meaning to the primary, stated rights. The decisions of the American courts, given all the factors which differentiate our systems, can be illuminating when considering the cases that have arisen in Canada.

3. The Supreme Court of Canada and the Charter

If the right to strike is suppressed, or seriously limited, the trade union movement becomes nothing more than one institution among many in the service of capitalism: a

convenient organization for disciplining the workers, occupying their leisure time, and ensuring their profitability for business.36

If Trudeau still had this youthful idealism when he formulated the Charter of Rights and Freedoms, perhaps trade unions would not now be in such a constitutional bind. Of course, the Charter does not contain an explicit recognition of the right to strike, but what the Charter does guarantee as a fundamental freedom is association in s. 2(d). This left the way open for a number of battles in the provincial courts involving unions and what they perceived as the abrogation of their freedom of association. These separate cases reached the Supreme Court of Canada in April 1987 when the Court gave its concurrent decision on three cases involving union rights. The Public Service Alliance of Canada (PSAC), the union representing almost all federal employees, brought an action against the federal government as a result of the Public Sector Compensation Restraint Act 37 which the Trudeau government instituted in order to deal with the high rates of inflation experienced in the early eighties. The inflation rate reached 12.9% in June and July of 1981. Essentially the Act limited wage increases in the federal public sector to six percent in the first year and five percent in the second year. PSAC challenged the legislation first in the Federal Court, Trial Division with Reed J. in 1984 and then in the Supreme Court of Canada with Dickson, C.J.C., Beetz, McIntyre, Wilson, Le Dain and La Forest JJ. in 1987. This same panel heard an Alberta reference on its own Public Service Employee Relations Act which followed the federal initiative on inflation.38 The final case dealt with the Saskatchewan Legislature's Dairy Workers (Maintenance of Operation) Act, 1983-84, which it invoked in response to the threat of a strike by dairy workers and a lockout by dairies.39 Among other things, the Act prohibited strikes and lockouts for a certain period of time.

Each case framed the question slightly differently, but essentially what the Supreme Court was asked to decide was

whether or not the right to strike and to bargain collectively is contained within s. 2(d) of the Charter. In some instances this is given and leads a s. 1 analysis. The appellants also claimed that the Restraint Act violated the “equality before the law” provision, s. 1(b), of the Canadian Bill of Rights.

One of the arguments put forward by the justices is that if the right to strike was derived from the freedom of association it would necessarily sanction all other objectives of all other groups. The freedom of association, they argued, only guarantees the freedom to join together in an organization and does not sanction the objects of that organization. Under this interpretation of the freedom of association, a bird watching group can hold meetings, pay dues and discuss its favourite birds. But as soon as the group goes out to watch some birds, the government can step in and prohibit that action, leaving no recourse to the Charter. Le Dain J. expresses this concern when he wrote:

> It is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activities by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union...that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence. 40

Le Dain J. seems worried that if the Court agrees that the right to strike is vital to making union association meaningful, other organizations would argue that the objects of their organization must receive constitutional protection because otherwise their associations would be meaningless. The bird watchers group, for example, when faced with the Bird Watchers Restraint Act, could take the government to court and demand that they be allowed to bird watch because otherwise their association is meaningless.

The first reaction of any liberal to this argument would be to question the role of the government in preventing its citizens from participating in any activity regardless of whether the activity is

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40 Re Public Service Employee Relations Act, supra note 32 at 239.
done by groups or individuals. So long as the group is not infringing or interfering with the liberty of other citizens, the activities of that association should not be banned by the government. Unless the bird watchers are breaking into my house to observe my pet parakeet, the government cannot be allowed to prohibit their activity and is obliged to allow them the greatest possible scope of freedom in the pursuit of this end.

A more germane example would be an association formed to criticize government policy in a specified field, trade relations for example. The objective of this organization would be to generate as much public opposition to the government’s policy as possible. Under the Supreme Court’s restrictions on the freedom of association, the lobby group would be allowed to form but the state is permitted to restrict their lobbying efforts despite the fact that this is the sole objective of the association and without such powers it is useless.41

Still, critics will argue that associations should not be given special protection just because they are associations. Peter Gall presented the argument when he wrote:

One of our levels of government may decide to ban the ownership of guns. This would not infringe any individual right under the Charter. But if some individuals have combined to form a gun club, does the Charter’s protection of freedom of association mean that the principal activity of the gun club, namely the ownership and use of guns, is constitutionally protected? One is quickly forced to the conclusion that it does not. The Charter does not protect the right to bear arms, regardless of whether the activity is carried out by an individual or by an association. The mere fact that it is the principal activity of the gun club does not give it a constitutional status.42

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41 Of course, bird watching and government lobbying do not involve any third parties. Third parties are often drawn into labour disputes unwillingly. For example, when firefighters go on strike against the city, home owners are caught in the middle. These examples will be discussed at length in the next section.

Aside from the merits of gun control, the analogy between banning guns and banning strikes is difficult to sustain. The key difference between a government initiative to limit the ownership of guns and anti-union legislation is that the gun laws are directed towards individuals while the latter is directed at an association, namely a particular union. Recall that the liberal asserts that what applies to the individual must also apply to the association. While the liberals would have problems with gun control legislation in itself, they could not allow the group to have a constitutional protection not afforded the individual. However, what the anti-union legislation does is single out an association just because it is an association. If Gall were to draw a more apt analogy it would have to be that the government permitted gun ownership and use by individuals but forbade the ownership and use of guns for gun clubs, or even more appropriately, for a specific gun club. Alternatively, the government would have to ban all individuals from ceasing work for the purpose of negotiating a better contract with their employers. If the law was logically consistent, it would then apply to unions. However, in practice this is not what anti-strike legislation does. It not only singles out associations for special restrictions but it most often singles out a specific association.

It is not a matter of advocating that a group formed for the purpose of promoting statism be allowed to murder any and all anarchists they wish. The proposal is not that in the formation of an association the group has ultimate protection for whatever unlawful purposes the group was formed. Rather, the position should be that if the activity is unlawful for all individuals, it would be unlawful for associations as well. Galligan J. of the Divisional Court of the Ontario High Court of Justice made this point when he wrote, “But I think that freedom of association if it is to be meaningful must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law.” The government may not prohibit bird-watching groups from bird watching because bird watching is not prohibited by law. The government may prohibit the slaughter of anarchists by socialist

groups because murder is against the law. Regardless of how large or organized an association the socialists form, they can never be given the right to murder.

While the Supreme Court dwells on what actions may be sanctioned in giving the freedom of association a broad interpretation, for the liberal, there is a more realistic concern in having a court that gives strict, semantic interpretations to rights and freedoms. If these rights and freedoms are interpreted narrowly, the government is given greater leeway in what actions it may and may not permit. The concern should rather be: What groups' actions may the state legislate against under such a meaningless Charter? The Supreme Court seems overly concerned with possible scenarios where the government would be overly restricted, and has neglected to consider the more plausible scenarios where individual liberty could be curbed because of a constricted interpretation of the freedoms guaranteed in the Charter.

McIntyre J.'s decisions on the three simultaneous cases should be given particular attention as he was the dominant voice for the majority decision. It would be a little misleading to say he wrote the majority decision. In fact, McIntyre J. wrote separate decisions to which Le Dain J. assented for the most part. But he wrote his own short decisions in which Beetz J. concurred. Dickson C.J.C. and Wilson J. were the two dissenters on the Court and they both wrote their own opinions.

McIntyre J. set out six possible interpretations of freedom of association: The first asserts that the freedom of association is “no more than freedom to enter into consensual agreements to promote the common interest objects of the associating group”44 but does not protect any of the objects of those associations. The second protects those objects of associations that are already protected in the constitution. For example, a religious group's associative activities would receive judicial protection because freedom of worship is in the Constitution, but bird watching would receive no protection. McIntyre J.'s preferred interpretation is the third on his list which provides that “an individual is entitled to do in concert what he is entitled to do alone and, conversely, that individuals and

organizations have no right to do in concert what is unlawful when done individually. 45 This is the definition offered here for the liberal interpretation of the freedom of association, although we shall see how McIntyre J. skews it. The fourth interpretation protects the objects of association when those objects are fundamental to our culture. This view was offered by Kerans J.A. when he wrote:

In my view the freedom [of association] includes the freedom to associate 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. 46

The fifth interpretation would afford constitutional protection for all those lawful objects of associations that are essential to their purposes. McIntyre J. attributes this position to Smith J. of the Ontario Divisional Court when Smith J. wrote, “The freedom of association carries with it the freedom to meet to pursue the lawful objects and activities essential to the association’s purposes.” 47 Finally, the sixth position is the most permissive in that it protects any and all associational activities subject only to s. 1 of the Charter.

McIntyre J. does not advocate either of the polar extremes. The most restrictive definition is rejected as overly narrow and having too little force and effect. The last three definitions, the more permissive ones, are rejected because, as he writes, “People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess.” 48 McIntyre J. echoes here the point made earlier that groups cannot receive any elevated status at law. On this liberal point, it is agreed that the freedom of association is, in fact, an individual right and not a group right. As T.I. Emerson wrote, “Association is an extension of individual freedom. It is a method

45 Re Public Service Employee Relations Act, supra note 32 at 222.
47 Broadway Manor, supra note 43 at 302.
48 Re Public Service Employee Relations Act, supra note 32 at 220.
of making more effective, of giving greater depth and scope to the individual's needs, aspirations and liberties.”

It may seem odd to say that the freedom of association is an individual right. After all, does it not, by its very name: apply to groups and not individuals? The distinction being made here is between “extending individual freedom” or “enlarging personal freedom,” and being granted a right due solely to one's membership in an association. McIntyre J. cites s. 93 of the Constitution Act 1867 and s. 25 of the Charter as the only two examples of “group” rights in the Canadian constitution. Taking s. 25 as an example, this right is given specifically and explicitly because of group interests, that is to say, the collective nature of aboriginal rights. The purpose of the section is precisely to give the collectivity precedence over the individual. In a thoroughly liberal society, of course, this would never be the case. The point here, however, is simply that just because the freedom of association applies to groups in a general way does not imply that it means to set up all associations for this sort of privilege. And this is what is meant when it is said that the freedom of association is an individual right.

Of course, every association is composed of individuals. The raison d'être of any association is that it gives a greater security of purpose than individual action. That is, it enhances the chances of achieving one's individual goals. This is exactly the case of the trade union. The individual's chances of achieving greater job security, pay, benefits, safer work conditions, etc., are enhanced through an association with fellow employees. First and foremost the trade union is concerned with advancing the conditions of the individuals within the group.


50 See: Clyde Summers, “Freedom of Association and Compulsory Unionism in Sweden and the United States” (1964) 112 U. Penn. L.R. at 647, where he writes, “Freedom of association is an individual right vested in the individual to enable him to enlarge his personal freedom.”

51 Although there are more. Dickson C.J.C. also sites s. 133 of the Constitution Act 1867 along with ss. 16-24, 27 and 29 of the Charter which, "implicitly embody an awareness of the importance of various collectives,” Re Public Service Employee Relations Act, supra note 32 at 196.
McIntyre J.’s first premise is that the freedom of association is an individual right; his second, that the group cannot have a right the individual does not have. The liberal cannot dispute these premises. His conclusion that freedom of association does not entail the right to strike requires a third premise: the individual does not have the right to strike. McIntyre J. supplies this premise when he quotes Dickson C.J.C. in the same case, “There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work.” The syllogism will only work if this major premise is true. The argument hinges on whether or not the individual has the right to strike. In opting for the third of his own definitions of the freedom of association, he is committed to defending any group rights that the members of that group enjoy individually.

McIntyre J. believes individuals cannot lawfully refuse to work for two reasons:

First, it is not correct to say that it is lawful for an individual employee to cease work during the currency of his contract of employment... The second reason is simply that there is no analogy whatever between the cessation of work by a single employee and a strike conducted in a accordance with modern labour legislation... An employee who ceases work does not contemplate a return to work, while employees on strike always contemplate a return to work.

The first objection can easily be dealt with by saying that no one is advocating that employees be given the right to strike at any point during their contract of employment. Normally, a union will only strike at the end of its contract and then only as a last resort after protracted negotiations have failed. As mentioned earlier, there is the long-term contract between employer and employees with specific intervals set up for the renegotiation of the particulars. If a union ceased work outside of these renegotiation intervals, then there is no difficulty in allowing the government to step in and enforce the contractual obligation the union has broken.

McIntyre J.’s second point is more complex. It is not clear in what sense there is “no analogy” between an individual ceasing work

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52 Ibid. at 198.  
53 Ibid. at 229-30.
and a union going on strike. He clarifies by saying that the individual never contemplates a return to work while the union does. Yet, this is far from the case. There are many examples and possible scenarios where an individual may cease work with the full intention of returning. The star athlete may cease playing at the end of his interim contract and begin to negotiate a new salary. Just as the union may argue that an increase in its workers’ productivity has increased its employers profits, the athlete may argue that his enhanced skills have improved the team’s winning record (and thus the team’s profitability) and he will demand a higher salary.

Another example is when Harrison Ford signs with Paramount Studios for three movies. After the first movie is a blockbuster, Ford will renegotiate his salary for the second picture. He is not ceasing work in the middle of a movie’s production so he is not refusing to work during the currency of his contract. However, he is refusing to work until his benefits are renegotiated—in other words, he is striking.

A hypothetical example may be if Company A decided to hire a famous television star as its spokesperson for a number of its products but is wary and wants to gauge the public’s reaction to her so they settle on a wage package for the first product endorsement and agree to renegotiate for the next. The spokesperson may make very high salary demands if the first product sells very well.54

All these examples, it may be argued, apply to famous or exceptional people and have nothing to do with the everyday world of blue-collar workers. Perhaps this is what McIntyre J. had in mind, that there is no analogy of individual strikes amongst blue collar workers. Indeed, if the factory worker went to her employer and said, “I want a 10% pay increase and I refuse to work until I get it," the employer would be less than receptive. If this is what McIntyre J. meant then he is arguing that there is no analogy because the individual is far less effective than the association. If this is the case, recall our example of the consumers’ group lobbying the pharmaceutical company for additional funding into breast cancer

54 If one puts one’s mind to it, there are innumerable examples of individual strikes: writers who have signed with a publishing house for a three book contract and the professor who signs a two year contract at the end of which she is up for tenure and during the course of which she discovers a cure for cancer may want more than a larger office from her contract. The examples go on and on.
research. The point of that scenario was that associations cannot be legislated against simply because they are more effective. To argue this would render pointless the whole purpose of associations as the only reason one joins an association is because it is a more effective way of achieving one's ends.

When the government singles out a union for back-to-work legislation, the effect is to isolate the individuals and deny them the effectiveness that is secured through the association. It is odd that little is said when the government orders a group of workers back to work but if the government were to order a single person to resume work, an athlete or spokesperson, it would be an outrage. While no association should receive constitutional protection simply because it is an association, if the freedom of association means anything, surely it means that no association can be singled out merely because it is an association.

IV. LIBERAL THEORY IN PRACTICE: THE FREEDOM TO STRIKE

"Ever been in a strike?" Willie asked.

"No."

"Well, I been a-thinkin' a lot. Why don' them depities get in here an' raise hell like ever' place else? Think that little guy in the office is a-stoppin' em? No, sir."

"Well, what is it?" Jule asked.

"I'll tell ya. It's cause we're all a-working together. Depty can't pick on one fella in this camp. He's pickin' on the whole darn camp. An' he don't dare. All we got to do is give a yell an' they's two hundred men out. Fella organizin' for the union was a-talkin' out on the road. He says we could do that any place. Jus' stick together. They ain't raisin' hell with no two hundred men. They're pickin' on one man."

John Steinbeck, *The Grapes of Wrath*
1. Freedom or Right?
The simplest way to differentiate these two concepts of rights and freedoms, which are often taken as synonymous, is to say that a right is a right to something while a freedom is a freedom from something, usually government interference. The question that is raised here is whether striking is a freedom or a right.  

What are the union members being given when they exercise their right to strike? Some would answer that they are being given higher wages, better benefits or whatever else is sought by striking. If this is the case, then it is untrue that workers have a right to any of these things. The liberal does not allow that anyone has a right to a particular wage for a specific job. Those philosophers who have protested the supply and demand determination of prices and wages have created various schemes for an objective calculation of wages and prices. Marx, for example, believed that each person should be given a wage according to their need.

Liberals deny these claims and argue that the only price or wage is what the market will bear. But this is not what unions are asserting when they postulate a right to strike. There is no set wage or benefits package that is morally justifiable outside the turbulent give and take of the free market. In contrast to socialists, liberals do not believe that one end result is any more just than another. As long as the rules of the game are just, the results will be just. This is how liberals justify the often severe inequality present in a liberal society and attack socialists for wanting to change the outcome. The analogy that is often used focuses upon the rules of a game. It would make little sense to criticize the score of a hockey game even if the home team is defeated soundly. As long as all the rules apply equally to both teams, the final score is just. Only if one team were allowed to be offside and the other not would there be cause to

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55 Interestingly, Galligan J. makes this distinction in Broadway Manor, supra note 43 at 246-248, and decides that, to be precise, it must be referred to as the freedom to strike, although he enters the discussion for different reasons than I do here.

56 See Part I, above, for a discussion of this issue.
question the outcome of the game. It does not matter that one team is better and stronger than the other team.

Such is the case with labour negotiations. Liberals cannot complain that a union receives too much in labour negotiations simply because it has the bargaining power to exact a generous contract. Likewise, socialists cannot complain if the union failed to have its demands met. What the unions are really seeking is the right to enter into the labour negotiation process without the fear of the state’s coercive powers being used against them. It is a freedom they seek, the same freedom liberals seek for all individuals—the freedom from government interference. The right to strike is only a right in the sense that unions have the right to enter into labour negotiations free from government intervention. In the same sense, freedom of religion is a right to worship free of state involvement.

So the right to strike is really the freedom to strike. The argument has been made that if the government is kept out of the labour field by providing unions with a constitutionally protected freedom to strike, the balance of power would be unfairly changed in favour of the unions. McIntyre J. makes the point when he writes:

To intervene in that dynamic [i.e. that of labour negotiations]... by implying constitutional protection for a right to strike would, in my view, give to one of the contending forces an economic weapon removed from and made immune, subject to s. 1, to legislative control which could go far towards freezing the development of labour relations and curtailing the process of evolution necessary to meet the changing circumstances of a modern society in a modern world.57

McIntyre J. believes that in dismissing the case he is leaving the situation as it was before with the power structure more or less equal. After all, he is not taking the freedom to strike away from unions but merely allowing the legislatures to regulate this freedom as they see fit. Unions can still legally strike in the same manner as they always could.

The fact that some unions did strike, and strike successfully, does not mean that unions had the legal freedom to strike. Even after this decision, some unions will still strike. The conclusion that

57 Re Public Service Employee Relations Act supra note 32 at 241.
the freedom to strike is not compromised because the government allows some strikes to go on is a non sequitur. A totalitarian regime may allow certain religions to practice but ban all others. Could this regime be said to have freedom of religion? What the Supreme Court did in failing to recognize a constitutional freedom to strike was to allow the government to step into any labour dispute and order the union back to work, which, in effect, enervates the freedom to strike.

McIntyre J. believes that in denying unions the freedom to strike he was remaining impartial in the field of labour relations. In fact, he believes that if unions were granted this freedom, he would be “freezing” the “process of evolution” by giving unions an unfair advantage. In its present form, the labour negotiation process is generally to the advantage of the employer. Obviously, some unions have more bargaining power than others. However, this power rarely exceeds that of their employer. For many reasons, unions are reluctant to launch a strike and once they do strike, there are pressures on a union to settle quickly. First, as Smith pointed out, the effects of a labour dispute are more immediate to the workers than to management:

A landowner, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, a few could subsist a month, and scarce any a year without employment. In the long-run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate. [my emphasis].

Even farther removed are the stockholders of those companies that are publicly traded. Secondly, many companies will have a reserve of their product on hand, especially if they have anticipated labour trouble, which will see them through the initial strike period. Workers, on the other hand, may have limited savings but even if they do, they will reluctantly dip into their life savings or their child’s college fund, certainly more reluctantly than the company will use up its surplus stock. Also, depending on the provincial

legislation and the union contract, it may be possible for the company to bring in replacement workers while the strikers must report for picket duty each day. Where replacement workers cannot be used, some companies can get by for a short time by using management to run the factory. Often, union workers are restricted from finding a temporary job during the strike and even when this is permissible, the hopes of finding an interim position are limited. A strike may involve thousands of workers, each of them feeling the effects of the work stoppage differently. This is why it is very difficult, even in a small union, to maintain cohesion, while the employer can more easily offer a united front.

It is difficult to maintain that the Supreme Court's decision is neutral. The government only rarely intervenes on behalf of the unions. None of Canada's major political parties have a great track record on protecting unions.

2. Why Do Governments Intervene?

Liberals do not subscribe to the anti-capitalist sentiment that the state is really another interest in the service of capitalism. There is evidence that corporations do exert a greater influence over governments than many liberal democrats assume. However, there are other reasons, less controversial to liberals, why government intervenes on behalf of business in labour disputes.

Governments are also under pressure from their constituents to act on behalf of their greater good. To take a hypothetical example, Company A has been deadlocked in a labour dispute for months. The company takes the position that it simply cannot afford to meet the demands of the workers and it cannot get the recalcitrant union to understand this. If the strike continues, the company will be forced to take drastic actions. Plants will be closed, jobs will be lost, or at the very least, prices will have to be raised. An appeal is then made to the government, either by the company or the public (or the company on behalf of the public) to help settle the dispute. When they are not constitutionally restrained from doing so, it is very difficult for the state not to step in and force the union back to work. The case becomes even more compelling when the work disruption affects the direct supply of a product to the public, such as milk in the case of the dairy workers or mail in a Canadian Union of Postal Workers' (CUPW) strike.
It is this democratic pressure that is responsible for more state interference in labour disputes than, as the socialists would have it, a manipulative capitalist class controlling government. The function of a liberal constitution is to restrain the majority, through their elected officials, from compromising individual freedom. This role of liberalism as a restraint on democracy is played out on many levels. Morally, the democratic majority may be appalled by the position someone takes in a speech but the liberal freedom of speech is in place to prevent the majority from legislating against this person. Economically, the majority may wish the minority of wealthy individuals to shoulder an unfair percentage of the tax burden. Liberalism would preclude the majority from exacting this.

From the liberal perspective, workers have no moral responsibility to provide a product or service to the public. In a proper liberal constitution, the public would be restrained from forcing them to do so. The moral imperative of liberalism compels each individual to provide the necessities of life for herself. The public is no more allowed to force the worker back into the factory than they are morally permitted to demand a share of her wages.

When a union goes on strike, especially if it is a large or public union, it often tries to get the public on its side through advertising campaigns or manipulation of the media. This approach has always seemed misguided. There is no reason whatsoever for the union to need the public’s support. The union is simply exercising their liberal freedom to strike and there is no reason to think that the public would support it in this effort. More often than not, the successes of a striking union are detrimental to the self-interests of those individuals outside of the union. Higher wages for union members may mean that the products of that company go up in price. Unless the individuals outside of the striking union are members of a similar union which may be able to use the striking union’s wage increase as leverage in their own negotiations, the public is either opposed to any wage increases or indifferent. The only reason to launch a public relations campaign during a strike is to prevent the public from pressuring the state to step into the labour dispute.

Because the public often stands to lose in labour disputes, socialist theory is antipathetic to unions. Despite the fact that unions have taken socialism as their theory of choice, there is good reason to question this. For the socialist, the individual’s rights are
subsumed into the greater social, or communal, rights of the public. Individual rights are only held subject to the greater good of the community. For example, under a liberal constitution a company can sell its product for whatever price the free market will support, but under a communal rights doctrine the company can be forced to sell its product at a lower price so that the less fortunate may afford it. The same applies for the freedom to strike. Although socialists are quick to support unions in their struggle against the capitalists, whom they see to be the dominant class, in practice they have had to weigh the benefits of a strike against the effects on the community. The balance has rarely weighed in favour of the unions.

There is another, more direct reason why a government would intervene with legislation in a labour dispute. Governments themselves have a huge labour force, most of whom are unionized. Even with the drive towards smaller and smaller government, they still have one of the largest unionized labour forces in the country. Government itself is often drawn into labour disputes with its own workers, and in these cases the temptation to use its coercive legislative powers is even more enticing.

3. Public Sector Unions

The most well-known case regarding the abrogation of collective bargaining and the freedom to strike of a public sector union is the one brought against the federal government by PSAC as a result of Trudeau’s Public Sector Compensation Restraint Act, 1982, popularly known as the “6 & 5” restraint programme. As a case study of how a government deals with its own unions, this example points to several interesting and enlightening aspects of the relationship.

The express purpose of this legislation was to encourage the private sector and the provinces to implement their own wage restraints. As well, the government wished to lower the unions’ expectations when negotiating wage increases. They argued that it needed to take a leadership role and show restraint itself if it expected others to tighten the proverbial belt and help fight inflation. Allan MacEachen, then the Minister of Finance, said, “The private sector and the provinces could not be expected to accept income restraint unless the government of Canada showed

59 Supra note 37.
leadership in the conduct of its own affairs." The claim was that the act would result in lower wage settlements throughout the economy and thus help ease inflation.

Thus, the federal government cast itself in the role of economic leader taking the initiative by tightening its own belt. With the spotlight focused on the government’s leadership role, its role as an employer was left in the shadows. As an employer, the federal government had a vested self-interest in controlling its employees. If the government was acting strictly as an economic leader and had no interest in subduing its employees, it follows that the government would have restricted itself to purely monetary matters simply because any restriction of non-monetary matters would have no effect on inflation. The government, however, did not restrict itself in this way. Section 6(1) of the Restraint Act reads as follows:

6(1) Notwithstanding any other act of Parliament except the Human Rights Act, but subject to section 7, the terms and conditions of

(a) every compensation plan that is extended under section 4 or 5, and

(b) every collective agreement or arbitral award that included such a compensation plan,

shall, subject to this Part, continue in force and without change for the period for which the compensation plan is extended [emphasis added].

Dickson C.J.C.’s interpretation of s. 6(1)(b) was that it “precludes collective bargaining on all issues, including non-compensatory matters.”

Clearly, the government had something else in mind besides controlling inflation. It made no attempt to limit itself to compensatory matters but, rather, chose to restrict collective bargaining and striking for any and all matters, regardless of whether or not they would affect inflation. Behind the facade of the government acting in the role of economic leader was the role of

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61 PSAC v. The Queen, supra note 32 at 254..
the government as an employer.\textsuperscript{62} Of course, wage increases are not the only compensatory matter. Maternity leave, employee benefits, sick leave and vacation time, all affect finances. All of these factors can affect the financial situation of the government and could have legitimately been included in wage restraint package. However, such matters as employee safety, management rights, grievance procedures, seniority and employee rights,\textsuperscript{63} do not affect the fiscal situation of the employer in question and should not have been abrogated in any way.

In drafting a blanket piece of legislation that affected all aspects of the employer-employee relationship, the governments in question tipped their hands to a surreptitious purpose of the legislation—to gain the upper hand over employees while ostensibly attempting to control inflation. If this had not been the purpose, there would have been clauses stating that nothing in the legislation affected the status, bargaining or striking potential of the employees regarding issues not related to pecuniary matters. Such a clause would have gone far to ease the reaction of the unions and make the tough medicine more palatable.

The cynical observer may also conclude that the government was trying to diffuse some of the blame for the inflationary situation by singling out the unions for the remedy. Consider the psychological affect of this legislation on the public. With rampant inflation threatening to ruin the economy, the government announces its bold plan to deal with the situation: it is going to reel in the wage increases of its own unions in the hope that other unions will be similarly disciplined. In the absence of a complex economic explanation of the causes of inflation, the public is left to draw the conclusion that if unions are being singled out they must have caused the inflation. Whether or not this was the purpose of the government, the affect of the legislation was to deflect some of the blame away from those government policies that played a part in creating the inflation. As any student of economics knows, an

\textsuperscript{62} Nor was this an isolated case. In Ontario’s \textit{Inflation Restraint Act}, 1982, which followed the federal initiative, s. 13(b) also extended the legislation to non-compensatory matters. I shall not repeat the section here as it is almost identical to the previous section of the \textit{Public Sector Compensation Restraint Act}.

\textsuperscript{63} I take these examples from Dickson C.J.C., \textit{PSAC v. The Queen}, supra note 32 at 266.
excessive level of aggregate demand is the cause of inflation. This,
however, does not stop the public from making the spurious
conclusion that inflation was solely a result of wage increases. As
Baumol points out:

Business managers and journalists are very likely to blame
inflation on rising wages. In a superficial sense, they are
right, because higher wages do indeed cause firms to raise
prices. But in a deeper sense they are wrong. Both rising
wages and rising prices are only symptoms of an
underlying malady: too much aggregate demand.
Blaming labour for inflation in such a case is a bit like
blaming high medical costs for making us ill.64

A challenge was made under s. 1(b) of the *Canadian Bill of
Rights* alleging that in singling out PSAC, the government was acting
capriciously and contrary to the “equality under the law” provision
of the *Bill of Rights*.65 The Court, however, did not agree with this
interpretation. The Chief Justice wrote:

The leadership role of the government constitutes
justification for Parliament's legislative focus on the
public sector. It was, in the circumstances, permissible for
Parliament to decline to impose a universally applicable
short-term controls programme on a heterogeneous
labour force, and instead to limit its interference with the
collective bargaining process to a discrete and relatively
homogeneous group of employees. The employees in
question shared in common an employer perceived to
occupy the role of the national economic leader and
trendsetter.66

When viewed from this perspective, PSAC was the logical choice.
The government was not acting arbitrarily, as the union charged,
but needed to set an example for the rest of the country. The
logical choice was its own unions. Aside from the fact that the
public sector was a “relatively homogeneous group,” it was the

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64 William Baumol et al., *Economics: Principles and Policy—Macroeconomics*,
65 PSAC did not use s. 15 of the Charter as s. 32(2) delayed this section from
coming into effect for three years.
66 *PSAC v. The Queen*, supra note 32 at 263.
logical choice because their employer was viewed as the national trendsetter.

There are several fallacies underlying the logic of this argument. To best illustrate these fallacies, an analogy is apt. A principal of a high school, who also teaches her own mathematics class, has discovered that the mathematics scores for her school have fallen below standard. Instead of opting for mandatory extra study for the whole school, she decides to take her own class and make them stay for an extra hour after school to study mathematics. This is done in the hopes that the rest of the mathematics teachers in the school will follow suit. An analogy is only as good as far as it is similar to the actual situation; so, we are to assume that it is not the principal’s class that drove the scores down but all the classes together. In fact, we must assume that her particular class actually had higher than average scores. (Between 1978 and 1982, the federal government succeeded in obtaining lower wage settlements with its employees than all of the other provinces and the private sector). The logic is the same. The principal has a role as a leader and her own class is the obvious choice to set the example. Two more suppositions are necessary to round out the analogy. Previous to this, when the mathematics scores fell below standard, she simply mandated extra study time for all students. (During the inflationary period of the early 1970s, the Trudeau government legislated universal wage and price control measures). Further, at the same time, she issued the edict that students in her class were subject to harsher rules of discipline than other students. (Do not forget that the legislation went beyond compensatory matters).

The logic of the principal’s policy is undermined on several counts. First, there is no reason to believe that the other mathematics teachers will follow her lead. In fact, they are unlikely to do so as they lack the coercive powers of the principal. Secondly, the students in her class will be subject to extra duties despite the fact that they played no part in lowering the scores. In spite of their best efforts to raise the school’s average, they are being unjustly penalized while nothing is done about the other students who have contributed to the substandard scores. Thirdly, because of this, it will be assumed throughout the school that these students are at fault for the lower scores and thus must not only suffer the extra study but the ignominy of being blamed for the school’s poor showing. Also, it is apparent that the principal has used the
opportunity of the lower mathematics scores, and her own powers as principal, to gain more control over her own class. Finally, even if the other teachers are able to order the extra study, the scores may still not go up simply because the students may not be at fault. Poor instruction on the part of the teachers or outdated textbooks may be to blame.

When abstracted in this way, it is easier to see the fallacies of what appears on the surface to be a very sensible policy. The employer-employee aspect cannot be ignored, although it certainly is not the whole picture. The public sector was treated unfairly and it shared a disproportionate amount of the blame for the inflation. It took on the brunt of the attempted remedy despite its own wage concessions in the past. The policy seems particularly unjust in retrospect as the union’s sacrifice yielded little results. The only ones who followed the federal lead were the provinces, and only six of those, primarily because they were the only other employers who had the coercive powers to force their employees to accept a harsh wage package. It is an odd sense of fairness if those who have excelled are penalized for the shortcomings of others. PSAC was not the logical choice simply because it cannot be held responsible for the inflationary situation. In forcing PSAC to bear the brunt of the corrective measures, the federal government acted unfairly in singling out a union that had already made concessions.

In relying on a questionable psychological effect, the federal government showed its naivety. It is simply unreasonable to expect employees to accept low wage increases in a period of runaway inflation. Wilson J. pointed out the contradiction in trying to affect voluntary wage constraint through coercion. “[It is] paradoxical for the government to seek to inspire voluntary compliance by imposing a programme of mandatory compliance. One might well ask how this can be seen as setting an example of voluntary compliance by either government or its employees.”

Given the government’s propensity for abusing its coercive legislative powers when it comes to its own employees, the public sector unions are in a particularly precarious position. This is why the freedom to strike must be more vigilantly guarded in their case. The prevailing mood seems to be that the public sector unions should concern us the least because it is not a matter of the state

67 PSAC v. The Queen, ibid. at 272.
interfering in the private sector but merely an internal, government matter. However, on this argument, there is no reason why these workers should be any more open to government abuse than those in the private sector and there is even more compelling evidence that they are more vulnerable to mistreatment.

It is difficult to leave an opening for the abrogation of the freedom to strike when it would necessarily be a weak freedom at best. If the freedom to strike was included under the freedom of association, it would be subject to the notwithstanding clause. A discussion of the merits of this clause is beyond this work, but suffice it to say that it gives government a trump card to be played whenever its policies are threatened with court action. Regardless of whether a freedom to strike is included under the freedom of association or appended in its own section, it would be subject to s.1. This gives the government greater scope in abrogating rights and freedoms.

All this being said, it must be recognized that public sector unions are simply not in the same position as private sector unions. The reason is that the government employees’ fortunes are not tied to the profitability of their employer in the same way that the private sector employees’ are. Contrary to the opinion of many columnists and commentators, the government cannot, and should not, be run as a business. Their employees do not have a vested self-interest in assuring the profitability of their employer. The restraint on private sector employees that keeps them from making unreasonable demands does not apply to the public sector. The government will not shut down and move south of the border because its employees’ wage demands were too high.

What effect does this have on the public sector’s freedom to strike? The public sector’s precarious position still demands a special diligence in ensuring it is not abused by government. Because the government has been quick to use its powers to legislate its employees back to work whenever they become too recalcitrant, it is difficult to say what the result of an unimpeded freedom to strike for government employees would be. It is doubtful that they would be able to extort outrageous demands from the government. A strike is still a very unpleasant affair for both sectors. If there is one caveat to the argument, it would allow for compulsory arbitration to be imposed if, and only if, a public sector union is obviously and blatantly abusing its powers to force excessive
demands from the government. It is important that the governments' actions be as limited as possible here to prevent labour abuses on its part. Further, there is no need for a special constitutional provision for this caveat as the terms laid down by the Supreme Court for a s. 1 challenge would be sufficient to cover these rare circumstances.

4. Essential Services

The Alberta Reference dealt with the Alberta government's *Labour Relations Act*\(^{68}\) covering fire-fighters and hospital workers and the *Police Officers Collective Bargaining Act*.\(^{69}\) In this way, it brought up the question of essential services. There are some workers who provide a service (or product) so necessary to the public good that to withdraw that service would jeopardize public safety. If these workers were given an unlimited freedom to strike, their bargaining power would be such that they could be reasonably expected to exact far-reaching concessions in a labour dispute.

The essential question for liberalism is whether this constitutes coercion. If the medical association decides it wants to triple its salaries and refuses to treat any sick or dying patients until its demands are met, it would be, in effect, threatening the public with life or death. But would this be coercion and would the government be allowed to intervene? The answer may not be as obvious as it seems. Recall that liberals adhere to a strict doctrine of negative rights: the individual cannot be compelled to come to the aid of anyone regardless of whether she is a doctor, police officer or fire-fighter. This entails a separation between acts and omissions: the individual who sets fire to someone's house can be held morally and legally accountable for that act but the person who stands by idly while the house burns without offering aid cannot be held accountable for that omission.

Unfortunately, there is no consensus amongst liberals as to what constitutes coercion.\(^{70}\) Given everything Rothbard has written, if convinced of the efficacy of the freedom to strike, he would extend these principles to essential service associations and not allow that

\(^{68}\) R.S.A. 1980, c. L-1.
\(^{69}\) S.A. 1983, c. P-12.05.
\(^{70}\) See Part I, above, for a discussion of this issue.
the medical association was being coercive. Hayek, on the other hand, would argue that the medical association was acting coercively and would permit government intervention. It is not my place here to settle this dispute for liberals.

It may be argued that the matter is moot because I have already argued that public sector employees may be subject to limitations under s. 1. As essential services are provided by the government, this would preclude excessive demands by unions providing essential services. This is misleading, however, because the government does not provide all essential services. For example, as part of the justification for abrogating the freedom to strike for dairy workers, it was argued that milk was essential to the public health. This argument also does little to quell liberal concerns because most liberals wish to have the government's involvement in the provision of essential services reduced. The smaller the public service and the more limited the state's involvement in essential services, the more germane the discussion becomes.

If one is a classical liberal who, like Nozick, grounds one's thoughts upon "natural rights," the discussion of essential services really ends with the argument that the state cannot coerce anyone to provide any service or product regardless of whether or not it is essential. For other liberals who are willing to temper the freedom to strike for workers in essential service industries, some questions remain. The first problem is to define exactly what constitutes an essential service. Liberals would want as confined a notion of essential services as possible so as to limit the amount of state coercion. The most restrictive definition would designate as essential any service or product the removal of which would result in the irreplaceable loss, a loss of life or property. This definition would preclude doctors, nurses, police officers, fire fighters and rescue workers, for example, from striking but could not apply to dairy workers, teachers or hospital cleaning staff. It cannot be argued that the loss of revenues by a company due to a strike could not be recouped in the future. It is important to emphasize that the key word is irreplaceable. Many essential service workers also perform tasks that could not be considered essential under this definition. Doctors must save people's lives but they may refuse to

71 See The Ethics of Liberty, supra note 15.
72 See The Fatal Conceit: The Errors of Socialism, supra note 29.
perform elective surgery. Police officers must prevent murders but can stop writing parking tickets. A more controversial example involves fire fighters who must rescue the person from their burning home but refuse to save the house. The home is replaceable while the person’s life is not.

The definition adopted by the Supreme Court seems too open-ended. Dickson C.J.C. defines an essential service as “one the interruption of which would threaten serious harm to the general public or to a part of the population.” This is ambiguous because it is unclear what would constitute “serious harm.” It would cause one serious harm to have one’s house burn down but it is not irreplaceable. Dickson C.J.C. does qualify his statement by saying that, “[m]ere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike.” Again, however, it is unclear whether something is a “mere inconvenience” or a “serious harm.” Some cases are clear: losing a leg because the doctor is on strike is serious harm while having to take the subway because the bus drivers are on strike is a mere inconvenience. However, the argument could be made that the financial loss to an employer is not an inconvenience but causes the firm serious harm. In any common usage of the word, education is essential to a person’s well-being. If teachers went on strike and forced the closure of schools for several weeks, would this constitute serious harm to the students? Certainly the classes are replaceable in the sense that they can be made up for during the summer break, but is this a mere inconvenience to the students? Under the replaceability argument, neither of these appeals could be made.

If an exception is to be made in the case of essential services, the problem of how to deal with it constitutionally presents itself. The presence of s. 1 makes any special constitutional provision unnecessary. The Supreme Court has already stated that if a constitutional guarantee were given to the freedom to strike under the freedom of association, it would necessarily be subject to limitation in the case of essential services by s. 1. Liberals are not fond of limitations to their rights; however, the Supreme Court has

73 Re Public Service Employee Relations Act, supra note 32 at 204.
74 Ibid.
75 Ibid.
set the test for a s. 1 challenge and it is fairly rigorous in its application. This mechanism is already in place. Having exceptions to the freedom to strike covered under its aegis affords the least amount of tampering with the existing constitution. The concern is that if these limitations are accommodated by other means, this would throw open the process and the exceptions may be judged by a standard less rigorous than s. 1.

The final concern is that existing definition of essential services is too lenient. If the limitation is imposed, the definition should be narrower and clearer. It should be noted that the definition discussed was contained in the minority opinion. Dickson C.J.C. allowed that the freedom to strike was contained in s. 2(d) and from there proceeded to discuss limitations. The majority, of course, did not allow the freedom to strike and therefore saw no need to discuss limitations. This gives the Court greater leeway to amend its definition in future decisions.

Striking is a freedom and, moreover, it is a negative freedom of non-interference. The thinking liberal would agree that the government has no place in the area of labour negotiations. McIntyre J., based his decision on a puzzling belief that he was remaining neutral and that there was no individual equivalent to the freedom to strike. Once these fallacious assumptions are set aside, it can be seen that the freedom to strike is not out of step with liberalism. If this freedom is to be secured for all unionized employees, it should be accommodated under the freedom of association. The public service poses more difficulties than the private sector; however, they are the most susceptible to coercion simply because they have the only employer who can legislate against them. In extending a limited freedom to strike to essential services workers, care must be taken that the special obligation of these workers is properly balanced with their personal freedom.

V. CONCLUSION

The cry comes from blighted unionized and non-unionized workers alike that their employers have ignored their interests and should have taken better care of them. Indignation runs high, even to the point of insisting that the employer has a moral responsibility to take care of her employees. Liberals have argued that employers do not have any ethical responsibility to ensure the well-being of their
employees. In fact, it is improper and inefficient to have the employer look out for the interests of her employees. No one knows the employee's interests better than the employee himself, not his company and certainly not the government. This is a lesson unionists must learn if they are to survive the move to liberalism.

What liberals must understand is that the best and most efficient way for workers to ensure their own well-being, given all the power imbalances inherent in the free market, is through an association with their fellow workers. There is nothing illiberal about this. The moral imperative of liberalism demands that workers take care of their own well-being and not rely upon their employers to do so. Charity is accepted by most liberals, but the worker cannot and should not depend upon the altruism of her employer. This philosophical argument compels individuals to go about achieving their goals, without coerced assistance, by the most effective, non-coercive means possible. As businesses, in general, have a poor record on maintaining and enhancing their employees' liberties, the initiative then falls to the employees to set their own goals and achieve these for themselves.

The liberal who objects to workers presenting a united front to their employer has not properly considered the key role freedom of association has played in liberalism. This freedom was conceived by liberals as a reaction against attempts by the state to divide its critics and deny them the strength that comes from unity. The right to associate freely with one's fellow men and women who share common interests or concerns has become indispensable to the smooth functioning of a liberal democracy and the preservation of personal liberty. In a large, modern democracy, an individual simply cannot effectively oppose the state by herself. Nor can citizens be expected to achieve those reasonable goals they have set for themselves if the state is permitted to atomize individuals because those goals are not consonant with the majority's or those of a special interest.

The question becomes what is the best way to protect workers from the coercive powers of the state. With a constitution that does not recognize the freedom to strike, and constitutional change embroiled in a demanding amending formula, the most promising solution is a Supreme Court decision that recognizes the place of the freedom to strike within the freedom of association. For many liberals, the Canadian Charter of Rights and Freedoms is an imperfect
document. The Supreme Court's formulation of the freedom of association makes an imperfect document intolerable. Had the Court fulfilled its promise to give a broad interpretation to the rights set out in the Charter so as to secure the maximum amount of liberty for Canadians, this work would have been significantly, and gladly, shorter.

Many liberals have a very critical view of the state, believing it too quick to abuse its coercive powers. Certainly when governments have dealt with their own employees, they have lived up to this view. If liberals are to advocate the freedom to strike, they must be particularly vigilant in the case of public sector employees and not shun the disputes of these workers as an internal government affair. When governments become willing to exploit this coercive ability, then those workers who fall remotely into the category of essential service workers should take heed. Because these workers often draw the electorate in as a third party to the dispute, the state frequently reacts quickly and forcefully in denying these workers their freedoms.

When dealing with two vast topics, unionism and liberalism, one could easily write a three-volume set. The necessity to cut out much that might have proven enlightening is always a difficult task. Trying to pare liberalism down to its essentials is a bit like cleaning the Augean Stables. One major component of liberalism I have virtually ignored is welfare state liberalism. Welfare liberalism is a more moderate theory than the polar theories of socialism and classical liberalism and perhaps would have been easier to defend. The problem with this is that it is not a welfare liberal framework under which the industrialized nations are operating but a classical liberal one. A reconciliation of welfare liberalism and unionism would have been impertinent because the dominant political and economic theory of the time is classical liberalism.

While I am a strong defender of union rights, I do not, however, pretend that unions are ideal organizations without flaws. One of their flaws, as I have pointed out, is their reliance on socialist rhetoric. The "evils of capitalism" argument has always failed to impress me and I am sure that it does little to win the public over to their cause. Hopefully I have shown unionists that there is more to be gained in keeping the government out of their affairs than in working to increase the state's prerogative in labour relations. I can also cite numerous examples of poor judgment on the part of
unions. The early history of unions was often violent and there are enough modern examples to make an impressive list. None of these individual cases, however, convince me that unionism, as an institution, is not worth maintaining. One can criticize the means without calling into question the ends.

This work was primarily directed at two audiences: liberals (in order to convince them of the need to endorse union rights within their ideology) and unionists (in order to convince them of the need to accept some tenets of liberalism). The difficulty is that unionists will likely agree with my conclusions and object to the methodology. Conversely, liberals will agree with the methodology but abjure the conclusions and, thus, neither side is satisfied. However, my hope is that at the very least I have given both sides a great deal to consider, and begun the process of discussion between these divergent forces.