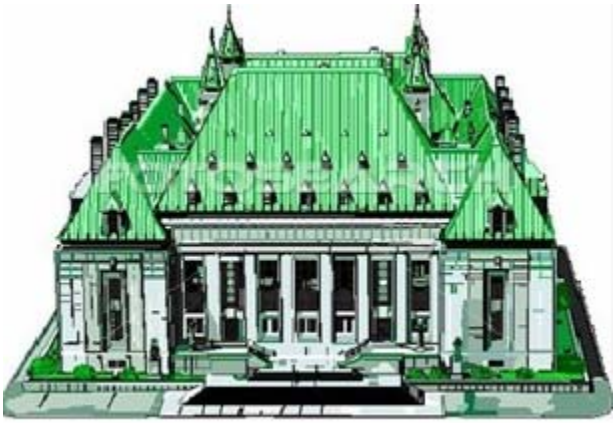
LEADING CONSTITUTIONAL DECISIONS OF THE SUPREME COURT OF CANADA

RETAIL, WHOLESALE AND DEPT. STORE UNION V. DOLPHIN DELIVERY

[1986] 2 S.C.R. 573



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Retail, Wholesale and Department Store Union, Local 580
AI Peterson and Donna Alexander, Appellants

-v.-

Dolphin Delivery Ltd., Respondent

-and-

Attorney General of Canada
Attorney General of British Columbia
Attorney General for Alberta
Attorney General of Newfoundland, Interveners

CORAM: Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

McINTYRE J.: [Dickson C.J.C., Estey, Chouinard and Le Dain JJ. concurring]

This appeal raises the question of whether secondary picketing by members of a trade union in a labour dispute is a protected activity under s. 2(b) of the **Canadian Charter of Rights and Freedoms** and, accordingly, not the proper subject of an injunction to restrain it. In reaching the answer, consideration must be given to the application of the **Charter** to the common law and as well to its application in private litigation.

The respondent, Dolphin Delivery Ltd. ("Dolphin"), is a company engaged in the courier business in Vancouver and the surrounding area. Its employees are represented by a trade union, not the appellant. A collective agreement is in effect between Dolphin and the union representing its employees, which provides in clause 8: "it shall not be a violation of this agreement or cause for discipline or discharge if an employee refuses to cross a picket line which has been established in full compliance with the British Columbia Labour Code." The appellant trade union is the bargaining agent under a federal certification for the employees of Purolator Courier Incorporated ("Purolator"). That company has a principal place of operations in Ontario but, prior to the month of June, 1981 when it locked out its employees in a labour dispute, it had a place of operations in Vancouver. That dispute is as yet unresolved. Prior to the lock-out, Dolphin did business with Purolator making deliveries within its area for Purolator. Since the lock-out, Dolphin has done business in a similar manner with another company, known as Supercourier Ltd. ("Supercourier"), which is incorporated in Ontario. There is a connection between Supercourier and Purolator, the exact particulars of which are not clearly established in the evidence, but it appears that Dolphin carries on in roughly the same manner with Supercourier as it had formerly done with Purolator and about twenty per cent of its total volume of business originates with Supercourier. This is about the same percentage of business as was done with Purolator before the lock-out.

In October of 1982 the appellant applied to the British Columbia Labour Relations Board for a declaration that Dolphin and Supercourier were allies of Purolator in their dispute with the appellant. A declaration to this effect would have rendered lawful the picketing of the place of business of Dolphin under British Columbia legislation. The Board, however, declined to make the declaration sought, on the basis that it had no jurisdiction because the union's collective bargaining relationship with Purolator and any picketing which might be done was governed by the **Canada Labour Code**, R.S.C. 1970, c. L-l. In the face of this finding it became common ground between the parties that where the Labour Code of British Columbia, R.S.B.C. 1979, c. 212, does not apply, the legality of picketing falls for determination under the common law because the **Canada Labour Code** is silent on the question. In November of 1982 the individual appellants, on behalf of the appellant union, advised Dolphin that its place of business in Vancouver would be picketed unless it agreed to cease doing business with Supercourier. An application was made at once for a *quia timet* injunction to restrain the threatened picketing. No picketing occurred, the application being made before its commencement.

The matter came before Sheppard L.J .S.C. and on November 30 he granted the injunction. . . .

The task of the Court in dealing with this case is made difficult by the way it developed in the courts below. The application for the injunction was made before any picketing occurred. The evidence was limited to affidavits, and some cross-examination upon them. Findings of fact on the crucial question of the nature of the apprehended picketing are limited. Ordinarily, the Court would not entertain

constitutional questions without a more secure factual basis upon which to rest the argument. Because of the nature of this case, however, the Court has felt obliged to do so. I refer below to the findings of fact and to certain assumptions upon which the Court's judgment will rest.

. . .

Hutcheon J.A. in the Court of Appeal also seems to have recognized the difficulty regarding the factual underpinning. He said [at p. 484]:

> The interim injunction was granted before any picketing took place. The proper assumptions to be made are that the picketing would be peaceful, that some employees of Dolphin Delivery and other trade union members of customer would not cross the picket line, and that the daily business of Dolphin Delivery would be disrupted to a considerable extent

These assumptions are reasonable and I adopt them. In summary then, it has been found that the respondent was a third party, that the anticipated picketing would be tortious, that the purpose was to injure the plaintiff. It was assumed that the picketing would be peaceful, that some employees of the respondent and other trade union members of customers would decline to cross the picket lines, and that the business of the respondent would be disrupted to a considerable extent

The following questions arise:

1. Does the injunction complained of in this case restrict the freedom of expression secured under s. 2(b) of the **Canadian Charter of Rights and Freedoms**?

2. Does the **Charter** apply to the common law?

3. Does the **Charter** apply in private litigation?

4. If it is found that the injunction does restrict freedom of information, is the limit imposed by the injunction a reasonable limit in accordance with s. 1 of the **Charter**?

Freedom of Expression

As has been noted above, the only basis on which the picketing in question was defended by the appellants was under the provisions of s. 2(b) of the **Charter** which guarantees the freedom of expression as a fundamental freedom. Freedom of expression is not, however, a creature of the **Charter**. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The importance of freedom of expression has been recognized since early times: see John Milton, **Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England** (1644), and as well John Stuart Mill, "On Liberty" in **On Liberty and Considerations on Representative Government** (Oxford, 1946), at p. 14:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility," he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy. The courts have recognized this fact. For an American example, see the words of Holmes J. in his dissent in **Abrams v. United States**, 250 U.S. 616 (1919), at p. 630:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . .But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Prior to the adoption of the **Charter**, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status. In **Boucher v. The King**, [1951] S.C.R. 265, Rand J., who formed a part of the majority which narrowed the scope of the crime of sedition, said, at p. 288:

> There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

In **Switzman v. Elbling**, [1957] S.C.R. 285, where this Court struck down Quebec's padlock law, Rand J. again spoke strongly on this issue. He said, at p. 306:

> But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.
>
> This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.

In the same case, Abbott J. said, at p. 326:

> The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.

He went on to make extensive reference to the words of Duff C.J. in **Reference re Alberta Statutes**, [1938] S.C.R. 100, at pp. 132-33, strongly supporting what could almost be described as a constitutional position for the concept of freedom of speech and expression in Canadian law, and then said, at p. 328:

> Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

It will be seen at once that Professor Peter W. Hogg, at p. 713 in his text, **Constitutional Law of Canada** (2nd ed. 1985), is justified in his comment that:

> Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the **Charter of Rights**.

The Charter has now in s. 2(b) declared freedom of expression to be a fundamental freedom and any questions as to its constitutional status have therefore been settled.

The question now arises: Is freedom of expression involved in this case? In seeking an answer to this question, it must be observed at once that in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at the very minimum would be classified as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent. The question then arises. Does this expression in the circumstances of this case have **Charter** protection under the provisions of s. 2(b), and if it does, then does the injunction abridge or infringe such freedom?

The appellants argue strongly that picketing is a form of expression fully entitled to **Charter** protection and rely on various authorities to support the proposition, including Reference re Alberta Statutes, *supra*; **Switzman v. Elbling**, *supra*, the American cases of **Thornhill v. Alabama**, 310 U.S. 88 (1940) (*per* Murphy J., at p. 95); **Milk Wagon Drivers Union v. Meadowmoor Dairies**, 312 U.S. 287 (1941), (*per* Black J., at p. 302), and various other Canadian authorities. They reject the American distinction between the concept of speech and that of conduct made in picketing cases, and they accept the view of Hutcheon J.A. in the Court of Appeal, in adopting the words of Freedman C.J.M. in **Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians,** [1971] 5 W.W.R. 328, that "Peaceful picketing falls within freedom of speech."

The respondent contends for a narrower approach to the concept of freedom of expression. The position is summarized in the respondent's factum:

> 4. We submit that constitutional protection under section 2(b) should only be given to those forms of expression that warrant such protection. To do otherwise would trivialize freedom of expression generally and lead to a downgrading or dilution of this freedom.

Reliance is placed on the view of the majority in the Court of Appeal that picketing in a labour dispute is more than mere communication of information. It is also a signal to trade unionists not to cross the picket line. The respect accorded to picket lines by trade unionists is such that the result of the picketing would be to damage seriously the operation of the employer, not to communicate any information. Therefore, it is argued, since the picket line was not intended to promote dialogue or discourse (as would be the case where its purpose was the exercise of freedom of expression), it cannot qualify for protection under the **Charter**.

On the basis of the finding of fact that I have referred to above, it is evident that the purpose of the picketing in this case was to induce a breach of contract between the respondent and Supercourier and thus to exert economic pressure to force it to cease doing business with Supercourier. It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from **Charter** protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

Section 1 of the Charter

It is not necessary, in view of the disposition of this appeal that I propose, to deal with the application of s. 1 of the **Charter**. It was, however, referred to in the Court of Appeal and I will deal with it here. It will be recalled that the Chambers judge in granting the injunction did so on the basis that the picketing involved the commission of two common law torts, that of civil conspiracy to injure and that of inducing a breach of contract. . . .It should be noted that in British Columbia the common law tort of

conspiracy to injure, as employed in labour disputes, has been abolished by statute and it would not be available as a support for an injunction. I am aware that the labour relations of the appellants are governed by the Canada Labour Code. However, since the Canada Labour Code is silent on the question of picketing, the common law applies, in this case the common law of British Columbia from which the tort of conspiracy has been expunged in labour disputes. In my view then the tort of civil conspiracy to injure may not be relied upon to support the injunction, which therefore must find its sole support from the tort of inducing a breach of contract.

The question then is: Can an injunction based on the common law tort of inducing a breach of contract, which has the effect of limiting the **Charter** right to freedom of expression, be sustained as a reasonable limit imposed by law in the peculiar facts of this case. . . . Ordinarily, some evidence will be necessary to enable the Court to decide whether s. 1 should be applied to preserve a limitation on a right, and the burden of proof will lie upon the party supporting the limitation. Dickson C.J. in the Oakes case, however, at p. 138, remarked concerning the need for evidence:

> I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

This, in my view, is such a case in so far as the need for evidence is concerned. The evidence before the Chambers judge, together with the assumptions and findings referred to above, provide a sufficient basis for the consideration of this question.

From the evidence, it may well be said that the concern of the respondent is pressing and substantial. It will suffer economically in the absence of an injunction to restrain picketing. On the other hand, the injunction has imposed a limitation upon a **Charter** freedom. A balance between the two competing concerns must be found. It may be argued that the concern of the respondent regarding economic loss would not be sufficient to constitute a reasonable limitation on the right of freedom of expression, but there is another basis upon which the respondent's position may be supported. This case involves secondary picketing--picketing of a third party not concerned in the dispute which underlies the picketing. The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible, work out their own agreement. . . . When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others. . . .

It should be noted here that in the Province of British Columbia, secondary picketing of the nature involved in this case, save for the picketing of allies of the employer, has been made unlawful by the combined effect of ss. 85(3) and 88 of the British Columbia Labour Code, R.S.B.C. 1979, c. 212, as amended. This statute, of course, does not apply in this case, but it is indicative of the legislative policy, in respect of the regulation of picketing in that Province. It shows that the application of s. 1 of the **Charter** to sustain the limitation imposed by the common law would be consistent with legislative policy in British Columbia. I would say that the requirement of proportionality is also met, particularly when it is recalled that this is an interim injunction effective only until trial when the issues may be more fully canvassed on fuller evidence. It is my opinion then that a limitation on secondary picketing against a third party, that is, a non-ally, would be a reasonable limit in the facts of this case. I would therefore conclude that the injunction is "a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society."

Does the **Charter** apply to the Common Law?

In my view, there can be no doubt that it does apply. . . . The English text [of s. 52(1) of the **Constitution Act**] provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit*." (Emphasis added.) To adopt a construction of s. 52(1) which would exclude from **Charter** application the whole body of the common law which in great part governs the rights and obligations of the

individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

Does the **Charter** apply to private litigation?

This question involves consideration of whether or not an individual may found a cause of action or defence against another individual on the basis of a breach of a **Charter** right. In other words, does the **Charter** apply to private litigation divorced completely from any connection with Government? This is a subject of controversy in legal circles and the question has not been dealt with in this Court. One view of the matter rests on the proposition that the **Charter**, like most written constitutions, was set up to regulate the relationship between the individual and the Government It was intended to restrain government action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation.
. . .

I am in agreement with the view that the **Charter** does not apply to private litigation. It is evident from the authorities and articles cited above that that approach has been adopted by most judges and commentators who have dealt with this question. In my view, s. 32 of the **Charter**, specifically dealing with the question of **Charter** application, is conclusive on this issue. . . . Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word 'government' is used in s. 32 it refers not to government in its generic sense--meaning the whole of the governmental apparatus of the state--but to a branch of government The word 'government' following as it does the words 'Parliament' and 'Legislature,' must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word 'government' is used in s. 32 of the **Charter** in the sense of the executive government of Canada and the Provinces. This is the sense in which the words 'Government of Canada' are ordinarily employed in other sections of the Constitution Act, 1867. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words 'Government of Canada,' particularly where they follow a reference to the word 'Parliament,' almost always refer to the executive government.

It is my view that s. 32 of the **Charter** specifies the actors to whom the **Charter** will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the **Charter** will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a **Charter** right or freedom. In this way the **Charter** will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

The element of governmental intervention necessary to make the **Charter** applicable in an otherwise private action is difficult to define. We have concluded that the **Charter** applies to the common law but not between private parties. The problem here is that this is an action between private parties in which the appellant resists the common law claim of the respondent on the basis of a **Charter** infringement. The argument is made that the common law, which is itself subject to the **Charter**, creates the tort of civil conspiracy and that of inducing a breach of contract. The respondent has sued and has procured the injunction which has enjoined the picketing on the basis of the commission of these torts. The appellants say the injunction infringes their **Charter** right of freedom of expression under s. 2(b). Professor Hogg meets this problem when he suggests, at p. 677 of his text, after concluding that the **Charter** does not apply to private litigation, that:

> Private action is, however, a residual category from which it is necessary to subtract those kinds of action to which s. 32 does make the **Charter** applicable.

He added:

> The **Charter** will apply to any rule of the common law that specifically authorizes or directs an abridgement of a guaranteed right

and he concluded by saying, at p. 678:

> The fact that a court order is governmental action means that the **Charter** will apply to a purely private arrangement, such as a contract or proprietary interest, but only to the extent that the **Charter** will preclude judicial enforcement of any arrangement in derogation of a guaranteed right.

Professor Hogg, at p. 678, rationalized his position in these words:

> In a sense, the common law authorizes any private action that is not prohibited by a positive rule of law. If the **Charter** applied to the common law in that attenuated sense, it would apply to all private activity. But it seems more reasonable to say that the common law offends the **Charter** only when it crystallizes into a rule that can be enforced by the courts. Then, if an enforcement order would infringe a **Charter** right, the **Charter** will apply to preclude the order, and, by necessary implication, to modify the common law rule.

I find the position thus adopted troublesome and, in my view, it should not be accepted as an approach to this problem. While in political science terms it is probably acceptable, to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of **Charter** application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the **Charter**. The courts are, of course, bound by the **Charter** as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of . governmental intervention necessary to invoke the **Charter** would, it seems to me, widen the scope of **Charter** application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the **Charter** precludes the making of the order, where a **Charter** right would be infringed, it would seem that all private litigation would be subject to the **Charter**. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advance must be present before the **Charter** applies.

An example of such a direct and close connection is to be found in **Re Blainey and Ontario Hockey Association**; *supra*. In that case, proceedings were brought against the hockey association in the Supreme Court of Ontario on behalf of a twelve year old girl who had been refused permission to play hockey as a member of a boys' team competing under the auspices of the Association. A complaint against the exclusion of the girl on the basis of her sex alone had been made under the provisions of the **Human Rights Code**, 1981, S.O. 1981, c. 53, to the Ontario Human Rights Commission. It was argued that the hockey association provided a service ordinarily available to members of the public without discrimination because of sex, and therefore that the discrimination against the girl contravened this legislation. The Commission considered that it could not act in the matter because of the provisions of s. 19(2) of the **Human Rights Code**, which are set out here under:

> 19.--(1). . .
> (2) The right under section 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

In the Supreme Court of Ontario it was claimed that s. 19(2) of the **Human Rights Code** was contrary to s. 15(1) of the **Charter** and that it was accordingly void. The application was dismissed. In the Court of Appeal, the appeal was allowed (Dubin, Morden JJ..A, Finlayson J. A. dissenting). Dubin J .A., writing for the majority, stated the issue in these terms at [D.L.R., p. 735]:

> Indeed it was on the premise that the ruling of the Ontario Human Rights Commission was correct that these proceedings were launched and which afforded the status to the applicant to complain now that, by reason of s. 19(2) of the **Human Rights Code** she is being denied the equal protection and equal benefit of the **Human Rights Code** by reason of her sex, contrary to the provisions of s. 15(1) of the **Canadian Charter of Rights and Freedoms** (the "**Charter**").

He concluded that the provisions of s. 19(2) were in contradiction of the **Charter** and hence of no force or effect. In the Blainey case, a law suit between private parties, the **Charter** was applied because one of the parties acted on the authority of a statute, i.e., s. 19(2) of the Ontario **Human Rights Code**, which infringed the **Charter** rights of another. Blainey then affords an illustration of the manner in which **Charter** rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation--government action--against the **Charter**.

As has been noted above, it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the **Charter** by private litigants in private litigation. Professor Hogg has dealt with this question, at p. 677, *supra*, where he said:

> . . . the Charter would apply to a private person exercising the power of arrest that is granted to "anyone" by the Criminal Code, and to a private railway company exercising the power to make by-laws (and impose penalties for their breach) that is granted to a "railway company" by the Railway Act; all action taken in exercise of a statutory power is covered by the **Charter** by virtue of the references to "Parliament" and "legislature" in s. 32. The **Charter** would also apply to the action of a commercial corporation that was an agent of the Crown, by virtue of the reference to "government" in s. 32.

It would also seem that the **Charter** would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the **Charter** rights of another, the **Charter** will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the **Charter** will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the **Charter** is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of **Charter** causes of action or **Charter** defences between individuals.

Can it be said in the case at bar that the required element of government intervention or intrusion may be found? In Blainey, s. 19(2) of the Ontario **Human Rights Code,** an Act of a legislature, was the factor which removed the case from the private sphere. If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case-assuming for the moment an infringement of the **Charter**--would be on all fours with Blainey and, subject to s. 1 of the **Charter**, the statutory provisions could be struck down. In neither case, would it be, as Professor Hogg would have it, the order of a court which would remove the case from the private sphere. It would be the result of one party's reliance on a statutory provision violative of the **Charter**.

In the case at bar, however, we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have found, the **Charter** applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the **Charter**. It follows then that the appeal must fail. The appeal is dismissed. The respondent is entitled to its costs. In the circumstances of this case, it becomes unnecessary to answer the constitutional question framed by the Chief Justice on September S, 1984.

BEElZ J.: [Concurring]

I agree with the reasons of the majority in the British Columbia Court of Appeal for holding that in the circumstances and on the evidence of this case, the picketing which has been enjoined would not have been a form of expression and that no question of infringement of s. 2(b) of the **Canadian Charter of Rights and Freedoms** could accordingly arise. . . .

This reason suffices for the dismissal of the appeal with costs.

It is unnecessary for me to express any view on other issues in order to reach this conclusion. However, given the importance of these issues, I wish to state that, I otherwise agree with the reasons for judgment written by my brother McIntyre.

WILSON J.: [Concurring in part, dissenting in part]

I agree with the reasons of my colleague, McIntyre J., with the exception of his reasons dealing with the application of s. 1 of the **Charter**.

The search under s. 1 is, I believe, for the appropriate test to apply when weighing a principle of the common law against a fundamental freedom protected by the **Charter**. On a s. 1 analysis the purposes and objectives of a piece of impugned legislation are ascertained through an objective approach: see, for example, the approach taken by this Court in **R. v. Big M Drug Mart Ltd.**, [1985] 1 S.C.R. 295 and **R. v. Oakes**, [1986] 1 S.C.R. 103. It seems to me that the same objective approach must be taken when weighing a principle of the common law against a fundamental freedom.

There are, as I see it, two distinct questions which must be answered, namely:

(1) Does the tort of inducing breach of contract represent a reasonable limit under s. 1 on freedom of expression in the labour relations context? and

(2) If the tort does represent a reasonable limit under s. 1, should injunctive relief be granted in this particular case?

The first question requires the application of the objective approach mentioned above. If the tort does not survive the first question then, of course the conduct is not wrongful and no injunction can issue. If, however, it does survive the first question, then the facts of this particular case (including the subjective impact on the employer) must be considered in order to see whether the other requirements for the award of an interlocutory injunction are present, i.e., does the balance of convenience favour the plaintiff? However, even on this question it seems to me that some weight must be given to the freedom of speech of the ' picketers.

My difficulty with my colleague’s approach to s. 1 is twofold, First, he has used the subjective impact on the employer on the first question, It is, on his analysis, the "pressing and substantial concern," And second, he has given no consideration to the origin and historical development of the tort and its role in relation to labour disputes. I would have thought that this was crucial on the s. 1 inquiry. As a consequence the two questions referred to above have been merged into one and no objective criteria for the s. 1 inquiry have been identified.

I nevertheless agree with McIntyre J.’s proposed disposition of the appeal.