

What Is a Strike?

*Brian Langille**

This paper looks into how a “strike” should be defined under Canadian law. Although labour boards and courts in Canada claim to apply an “objective” definition, whereby a “strike” means any concerted cessation of work, the author argues that this approach is incapable of providing a coherent answer to the question of which work stoppages are strikes and which are not. What is needed, rather, and what accurately reflects the understanding of “strike” embodied in labour relations statutes and cases decided at common law, is a subjective definition that is based on the reason for the work stoppage. Thus, in the author’s view, a strike is a timely (and hence legal) cessation of work if it is engaged in by a group of workers who are negotiating (or renegotiating) their agreement with an employer, in an effort to induce the employer to come to terms. The author warns, however, that any attempt to constitutionalize the right to strike through the Charter freedom of association in s. 2(d), rather than through the guarantee of equality in s. 15, will inevitably draw courts into the mistaken exercise of trying to create a “judicial labour code.”

1. INTRODUCTION

It will probably not be long before the Supreme Court of Canada has to decide whether there is a constitutional right to strike in Canada. When the Court confronts that issue, it will be helpful if it has a clear idea of what exactly it is being asked to constitutionalize. In other words, we need a coherent legal definition of a “strike.” But, I claim, we do not have one in Canada. In this paper I deal with two questions, to which our current answers show that claim to be true.

- (1) *What is a strike under Canadian collective bargaining legislation?* This question reveals a very unsatisfactory aspect of Canadian law, and one that needs to be clarified as part of the current constitutional debate. Courts (and even labour boards,

*Faculty of Law, University of Toronto.

who should know better) insist that there is an “objective” definition of a “strike.” This is not true, nor is it even possible. If, as the “objective” view has it, any concerted cessation of work is a strike, then to constitutionalize that right is to constitutionalize too much. Moreover, our current overbroad definition will make such constitutionalizing a much less attractive idea than it should be. We need (and at least sometimes actually have) a narrower, “subjective” definition of a strike. Getting one will make constitutionalizing easier to imagine, as it should be.

- (2) *What is a strike for those excluded from Canadian collective bargaining legislation?* This too is a very obscure part of our labour law. For 60 years or so, the dominance of the statutory scheme has orphaned any real legal analysis of strikes outside the statute — i.e., “at common law.” As a result, most of us have forgotten how to think about these matters.¹

In what follows, I attempt to discuss these difficulties and then to propose a way of resolving them. In my view, there is a constitutional “right” (or more exactly, a constitutional freedom) to strike. But my view of the proper legal derivation of that “right” follows an analysis that the Supreme Court did not accept in its 2007 decision in

1 There is a third question: does this second question arise at all? What may be called the “comprehensive code” approach holds that all workers in Canada are regulated by the statutory scheme when it comes to the issue of striking — or in other words, that even “excluded” workers are not actually excluded from the right to strike. The argument is that the only way to obtain the right to strike in Canada is by jumping over the various statutory hurdles (certification, bargaining, conciliation, giving statutory notice, etc.), thereby ending up at the one point in time when the statute permits a strike. The result of this argument is that those whom the statute disqualifies from entering the race are intentionally excluded from the very possibility of ever arriving at the point where strikes are permitted. This “comprehensive code” approach has been discussed from time to time. See, for example, the judgment of Wilson J.A. in *Grey-Owen Sound Health Unit v. O.N.A.* (1979), 24 O.R. (2d) 510 (C.A.), considered in *Haldimand-Norfolk Regional Health Unit v. O.N.A.* (1981), 31 O.R. (2d) 730 (C.A.). The approach may embody the implicit (but incorrect) assumptions of many Canadian labour lawyers, because of the dominance of the statutory scheme in their thinking.

the *B.C. Health* case.² Just as with the “right” to collective bargaining, a very simple line of thought leads to the conclusion that a “right” to strike does exist. This line of thought also leads to a definition of “strike” which is congruent with our best understandings of both the statutory and common law definitions. In this paper, I hope to show that clear thinking about the legal meaning of “strike” highlights the need to resort to that simpler and better analysis.

2. WHAT IS A STRIKE UNDER COLLECTIVE BARGAINING STATUTES?

The law in Canada is, on its face, clear. But it contains a defect which, if latent, is only barely so. Here is the problem: Canadian law insists that there is what has been called an “objective” definition of a strike. The Supreme Court of Canada³ and every provincial appeal court that has considered the issue⁴ has so held, as have leading labour boards.⁵ Therefore, from a practitioner’s point of view, life is simple. If a client asks whether a “political” strike, for example, or a refusal of a group of workers to cross the legal picket line of another group of workers, is a strike — the answer is “yes.” This is because the objective definition is not concerned with “subjective” motives, or with the reasons for a work stoppage — but only, it is claimed, with the blunt fact of a collective cessation of work (a cessation that is done, in the words of the prevalent statutory formulation, “in combination, in concert or in accordance with a common understanding”⁶). This position leads to the conclusion that if a group of workers (covered by a collective agreement) leaves work to join a

2 *Health Services and Support-Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391 (“*B.C. Health*”).

3 *I.L.A. v. Maritime Employers’ Ass’n*, [1979] 1 S.C.R. 120.

4 See, for example, *Robb Engineering v. U.S.W.A., Local 4122* (1978), 86 D.L.R. (3d) 307 (N.S.C.A.).

5 See, for example, *Domglas Ltd. and United Glass & Ceramic Workers of North America* (1976), 76 C.L.L.C. ¶16,050 (Ont. L.R.B.); affirmed (1978), 78 C.L.L.C. ¶14,135 (Ont. Div. Ct.). See also *General Motors of Canada Ltd.*, [1996] O.L.R.B. Rep. (May/June) 409.

6 *OLRA* s. 1(1) — definition of “strike.”

public day of protest against, say, the presence of Canadian forces in Afghanistan, they are on an illegal strike.⁷ In other words, not only are they in all probability in violation of their contractual obligation to appear at work; they have also violated the public policy of the province of Ontario, as expressed in the provincial labour relations statute. (On this view, it is the concern of labour laws to regulate political protest, which is not at all obvious.) So too, the refusal to cross a picket line is a concerted refusal to work, and is therefore a strike.⁸ The idea is that any concerted cessation of work is a strike — full stop. And in Canada, if a strike occurs while a collective agreement is in force, it is invariably illegal.⁹

There are many problems with this view, of which one looms very large: it is simply not true that all concerted cessations of work are strikes. Our judges know this. Sometimes they even say it. In one of the appellate decisions on point, Chief Justice MacKeigan of Nova Scotia (a notable labour lawyer) held what while group participation in a national day of protest was a strike, “four men deciding together to go fishing would not be striking.”¹⁰ That is certainly true. But it is also certainly fatal to the idea of an “objective” definition. “Four men deciding together to go fishing” is clearly a concerted cessation (or, if you like, clearly “in combination, in concert or in accordance with a

7 *General Motors, supra*, note 5.

8 *Maritime Employers' Ass'n, supra*, note 3. See also *Nelson Crushed Stone and United Cement, Lime & Gypsum Workers' Int'l Union*, [1978] 1 Can. L.R.B.R. 115 (Ont. L.R.B.).

9 Labour relations statutes in Canada ban all mid-contract strikes. A strike is permitted only if it is “timely” — i.e., if it undertaken by a group of workers who have selected a union to represent them in a way recognized by the law (usually by certification after establishing majority support), and who have then gone on to bargain in good faith, endure a conciliation process, give notice to strike, approve the strike in a compulsory ballot, and wait until a statutory cooling-off period has expired — thereby finally reaching the time when it is legal for them to exercise the right to strike (and simultaneously, for the employer to exercise the right to lock out). Strikes are thus only permitted in order to obtain a collective agreement. Once an agreement is signed, strikes are forbidden during its term (which under the statute must be at least one year).

10 *Robb Engineering, supra*, note 4, at pp. 315-316.

common understanding”). But as the Chief Justice noted, it is not a strike. The problem is that on an objective definition, it would have to be a strike. Therefore, we do not have an objective definition.¹¹

The truth is that there are many concerted cessations which are not strikes. If workers jointly decide that the workplace roof is about to fall in under the weight of snow, and clear out — that is not a strike. So too, all workers downing tools (shutting off your computer) at the end of a workday or shift is a concerted cessation, and is in accordance with a common understanding (that it is time to go home). But it is not a strike. So too a group of workers who agree to “play hookey” and go to the opening game of the baseball season . . . and so on.

On the other hand, if a group of workers leaves work to pressure their employer to recognize a union — that is a (recognition) strike. A mid-contract work stoppage to protest the dismissal of a colleague — that is also a strike. If the members of a bargaining unit decide to leave work in the mid-term of a collective agreement to

11 At this point, someone will raise the following objection: “The statutory definition (at least in Ontario) says that to be a strike, the cessation must be ‘designed to restrict or limit output’ and this does not hold for our fishing aficionados; they simply want to fish, not limit output.” I must confess that I have always been mystified by this argument. On the one hand, an impact on production is always foreseeable, and in this sense “intended” — even by our fishing buddies. So they must be on strike as well, contrary to the objectors’ view. On the other (and better) hand, it seems obvious to me that those leaving work to join a protest against the war in Afghanistan, or the prorogation of Parliament, or to avoid a falling roof, are very unconcerned with production: their minds are clearly on some other objective. But the important point is this: it is the purpose which is critical. The issue is not what will happen to production (or can be foreseen to happen to production, or be designed to happen to production) if we stop work, but the reasons, the purpose, for our stopping work. And as we have seen, the statute is very limited in its concerns in this regard, both as to purposes it is concerned to permit and to prohibit. Even “real” strikes for higher wages are certainly designed to limit output, but that is not their purpose, or end, in any important sense. The real purpose is to get the employer to agree to terms, and the restriction on output is a means to that end. It is the end which counts. So the words the objector relies upon either prove too much or add nothing. I think the latter.

pressure their employer to increase pension contributions, that is again a strike. The cases here are too numerous to mention.

So it is clear that some concerted cessations are strikes and some are not. The objective definition is a non-starter. But how do we tell which concerted cessations are strikes, and which are not? The answer is the same as it always is: it is a matter of legislative intent. The reason why “four men deciding together to go fishing” is not a strike is that it is not the concern of the labour laws of the country to regulate employee attendance. It *is* a concern of the parties to the collective agreement, and employees who go fishing when they are supposed to be at work are in all probability subject to discipline under that agreement. But then, what *are* the concerns of the statute? A reading of its language against the background of the common law that it displaces makes the following plain:

- (1) First, the law is designed to outlaw recognition strikes. A very basic aim of our labour laws was to end pitched battles in the streets (and factories) for union recognition, and to replace them with the peaceful, democratic-majoritarian, administrative process of “certification,” run by a labour relations board. This is one of the statute’s great trade-offs: workers lose the right to self-help (to strike) for recognition, but in return they get the certification process.
- (2) Second, the statute embodies another great trade-off: it bans strikes to enforce an existing collective agreement. It thereby overrules *Young v. Canadian Northern Railway*,¹² eliminating the “common law” self-help method of enforcing collective agreements (the strike) and replacing it with the peaceful, administrative, adjudicative process of labour arbitration.
- (3) Third, the statute allows collective bargaining strikes, but it demands that they be limited to carefully regulated periodic bouts of bargaining for a collective agreement, and it insists that (once bargained) an agreement is binding for its term (see

12 [1931] 1 D.L.R. 645 (P.C.).

point 2, above). Closely related is the view of our labour boards that a great variety of concerted employee actions can be a strike — a slowdown, a work-to-rule, a partial or rotating work stoppage, a speed-up, and even the collective refusal of voluntary overtime. Equally, though, all of these things are permitted and protected if they are undertaken for the purpose the statute enshrines: to put pressure on the employer during timely periodic negotiations for a new collective agreement.

And that is it. For statutory purposes, three types of strikes exist, only one of which (the third one) is the type the statute is concerned to *permit*. The other two — recognition strikes, and strikes during the term of a collective agreement — it is the concern of the statute to prohibit. Any further extension of the definition of a strike cannot be grounded in a statutory purpose, and will conflict with some other clear and important purpose. For example, extending the definition to refusals to cross a picket line overrides the statutory commitment to free collective bargaining about when workers have to work. So too, the ban on political strikes conflicts with our basic ideas of free political expression and action; the idea that labour statutes are concerned to regulate this fundamental issue is bizarre on its face. It is often said that one of the purposes of our labour law is “industrial peace.” That is true, but the kind of peace the statutes aim to achieve is reflected in the restriction of strike action in the three contexts just outlined. Those laws cannot, do not, and should not, provide a statutory guarantee of uninterrupted production during the life of a collective agreement (which is what the objective definition, taken literally, would amount to).

So the reason for the strike matters. The reason is why we know that the examples, set out above, of concerted cessations which are strikes, are indeed strikes.¹³ What is protected is the classic bargaining strike in aid of obtaining an agreement. In this sense we do need,

13 This latter point our law has straight. See *Graham Cable TV/FM and Communications, Electronic, Electrical, Technical & Salaried Workers of Canada* (1986), 12 Can. L.R.B. Rep. (N.S.) 1 (Can. L.R.B.).

and in practice we actually have, a “subjective” definition” of “strike.”¹⁴

3. WHAT IS THE STATUS OF A STRIKE BY THOSE EXCLUDED FROM COLLECTIVE BARGAINING LEGISLATION?

We have not had much occasion in recent years to think about the status of a strike at common law, that is, a strike by those who are not covered by a collective agreement. Because of, and since, the adoption of the comprehensive Wagner-based statutory framework in Canada, the law of strikes has been dominated by that framework and has developed almost exclusively within it. Everything is regulated by the statute, and the statute makes it all a matter of “timeliness.” If a labour lawyer in Canada hears that a strike has occurred, the first question that pops into his or her head is, “when?” If the strike is “untimely” because it is a recognition strike, or because it happens while a collective agreement is in force, or because it comes too early

14 There is another way of making this point. On the objective definition approach, we end up in the following predicament. Suppose a collective agreement contains a (reasonably common) clause allowing employees not to cross the legal picket line of another group of workers who are legally on strike. Suppose, too, that a number of employees covered by the agreement do not cross such a picket line. On the objective definition of a strike, we end up with the following little drama:

1. Employer: This is a collective cessation of work and therefore a strike.
2. Union: But read the picket line clause. We don’t have to go to work — so it’s not a cessation of work, and not a strike.
3. Employer: The picket line clause is an attempt to contract out of the Act’s restrictions on untimely work stoppages, so it’s illegal. You do have to be at work, and this is a strike.
4. Union: But we can’t be contracting out of the ban on untimely work stoppages, because we’re not obliged to work in the first place.
5. (Repeat 3 and 4 *ad infinitum*.)

Can this circle be broken? Yes, but only if we ask what the statute requires — in other words, if we decide whether it is the purpose of the law to prohibit such refusals. This is the toughest question of all. In my view, the answer is no — just as the law does not restrict employer appeals for the support of third-party workers (also known as replacement workers, or scabs) during the conflict.

in the bargaining process, that is the sole determinant of the strike's legality (given the accepted idea that the "why" of the strike is irrelevant). So no tort or contract law analysis of strikes is necessary. In the famous *Maritime Employers' Ass'n* case,¹⁵ an injunction was issued against a strike, and in all three levels of court, including the Supreme Court of Canada, no cause of action was ever mentioned. Everyone knew that the only issue was timeliness under the statute. Our basic thinking about the legality of strikes has evaporated, and this truth is revealed when we no longer have the statute to fill the legal gap for us.

Against this backdrop, we need to look more closely at the Canadian statutory scheme. At its heart is the following principle (I will use the formulation in s. 5 of the Ontario *Labour Relations Act, 1995* as an example): "Every person is free to join a trade union of the person's own choice and to participate in its lawful activities."¹⁶ In spite of what the Supreme Court said in *B.C. Health*,¹⁷ this statutory principle served to clear up a lot of legal confusion, especially in the tort law of trade union activity. It is clear that that striking is a protected activity under s. 5.¹⁸

But what of those who are left out of the statute? Surprisingly, perhaps, there are two ways in which workers are "left out." First (to use the Ontario statute again as an example), s. 1(3) says:

Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,

- (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or
- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.¹⁹

15 *Supra*, note 3.

16 *OLRA* s. 5.

17 B. Langille "The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It" (2009), 54 *McGill L.J.* 177, at pp. 190-191.

18 *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609 ("Royal York").

19 Section 97: "For the purposes of section 87 [protection of witnesses' rights] and any complaint made under section 96 [remedies, etc., for breach of the Act], 'person' includes any person otherwise excluded by subsection 1(3)."

Second, s. 3 states that “[t]his Act does not apply” to various types of workers, including (until recently) agricultural workers, and still including (among others) “a domestic employed in a private home” and “a person employed in hunting or trapping.”

We will take lawyers as our example of those excluded under s. 1(3), and agricultural workers as our (now historical) example of those excluded under s. 3. These are two different kinds of exclusions, at least on their face. Agricultural workers do not get s. 5 rights because they are excluded from the Act altogether; s. 5 never reaches them. Their right to strike has not been clarified by the *Royal York* decision,²⁰ discussed below. They are completely at the mercy of whatever the old common law rules were or are, on both the tort²¹ and the contract fronts.

But as for lawyers, it seems at first sight — even if they are “employed in a professional capacity” — that they do have s. 5 rights, because they are not excluded from the Act but only from employee status. Section 5 speaks of “persons,” which they are — they are just not “employees.” So it looks as though a group of lawyers cannot be “certified,” and cannot require their employer to bargain in good faith under the statute, because only “employees” can do that. On the other hand, it would seem, again at first sight, that the basic unfair labour practice provisions do apply to them in the exercise of their freedom to associate. And, interestingly, the timeliness restrictions on striking do not apply to them, because those restrictions apply only to “employees.”

We are left with two questions. Can lawyers and doctors and others listed in s. 1(3) strike? And what about s. 3 folk — domestics, trappers, agricultural workers, and so on? The Act does not apply to them at all; it imposes no restrictions on them, but neither does it give them any statutory rights, including those under s. 5. Why the difference? Why the two ways of excluding? I don’t think anyone knows.

But then there is the wrinkle created by the notorious Supreme Court of Canada decision in *Barbara Jarvis*,²² where the Court

20 *Supra*, note 18.

21 See I. Christie, *The Liability of Strikers in the Law of Tort* (Kingston, Ont.: Queen’s Industrial Relations Centre, 1967).

22 *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497.

decided that the word “person” in s. 5 actually meant “employee.”²³ The *OLRA* was amended after that decision, to provide that for the purposes of complaints brought under the Act’s main remedial provision, “‘person’ includes any person otherwise excluded by subsection 1(3).”²⁴ However, the Ontario Labour Relations Board has refused to read that amendment as a complete overruling of *Barbara Jarvis*;²⁵ the word “person” in s. 5 continues to be interpreted to mean “employee.” The explanation for all of this lies, perhaps, in the fact that the cases in question concerned “managers” who were and are excluded under s. 1(3) along with, and in the same way as, lawyers. The importance of the “managerial” exclusion in the Wagner model cannot be overestimated, as Karl Klare has famously explored.²⁶ The perceived need to keep managers and workers at “arm’s length” runs very deep. The OLRB has been of the view that “it would be contrary to what we conceive to be the essential purpose and scheme of the Act to conclude that a managerial person has a protectable right to union membership.”²⁷

Driven by such thinking about the managerial exclusion, s. 5 gets read down to cover only “employees,” taking everyone else (including lawyers and all the others listed in s. 1(3)) along for the ride. The result is that there is really only one type of exclusion —

23 The majority in *Barbara Jarvis* held that “person” in s. 5 must mean “employee” because in the provisions of the Act providing unfair labour practice remedies for employer violations of the exercise of s. 5 rights, some remedies were limited to employees and persons applying to be employees; the word “person” was used to capture prospective employees who never became employees because of an unfair labour practice refusal to hire. This mistake is eerily similar to that made by the Supreme Court of Canada in the recent *Wal-Mart* case (*Desbiens v. Wal-Mart Canada Corp.*, [2009] S.C.J. No. 55 (QL)) — i.e., reading back from the remedy section to limit the right.

24 Now s. 97, *supra*, note 19.

25 See *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] O.L.R.B. Rep. (Dec.) 751. There is a strong argument that the legislative response, mentioned in the introductory words of the s. 1(3) exclusion (“subject to section 97 . . .”) should be read as a surgical and complete reversal of *Barbara Jarvis*. But the OLRB refuses to read it this way.

26 K. Klare, “The Bitter and the Sweet: Reflections on the Supreme Court’s *Yeshiva* Decision” (1983), 13(5) *Socialist Review* 99, at p. 120.

27 *A.A.S. Telecommunications, supra*, note 25, at p. 757, quoting *Ottawa General Hospital (No. 2)*, [1974] O.L.R.B. Rep. (Oct.) 714.

lawyers and agricultural workers alike get no benefit from the statute at all. In the end, there seems to be no difference between being excluded from employee status by s. 1(3) and being entirely excluded from the Act by s. 3. Where does that leave us? It leaves all of those who are excluded without the benefit of s. 5 rights. Among the rights which are denied to them is a (statutory) “right” to strike — really a “freedom” to strike — which would be backed up by unfair labour practice protection and would therefore be a real, enforceable right that imposed a corresponding duty on employers not to interfere with its exercise.

Yet Canadian judges have on many occasions stated that the “right” to strike existed before statutes on the Wagner model were enacted. In *Haldimand-Norfolk Regional Health Unit*, the Ontario Court of Appeal put it this way:

The rights to strike and lock-out are basic and fundamental rights of the parties to collective bargaining in endeavouring to settle the terms of a collective agreement. They are rights that existed at common law. They are rights which continue to exist since the passing of the *Labour Relations Act*, subject however to certain restrictions and limitations placed thereon by the Act The Act leaves inviolate the common law right to strike or lock-out subject to the provisions for conciliation procedure and the restrictions with respect to the time at which the parties may resort to such action.²⁸

But how is a strike thought of at common law? In *Royal York*, the employer had fired several employees because they were out on a legal strike for a very long time. The issue was whether they had been fired for exercising a right under the Act, in contravention of the unfair labour practice provisions. The employer argued that the employees had breached their contracts of employment by going on strike. Although the case was actually decided on a question of statutory interpretation, Cartwright J. (for the majority in the Supreme Court of Canada) presented us with a rarely seen tort and contract analysis. First, he disposed of tort liability in this very non-technical manner:

In considering the question whether the right to strike which the [employees] claimed to be exercising is a right under the Act, it must first be decided whether the strike was a lawful one. That the purpose of the employees in going on strike was not to injure their employer but to achieve improvements

28 *Supra*, note 1, at p. 746, *per* Goodman J.A.

in their working conditions and monetary benefits has not been questioned. The argument that the strike was unlawful is based on the submission that in ceasing to work each of the employees was committing a breach of contract.²⁹

Then the contract analysis: “There is the highest authority for the proposition that a strike which would otherwise be lawful at common law becomes unlawful if the cessation of work is a breach of contract.”³⁰

The Court here followed standard common law contract of employment thinking, and pursued the question of whether the employees gave reasonable notice of their intention to strike — i.e., reasonable notice of termination of their contracts of employment. Since the Court’s 1975 decision in *McGavin Toastmaster Ltd. v. Ainscough*,³¹ we would say that any idea that individual contracts of employment continue to exist under the statutory scheme is both unnecessary and misconceived. And we know that *Royal York* actually turned on s. 1(2) of the Ontario *Labour Relations Act*, which at that time read as follows:

For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

This section renders the common law analysis irrelevant for those who fall under the statute, as the workers in *Royal York* did. However, for those outside of the statute, the *Royal York* case provides as clear a statement of the common law contractual analysis of striking as is available to us. Cartwright J. said:

Mr. Jackett’s real attack on the legality of the strike, if I have correctly apprehended his argument, is based not on the breach of a contractual provision requiring the employees to give a stated length of notice before ceasing work but rather on the view that, to remain within the law, each employee must before or at the moment of ceasing work terminate his contract of employment. It is said that so long as his contract is in existence it is his duty to work and failure to come to work is a breach of contract which renders the

29 *Supra*, note 18, at p. 615.

30 *Ibid.*

31 [1976] 1 S.C.R. 718.

strike unlawful. In support of this submission reliance is placed on statements an example of which is that of Lord Davey in the *Denaby* case [[1906] A.C. 384], at p. 398:

My Lords, the appellants were perfectly within their right in electing to treat the absence of the men from work since June 29 as a rescission of their contracts and requiring them to enter into new contracts of service before resuming work.

*That, undoubtedly, would be a correct statement of the position of the parties at common law; the employee cannot have it both ways; if he is still an employee it is his duty to work, and if he refuses to work he is in breach of the contract of employment and the employer can treat it as at an end. But, in my opinion, the position of the parties is altered by the relevant provisions of the Act [i.e., by s. 1(2)].*³²

So it looks like there is a “common law right to strike” for those outside the statute. But just as with the statutory definition, there is a problem with the common law idea of a strike. The common law may provide an analysis of the legal mechanics of a strike when we know that we have one — but how do we know when we have one? The common law idea of notice of termination of individual contracts of employment (i.e., through the provision of reasonable notice by employees) applies to termination for any reason — leaving for a new job, retirement, and so on. Those acts are exercises of a basic legal freedom and are not strikes, even if they are done by a group deciding in concert that they will take new jobs, retire, etc. We know they are not strikes because, again, we understand that stopping work is a strike only if it is done for a certain kind of purpose. *Royal York* was a classic bargaining strike.³³ The common law “right” to strike amounts to this: it is the freedom of a group of workers, playing by the rules of contract termination, and acting for a certain purpose (i.e., (re)negotiation of their contract with the employer), to stop working in an effort to get the employer to come to terms. If we are constitutionalizing something, this is what it is. But it is purely a *freedom* at common law, and one not protected by a perimeter of rights. There is no protection, no right, against employer retaliation

32 *Supra*, note 18, at pp. 616-617 [emphasis added].

33 In the words of the Court, “the purpose of the employees in going on strike was not to injure their employer but to achieve improvements in their working conditions and monetary benefits . . .” *Supra*, note 18, at p. 615.

for the exercise of the freedom (and the employer has no duty not to dismiss, no duty to rehire, etc.). That protection, or right, is what is given by s. 5 of the statute. As *Royal York* makes plain, it is a right that did not exist at common law, and one which (as we have just seen) is withheld from all workers who are excluded from the statute.

4. WHERE DOES THIS LEAVE US NOW?

The view presented here is that a legal strike amounts to the same thing under the statute and at common law. A purposive definition is in place, and it is this: a strike is a timely and thus a legal cessation of work if it is engaged in by a group of workers who are negotiating (or renegotiating) their agreement with an employer, in an effort to get the employer to come to terms. The “right” to strike is actually a freedom to strike. That is the definition of a strike. My claim is that when the Supreme Court of Canada goes about constitutionalizing a right to strike, it will have to be concrete about what it is constitutionalizing — and that is the best articulation we have. It encapsulates what is permitted both under Canadian statutes and at common law.

It is true that there is a distinction between the common law and the statutory legal framework. Under the statute, but not at common law, the exercise of the freedom to strike is protected by a further set of employee rights (unfair labour practice rights), which impose corresponding duties on the employer not to interfere with the exercise of that freedom. Nonetheless, the same freedom exists in both legal regimes.

I have criticized the Court’s reasoning in *B.C. Health*³⁴ on the ground that if the Court is going to invoke s. 2(d), which I argue it should not do, then there is a simpler way of determining the meaning of that section than how the Court did it in that case (which involved a long and difficult tour of legal history, international labour law, and what are called “*Charter* values”). The following provides a coherent notion of freedom of association: it is the freedom to do with others what one is legally free to do alone. I am legally free to

34 Langille, “The Freedom of Association Mess,” *supra*, note 17.

bargain my contract with my employer, and free to withhold my labour until we have concluded a deal. That is a basic, and very contractual, idea. Because I also have a freedom to associate, I can join with others in doing the same thing — i.e., I have the freedom to bargain collectively, and the freedom to withhold my labour along with others until we reach agreement. In other words, I have the freedom to strike in connection with the negotiation of a contract. This is exactly the freedom that the common law sees as a “right” to strike, and it is the freedom to strike that is enshrined in our statutory definitions (properly understood). My argument is that if this way of thinking gets us to exactly where we are and need to be, we would do well to break with the torturous approach used in *B.C. Health*, including all talk of “inherently collective rights.”

I have also criticized the Court’s decision in *B.C. Health Services* for coming to the right conclusion (that there is a constitutional “right” — i.e., a constitutional freedom — to bargain collectively), but for the wrong reasons. My main criticism is that the Court does not need, and should abandon the effort, to conjure a “judicial labour code”³⁵ from the three words “freedom of association” in s. 2(d) of our *Charter*. Instead, the Court should appeal openly (rather than covertly) to the guarantee of equality in s. 15. Doing so avoids all sorts of difficulty, including the herculean task of actually constructing a judicial labour code. I do not want to dwell on that point here, but it is worth noting.

If a constitutional right to strike is recognized, two types of difficulties will arise, one harder than the other to deal with. First, there will be the relatively easy task of deciding whether the current restrictions on the right to strike for those who are regulated by statute (or other restrictions that might later be imposed on them) can pass s. 1 scrutiny. The other, much more difficult problem will be the situation of those outside of the statutes, who can look to no rules at all on striking. While it is true that their freedom to strike is not protected by unfair labour practice rights, they also do not have the obligations imposed by labour relations legislation (including, critically,

35 See B. Langille, “Why Are Canadian Judges Drafting Labour Codes – And Constitutionalizing the Wagner Act Model?” (2009-2010), 15(1) C.L.E.L.J. 101.

the timeliness restrictions, the rules on minimum duration of collective agreements, and so on).³⁶ They still have their *Young v. Canadian Northern Railway* rights to “arbitrate with their feet.” They can strike for recognition. What about strike votes? Or compulsory conciliation? And what about the situation after the strike, if a collective agreement is signed? Someone will have to answer such questions as whether those agreements are still not binding at common law, whether the employees remain mere “third parties” to a collective agreement, and whether a union not operating under the statute has the legal personality to make and enforce such an agreement. And on and on. This is the task Canadian judges have signed up for by undertaking a s. 2(d) analysis rather than bringing a s. 15 equality rights analysis to bear on these labour law issues.

To undertake the task of drafting a complete judicial labour code, even limited to the provisions on striking, is to enter a world without end. One can already begin to see how this challenge will be met, and parallels will be drawn to the first steps that have been taken with respect to the newly created “right” to collective bargaining (as part of the “judicial labour code”). Once the drafting begins, there will be a lot to think about. Judges will quickly see that the only way out is to turn to the existing Wagner model. So, if the Supreme Court of Canada creates a “right” to strike, someone is going to have to come along and clean up the resulting mess (as in *Fraser*³⁷). This will be done, it can be predicted, by once again sweeping the mess under the carpet of the existing statute: in other words, by creating a judicial labour code which turns out to be a cut-and-paste job from the Wagner model. For every *B.C. Health*, we will need, and we will have, a *Fraser*. But the real problem is that this would not only be a cutting and pasting of the Wagner model; it would also be a constitutionalizing of that model.

The real constitutional problem in all of these cases is to be solved not by gassing around in the abstract about the true meaning

36 This is something Judson J. saw in his dissent in *Barbara Jarvis* — that exclusion from the Act meant not only not being “entitled to its protection,” but also not being “amenable to [its] obligations.” *Supra*, note 22, at p. 507.

37 *Fraser v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 481 (C.A.).

of “freedom of association” (invoking history, international law, *Charter* values, and so on). In the case of the right to strike, the problem is best viewed through the lens of a simple question: do most workers have their freedom to strike concretely instantiated, respected, and protected against employer interference, while the complainants, for no good reason, do not? Asking that question simply extends the promise of equality to those who are denied a “right” to strike.³⁸ It also avoids the serious and unnecessary sin of constitutionalizing the Wagner model.

So the positive conclusion is this: if we think clearly about defining a “strike” before we embark on constitutionalizing it, we may make the latter exercise the much simpler one that it deserves to be. And, as a bonus, we will be given yet more reasons to think, or at least to hope, that the end results of *B.C. Health* and *Fraser*, correct as they are, will someday be arrived at by a much simpler, more legitimate, and less dangerous route.

38 For more on the idea that s. 15 (equality), and not s. 2(d), is the key to our problems, see Langille, “The Freedom of Association Mess,” *supra*, note 17; and Langille, “Why Are Canadian Judges Drafting Labour Codes – And Constitutionalizing the Wagner Act Model?” *supra*, note 35.