1998

Right to Strike: A Comparison of Canadian and Chinese Law

Tianjiao Yu

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Right to Strike

– A Comparison of Canadian and Chinese Law

by

Tianjiao Yu

Submitted in partial fulfilment of the requirements for the degree of Master of Law

at

Dalhousie University
Halifax, Nova Scotia

August, 1998

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0-612-36544-1
To my husband

Wang Jia-qi
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The socialist market economy was written into the Chinese Constitution in 1993. From then on, the Ministry of Labour stopped officially denying the existence of strikes in China. For the past several years, there have been numerous reports of labour unrest. However, there is in no law regulating strikes. Strikes are prohibited in China.

This thesis is designed to conduct a comparison of Canadian and Chinese law respecting the right to strike. Chapter I is devoted to analysis of the right to strike under Canadian law in two aspects. The first aspect is the question of whether there is a right to strike under the Canadian Charter of Rights and Freedoms. Three judgments of Alberta Reference are carefully examined. The second aspect is the right to strike under Canada labour law. This analysis focuses on statutory regulations and case law to examine the Canadian theory of conflicted interests, the basis for a right to strike in Canada.

Chapter II of the thesis deals with the right to strike under the Chinese constitutions. The right to strike was not included in China’s first Constitution. Although the 1975 and 1978 constitutions guaranteed a right to strike to Chinese citizens, it was removed from the 1982 Constitution. This chapter discusses the reasons why the Chinese constitution does not protect the right to strike. This discussion focuses on the doctrine for no right to strike in today’s China, which is the same interest among the state, the enterprises and the workers.

Chapter III of the thesis is concentrated on the right to strike under Chinese labour law. In accordance with the Constitution, strikes are prohibited under Chinese labour law. The formal mechanism to resolve labour disputes in Chinese includes consultation, mediation, arbitration and lawsuit.

The last chapter is to provide law reform recommendations in relation to the Chinese legal system respecting the right to strike. The necessity of a right to strike in today’s China is the conflicted interests under the socialist market economy. Specific legal reform suggestions will be provided respecting the relevant statutes.
Special thanks given to my supervisor

Dianne Pothier
INTRODUCTION

A. Thesis Topic

The thesis topic is *Right to Strike - A Comparison of Canadian and Chinese Law*. The underlying objective of the thesis is to conduct a comparison between Canadian and Chinese law, focusing on the right to strike. With the introduction and comparison as the foundation, the thesis attempts to provide legal reform suggestions in relation to the Chinese legal system in regard to the right to strike in China.

Given the substance of my thesis, my audience includes two kinds of people. The first part is the general reader with interest in Chinese and Canadian labour law. What they want to know from my thesis is to have some ideas on either Canadian or Chinese labour law. The second part of my audience is the people who want to pay attention to the intricacies of labour law. It may include law school professors and students, government officers and trade union members. They will demonstrate their interests in my thesis either theoretically or practically. Hence, my thesis should be both simple and complicated. Simple enough for the first part of my audience to understand and complicated enough for the second part to be educated.

While describing my thesis topic, it is significant to note that I am not trying to fully develop the factors that influence the differences of these two kinds of legal systems. My reason is that it is a complex issue which includes various aspects, such as economic structure and the political system. That will be a complete thesis topic.
itself, but not the one I want to write. Instead I will address the factors insofar as it
will be needed to set the context for my comparison and assess why my suggestions
are practical.

B. Why I Chose the Thesis Topic

As previously noted, this thesis is designed to make a comparison between
Canadian and Chinese law. There are two reasons for why I have chosen this thesis
topic.

The first reason is that I want to introduce Canadian labour law to China and
introduce Chinese labour law to Canada. I felt embarrassed after I came to Canada
when I was asked by no fewer than ten people whether we had trade unions in China.
Not to mention that they did not know the Labour Law of the People's Republic of
China, which came into force just three years ago. It is difficult for Canadians to have
information about China since there are few things about China in the newspaper
periodicals or on television.¹ In the meantime, a lot of Chinese people have little
knowledge about Canada. Much attention has been paid to the United States and some
Chinese people even think that Canada has a similar labour law system to the

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¹ For example, the Chinese Communist Party held its 15th national meeting in the year 1997. In that
meeting, the CCP elected its new leadership for the next 4 years. At the same time, Princess Diana was
killed in a traffic accident, the Canadian journalists made lots of reports on the latter and paid little
attention to the former. I think it is not wise to ignore such an important news in a country that includes
one-third of human kind.
American one. I hope through my research, I could create awareness of the different legal system to both Chinese and Canadian people.

The second reason is that I hope to build a model that can be implemented in today’s China to regulate strikes. Strikes are prohibited under the Chinese legislation. Since the government regards strikes as a threat to its sovereignty, the right to strike is a very sensitive issue in China. Few scholars are willing to do research although much research work needs to be done. More specifically, under the market economy in today’s China, workers are in a weak situation as opposed to employers. They are liable to be prejudiced by employers whose interests are in conflict with theirs. It is the time to provide Chinese workers a right to strike to advance their interests.

C. Methodological Prospectus

As is clear from the thesis topic, the methodology I will be utilizing in developing my thesis is the comparative one. Comparative law is an intellectual activity with law as its object and comparison as its process. Within my thesis topic, the object of my comparison are Canadian and Chinese legislation respecting the right to strike. What I want to emphasize in my comparative methodology is that since

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2 Of course, Canadian labour law is different from the American one, although they have some similarities. For instance, Labour Boards in Canada have generally rejected the United States approach toward replacement workers which recognizes the employer’s right to hire permanent replacement workers during economic strikes. Under the Canadian legislation, an employee who participates in a lawful, timely strike is protected under the statutes with respect to the return to work. But, in the U.S., a striker may lose her job to a replacement worker during economic strikes. For more discussion, see P. Weiler, “Striking a New Balance: Freedom of Contract and the Prospects for Union Representation” (1984) 98 Harv. L. Rev. 351.
there is no right to strike in today’s China, my comparison of these two legal systems focuses on their different theoretical base. In Canada, the assumption of conflicting interests between employees and employers is the basis for the right to strike; while in China, the assumption of unity of interests among the state, the enterprises and the workers is the basis for no right to strike. Therefore, my comparison of Canadian and Chinese legislation pays much attention to the analysis of these two different doctrines.

The starting point for my comparative research is dissatisfaction with Chinese theory, with the hope to find some useful insights from Canadian theory. It is the proposition that China should adopt some solutions from the Canadian system that drives me to conduct this comparative research. I attempt to look inside the Canadian system in order to produce a practicable model for China to regulate strikes. With the law reform proposals in relation to the Chinese legal system, my comparative research will be not only a method of thinking - the investigation of the Canadian law provides China a working hypothesis - but also a method of working: How does this hypothesis actually set forth under the Chinese legal system?

However, there are limitations on my thesis writing. First, my one-year study in Dalhousie Law School is not long enough to enable me to get fully familiar with Canada labour law. That is the reason why I chose to concentrate on the theoretical base of Canadian and Chinese labour law to conduct my comparison because I want to develop the theme that connects these two kinds of legislation. Second, there are few Chinese materials on the issue of the right to strike. I am very glad, however, that some foreign scholars have done serious research on this topic and this research has
helped me in my thesis work. In addition, the absence of case law in China and English as a foreign language to me make the writing of my thesis more challenging.

**D. Contents of the Thesis**

The term of "socialist market economy" was written into the Chinese constitution in May 1993.\(^3\) For the first time in the history of the People's Republic of China, the planned economy lost its dominance after four decades. On July 5, 1994, China promulgated its first labour code in an effort to establish and safeguard a labour system suited to the socialist market economy.\(^4\)

These two events mark an important change in labour relation in today's China. As a result of excessive and rigid control by government planners, labour relation under the planned economy had been assumed to have a fundamentally different nature than in the Canadian situation. The establishment of a socialist market economy provides a chance to re-examine labour relationship in today's China from a new perspective. Through an analysis of the right to strike in Canada in Chapter I, the thesis is intended to provide China a completely different doctrine respecting labour relation.

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\(^3\) Chen Qiuping, "Constitution Amended to Advance a Market Economy" (1993) 17 Beijing Review (BR) 14.

As indicated above, the starting point for this comparative research is to find a practicable model for China to regulate strikes. In order to accomplish this objective, a large portion of the thesis concentrates on the Chinese legal system. Because the Chinese assumption of identity or unity of interest among the state, the enterprises and the workers is the basis for the whole system of Chinese labour law, understanding this theory is of considerable importance to understand the absence of a right to strike in China. Therefore, the second chapter of the thesis is devoted to analysis of the right to strike under the Chinese constitution with sufficient attention to highlight the Chinese doctrine of “identity of interest”, a different doctrine from the Canadian one.

The third chapter of the thesis deals with the right to strike under Chinese labour law. To a considerable extent, the analysis focuses on the Chinese system of collective bargaining and the mechanism to resolve collective disputes. Although the 1994 Labour Law of the People’s Republic of China provides for collective contracts and sets forth a mechanism to resolve labour disputes, it does not indicate any substantial change in the government’s repressive attitude toward a right to strike. Strikes are prohibited for any purpose in China.

The last chapter of the thesis deals with law reform proposals in relation to the Chinese legal system. Various kinds of ownership under the market economy have brought significant changes in China’s labour relation. In today’s China, the conflicting interests between the two parties in labour relation cannot be ignored any longer. For the past several years there have been numerous reports of labour disturbances and the Ministry of Labour has stopped officially denying the existence
of strikes since the year 1993. It is time for China to conduct some legal reform in regard to a right to strike to prevent and resolve industrial conflict.
CHAPTER I

THE RIGHT TO STRIKE IN CANADA

Introduction

The right to strike is not expressly granted by the Canadian constitution. It is recognized and protected in labour relations legislation on the basis of assumed conflicting interests between employers and employees, the two parties to labour relations. The purpose of this chapter is to analyze the right to strike under the Canadian legislation to provide a basis for the subsequent discussion of no right to strike in China and the legal reform suggestions in relation to the Chinese legal system.

The first part of this chapter is a discussion under the Canadian Charter of Rights and Freedoms. Three cases reached the Supreme Court of Canada for its initial ruling in regard to whether the right to strike is a constitutional right. The majority of the Supreme Court of Canada held that the Charter does not guarantee a right to strike. The central decision was given in the Reference Re Public Service Employees Relations Act (Alta), which will be the case mainly examined below. The second part of this chapter is an investigation of the right to strike under Canadian labour law including the following: requirements of a strike, definition of "strike",

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5 1982, c.11 (U.K.).

employee status during a lawful strike and support of a lawful strike. This discussion consists of the statutory provisions and the case law for the purpose of drawing a clear picture of the right to strike in Canada.

A. Under the Charter

The right to strike is not explicitly guaranteed under the *Canadian Charter of Rights and Freedoms*. Since freedom of association, a fundamental freedom guaranteed in s. 2 (d) of the *Charter*, indicates the right to participate in the lawful activities of the association,\(^7\) it is a relevant provision to the right to strike under the *Charter*. The jurisprudence in the lower courts was divided on the nature and scope of freedom of association. On the one hand, the trial decisions of a number of provinces have endorsed a constitutive definition of freedom of association, holding neither collective bargaining nor strike activity is protected by freedom of association.\(^8\) On the other hand, the decisions in Ontario and Saskatchewan cases have adopted broader definitions, concluding that in guaranteeing workers’ freedom of association, the

\(^7\) Ibid.

Charter also guarantees the freedom to pursue common purposes and to engage in collective activities.\(^9\)

Three cases reached the Supreme Court of Canada in regard to whether the right to strike is constitutionalized. In PSAC \textit{v. Canada (A.G.)}, \(^{10}\) the union challenged the validity of the \textit{Public Sector Compensation Restraint Act}, \(^{11}\) which effectively deprived federal public servants of the right to bargain collectively for a two or three year period by virtue of provisions extending existing and expired collective agreements with statutorily prescribed wage increases. In RWD\textit{SU v. Saskatchewan}, \(^{12}\) the union challenged \textit{The Dairy Workers (Maintenance of Operations) Act} \(^{13}\) which had the temporary effect of prohibiting a threatened and otherwise lawful rotating strike by dairy employees, and ordering resolution of the dispute by interest arbitration. In \textit{Reference Re Public Service Employees Relations Act (Alta.)}, \(^{14}\) the union challenged Alberta statutes which placed restriction on public service employees by prohibiting the right to strike and imposing a specific form of compulsory interest arbitration for unresolved disputes.


\(^{10}\) 87 C.L.L.C. 14,022; [1987] 1 S.C.R. 424.

\(^{11}\) S.C. 1980-81-82-83, c. 122.


\(^{13}\) S.S. 1983-84, c. D-1.1, (Bill No. 44).

\(^{14}\) Supra note 6.
The question presented in each of these three cases was slightly different, but essentially what the Supreme Court of Canada was asked to decide was whether or not the right to strike and to bargain collectively is protected under s. 2(d) of the *Charter*. In the opinion of the unions, the right to strike is included in s. 2(d)’s guarantee of ‘freedom of association’. However, the Supreme Court of Canada gave a negative answer in all these three cases; the majority held that the *Charter* does not guarantee a right to strike. Its central decision was delivered in the *Alberta Reference* case, which provides the reasons on which the other two decisions are based; the *Alberta Reference* is accordingly the one that will be examined below.

Four of six judges held that freedom of association did not include protection for the right to strike. The judgment of half of the court was delivered by LeDain J., with Beetz and La Forest JJ. concurring. McIntyre J. wrote a separate concurring judgment in which he stated that the right to strike is not included in s. 2(d) guarantee of freedom of association, but he gave no explicit answer to whether the freedom to participate in collective bargaining might be constitutionally protected. A dissenting judgment was delivered by Dickson C.J.C., with Wilson J. concurring. The Chief Justice held that striking and collective bargaining are protected freedoms within s. 2(d). These three judgments will be discussed in turn.

1. The Judgment of LeDain J.

The judgment of LeDain J. is the briefest one among the three judgments. LeDain J. expressly recognized freedom of association under s. 2(d) of the *Charter* in
two situations: where the individual wishes to create, support and engage in the internal activities of an organization; and where the individual wishes to exercise, in combination with others, the freedoms specifically protected by the Charter. It is within this framework that LeDain J. asserted the rights to bargain collectively and to strike are not fundamental rights or freedoms because "...they are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise."16

The definition of freedom of association given by LeDain J. is similar to the one given by McIntyre J.. It puts emphasis on the scope of freedom of association. LeDain J. suggested that freedom of association should not include broader freedoms beyond those specified under the Charter, in contrast to what Dickson C.J.C. argued in his dissent. Nor did LeDain J. agree with Dickson C.J.C. that the protection of freedom of association, in the area of labour relations, should include the protection to pursue the activities for which the organization is established.17 It is regrettable to say that LeDain J.’ definition fails to recognize the purpose and value of freedom of association for working people, which potentially enable them to exercise some degree of control over their working life and enhance the justice in the workplace - the major thrust of Diskson C.J.C.’s dissent.18 More specifically, it is strongly


16 Supra note 6 at 12,151.

17 The following section will provide more analysis of the Chief Justice’s definition of freedom of association.

18 More discussion on this point will be provided in the following analysis of the Chief Justice’s judgment.
questionable to assert that the rights to strike and collective bargaining are mere creatures of statute. The reality is, they are creatures of working class action.¹⁹

LeDain J.'s real concern on constitutionalizing the right to strike was that the courts should not have to deal with collective bargaining policy because the courts are ill-equipped to act as social engineers in collective bargaining matters which require a level of expertise.²⁰ This "hands-off" approach is an important element in the Canadian labour policy. In the legislative scheme, the "hand-off" approach is to set general ground rules (for instance, the restrictions on the right to strike) within these general parameters, to enable the parties to reach their own collective agreements. This general commitment to free collective bargaining plays a positive role in keeping industrial peace.²¹ However, the "hands off" approach advocated by LeDain J. is at a different level, of not wanting court selecting of legislative policy. In my view, this is not a sound approach under the Charter. Under the Charter, especially in s. 1, the courts are expected to deliberate on the substance of legislative policy choices. If the courts choose to interpret freedom of association narrowly just to avoid the tough policy decisions that s. 1 requires, it is inconsistent with the substantive fairness of the courts' policy choices.

¹⁹ Professor G. England argued in his article that striking and collective bargaining have been social rights used by working people to improve their lot in industry from the earliest days of nineteenth century Canadian capitalism. Although legislation assists unions in important ways, it merely acknowledges as a fait accompli the social rights of striking and collective bargaining which were established by the struggles of working people. Supra note 15 at 178.

²⁰ Supra note 6 at 12,151.

²¹ The following discussion of the right to strike under Canada labour law will provide more analysis of it.
In sum, LeDain J. supported the proposition that workers’ right to strike and bargain collectively cannot possibly claim the protection of the Charter. LeDain J.’s main concern is that although the legislature can change the balance of power between the labour and the capital of employment by favouring whatever side, the courts should not. LeDain J.’s judgment, which represents the half decision of the court, is too brief to deliver in a case of this importance.

2. The Judgment of McIntyre J.

The thirty-three-page judgment for McIntyre J. refers explicitly to the issue of the right to strike. In the first part of the judgment, McIntyre J. addressed the meaning of freedom of association. He identified six possible approaches to define freedom of association guaranteed by the Constitution. 1. Freedom of association provides protection only to associate with others in common pursuits or for certain purposes, but does not protect either the objects or the actions of the group. 2. Freedom of association is the freedom to engage collectively in those activities that are already protected in the constitution for each individual. 3. Freedom of association “stands for the principle that an individual is entitled to do in concert with others that which he may lawfully do alone, and conversely, that individuals and organizations have no right to do in concert what is unlawful when done individually.”22 4. Freedom of association protects collective activities “which may be said to be fundamental to our

22 Supra note 6 at 12,154.
culture and traditions and which by common assent are deserving of protection." 5. Freedom of association affords constitutional protection to all those lawful goals that are essential to the purpose of an association. 6. Freedom of association extends its protection to all associational activities, subject only to limitation under s. 1 of the Charter.

McIntyre J. categorically concluded that the fourth approach, the fifth approach and the sixth approach are unacceptable definitions of freedom of association. 24 Of the remaining approaches, McIntyre J. held that the first approach is sound because it affords the essential freedom enjoyed prior to the adoption of the Charter by protecting the right to join with others in lawful common pursuits and to establish and maintain associations. The second approach that protects the right to engage collectively in those activities which are constitutionally protected for each individual embraces the purposes and values of the freedoms which were identified earlier. Turning to the third approach, McIntyre J. considered it an acceptable interpretation. McIntyre J. suggested that freedom of association does not protect any group activity that is not protected under the Charter for the individual merely by the fact of association because the Constitution does not provide greater rights for groups than for individuals. Then McIntyre J. gave his own definition on the meaning of freedom of association under the Charter in these words:

It follows from this discussion that I interpret freedom of association in s. 2(d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the

23 Supra note 6 at 12,155.

24 Supra note 6 at 12,156.
individual. Furthermore, freedom of association means that freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.\(^{25}\)

McIntyre J.'s definition of freedom of association included the two situations spelled out in the definition given by LeDain J.. Moreover, McIntyre J. held that freedom of association encompassed the third situation, it protected the individual who wishes to pursue, in concert with others, activities which are lawful for the individual to pursue alone. The basis of McIntyre J.'s definition was the "face"\(^{26}\) of the *Charter*, which suggests that the meaning of freedom of association should be dictated by the words themselves. Since the right to strike is not independently protected under the *Charter*, it can only be protected under freedom of association, if such activity is permitted by law to an individual.\(^{27}\)

McIntyre J. provided two reasons to advance his conclusion that freedom of association did not encompass protection for the right to strike. The first reason is that "the *Charter* upon its face cannot support an implication of a right to strike".\(^{28}\) That is, there is no specific reference to the right to strike appearing in the *Charter* as it does in the Constitution of France, Italy and Japan. McIntyre J. asserted that the omission of similar provisions in the Canadian constitution speaks strongly against any implication of a right to strike.

\(^{25}\) Supra note 6 at 12,158.

\(^{26}\) Supra note 6 at 12,160.

\(^{27}\) Supra note 6 at 12,158.

\(^{28}\) Supra note 6 at 12,160.
True, there is no explicit provision in regard to a right to strike under the

*Charter*, as in the Constitutions of the countries that McIntyre J. spelled out. However, it is surprising that McIntyre J. did not take into account of the inference of those countries that provide constitutional guarantees of striking on the ground that the strike is internationally recognized as a fundamental freedom, as Dickson C.J.C. argued in his dissent.\(^\text{29}\) In addition, McIntyre J. made no reference to the *International Labour Organization Convention 87 on Freedom of Association*,\(^\text{30}\) which was ratified by Canada in 1972. As Dickson C.J.C. said in his dissent, the Convention has been interpreted such that freedom of association includes a right to strike and a considerable body of jurisprudence has reached the same conclusion. It is an accepted principle in the Canadian constitution that “a value enjoying status as an international human right is generally ascribed a high degree of importance under s. 1”.\(^\text{31}\) It is contended, therefore, that the freedom of association under the *Charter* ought to include a right to strike.

McIntyre J.’s second reason was “grounded in social policy against any such implication”.\(^\text{32}\) McIntyre J. considered the public interest depends on the security of the balance between two sides which have equal strength, the organized labour and the employers of labour, and care must be taken in considering whether constitutional

\(^{29}\) Supra note 6 at 12,174 - 76.

\(^{30}\) 67 U.N.T.S. 18 (1948).


\(^{32}\) Supra note 6 at 12,160.
protection should be given to one side while leaving the other subject to the social pressures. McIntyre J. made this point as follows:

To intervene in that dynamic process at this early stage of Charter development 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 that process of evolution necessary to meet the changing circumstances of a modern society in a modern world.33

McIntyre J.’s judgment in the above regard is open to criticism for his incorrect assumption of the two equally powerful forces in labour relations. This is very contrary to the actual circumstance of labour relations where individual workers are too powerless to protect their own interests unless they are collectively organized and have the right to collectively withdraw labour. It is quite a disappointment that McIntyre J. failed to capture the value of striking and collective bargaining in potentially enhancing justice for the individual in the workplace, which is the main thrust of the Chief Justice’s dissent.

In the judgment, McIntyre J. also discussed the adverse effects of constitutionalizing the right to strike. First, McIntyre J. believed that “specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions.”34 If the right to strike is constitutionalized, much of the value of specialized labour tribunals would be lost since the courts should deal with such matters as its application, its extent, and any questions of its

33 Ibid.

34 Supra note 6 at 12,161.
legality. Second, "the function of the freely-elected Legislatures and Parliament"\textsuperscript{35} does not allow the intrusion by the courts into the field of legislation. If the right to strike is included in the \textit{Charter}, courts will have to resolve the question of the application of s. 1 of the \textit{Charter} to determine whether some attempt to control the right to strike may be permitted. This is "a nature peculiarly apposite to the functions of the Legislature".\textsuperscript{36} Here McIntyre J. shared the same concern as that of LeDain J. that the courts should avoid having to make decision about collective bargaining policy. As discussed in the first section, it was an unsound approach under the \textit{Charter} because it was designed to keep the courts away from the substantive fairness policy choices.

In sum, McIntyre J. held that the right to strike did not fall within freedom of association on the ground of the \textit{Charter} text and social policy. McIntyre J.'s judgment, while more detailed, shared the major points of LeDain J.'s judgment. Unfortunately, it also shared the similar weakness of LeDain J.'s judgment, that is, the failure to capture the essential meaning of either collective bargaining or the \textit{Charter} itself.\textsuperscript{37}

\textsuperscript{35} Supra note 6 at 12,162.

\textsuperscript{36} Ibid.

3. The Judgment of Dickson C.J.C.

The dissenting judgment of Dickson C.J.C., with Wilson J. concurring, consists of sixty-eight pages. In his judgment, Dickson C.J.C. addressed the extent of freedom of association under s. 2(d) of the Charter, as LeDain and McIntyre JJ. did in their judgments.

After an extensive analysis of the authorities which include the Judicial Committee of the Privy Council, Canadian case law, United States jurisprudence and international law, Dickson C.J.C. pointed out that in order to understand the meaning of Section 2 (d), it should be noted that “the purpose of s. 2 of the Charter must extend beyond merely protecting rights which already existed at the time of the Charter’s entrenchment”\(^{38}\) because the meaning of the Charter’s provisions should not to be determined solely on the basis of preexisting rights or freedoms. Similarly, the scope of the provisions “should not be confined by the fact of legislative regulation in a particular subject area”\(^{39}\) on the ground that the nature of judicial review under a written constitution should not be “circumscribed by what the legislature has done in the past”,\(^{40}\) but “be consistent with the principles set down in the Constitution”.\(^{41}\)

\(^{38}\) Supra note 6 at 12,177.

\(^{39}\) Ibid.

\(^{40}\) Ibid.

\(^{41}\) Ibid.
Like his colleague McIntyre J., the Chief Justice discussed several approaches to defining freedom of association. The first one is a constitutive approach that entails freedom of association as a freedom to belong to or to form an association. On this view, the constitutional protection of freedom of association does not guarantee associational actions except the protection of individual’s status as a member of an association. Dickson C.J.C. did not consider it a sufficient approach. He stated that “… if freedom of association only protects the joining together of persons for common proposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.”

The second approach is the derivative approach. “In the Canadian context, it is suggested by some that associational action which relates specifically to one of the other freedoms enumerated in s. 2 is constitutionally protected, but other associational activity is not.” Dickson C.J.C. considered it an unacceptable limitation on freedom of association because it ignores the fact that freedom of association is an independent freedom expressed explicitly in s. 2(d) of the Charter.

The third approach argues that freedom of association should be interpreted narrowly and restrictively on the ground of its political nature. Dickson C.J.C. reasoned that s. 2(d) is a fundamental freedom whose fundamental nature relates to the central importance to the individual of her interaction with fellow human beings.

In the Chief Justice’s conclusion regarding freedom of association, he agreed that freedom of association includes the right to do collectively what one can do as an

42 Supra note 6 at 12,178.

43 Ibid.
individual, but it entails a more extensive function which supplements individual action:

The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends. What freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage.\(^4\)

The Chief Justice’s definition of freedom of association is more reasonable than the definitions given by LeDain and McIntyre JJ. In his definition, Dickson C.J.C. addressed the point that the express inclusion of freedom of association under s. 2(d) of the Charter infers broader freedoms, beyond those specifically protected under the Charter, are intended to be encompassed, otherwise s. 2(d) would be otiose. More importantly, Dickson C.J.C. realized that the constitutional guarantee of freedom of association should protect the freedom of the individuals to engage in the activities for which the organization was established.\(^5\) Otherwise, this freedom was “legalistic, ungenerous, indeed vapid”.\(^6\)

Moreover, Dickson C.J.C. rejected the argument that collective bargaining is an associational activity with purely economic ends, and should not be accorded constitutional protection, by emphasizing the intrinsic value of work to people.

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\(^4\) Supra note 6 at 12,179.

\(^5\) Definitely, this protection does not apply to every type of association. For instance, if an organization is established to overthrow the government, I do not think it can be granted the constitutional protection of freedom of association. It is not necessary to discuss this issue in the thesis because the Chief Justice’s judgment is in a specific area of labour relations.

\(^6\) Supra note 6 at 12,178.
Dickson C.J.C. held that what happened to the individual at the workplace could not be kept behind the factory door. The Chief Justice said that “the conditions in which a person works are highly significant in shaping the whole compendium of psychological emotional and physical elements of a person’s dignify and self respect”, and thus, the Charter, as its purpose of enhancing human dignity in the widest societal sense, should deal with justice in the workplace. Because striking and collective bargaining can help to enhance justice in the workplace, it should be included in the fundamental freedoms under the Charter.

The distinguishing feature of Chief Justice Dickson’s judgment is his recognition of the vital role of association in pursuing the needs and interests of working people. The Chief Justice said:

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength to those with whom their interest interact and, perhaps, conflict.

These remarks in the Chief Justice’s judgment are tremendously significant. They explained the importance of freedom of association in enabling the individual to resist the power of the employer and obtain some degree of control over her working life. It is on this ground that the Chief Justice advanced his conclusion that striking and collective bargaining should be constitutionally protected by s. 2(d) of the

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47 Supra note 6 at 12,180.

48 Supra note 6 at 12,179.
Charter. These rights, of course, are not absolute. A legislature could still restrict their exercises if both the circumstances and the alternatives, for instance, binding arbitration, satisfied the judges under s. 1 of the Charter.

Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees on the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter. 49

The significance of the above statement is that on the recognition that the right to strike is protected under the Charter, the Chief Justice is prepared to approve under s. 1 a reasonable limit on this right in accordance with the requirement in a free and democratic society.

In sum, Dickson C.J.C. held in his judgment that the right to strike and the right to collective bargaining are protected freedoms within s. 2(d) of the Charter. The Chief Justice's judgment, although it was dissenting, is more impressive than the other two. Not only did it recognize the purpose and value of association, but it also realized the invaluable significance of collective bargaining and right to strike in promoting justice in the workplace, 50 and in protecting workers from the coercive powers of the state. 51

49 Supra note 6 at 12,181.

50 Supra note 15 at 193.

B. Under Labour Law

The era of free collective bargaining in Canada began at 1944 with the federal government's P.C. 1003, the National War Labour Order. This regulation recognized the rights of private sector workers across Canada to organize, to bargain collectively and to strike. To make these rights effective, the statute established state sanctions against an employer who refused to recognize and bargain with a trade union. In 1948, P.C. 1003 was superseded by the Industrial Relations Disputes Investigation Act giving these rights a permanent legislative basis under federal jurisdiction. Similar legislation was adopted by all provinces covering all employees in the private sector.

The Canadian system of collective bargaining is based on the recognition of inherent conflict of interests between the employers and employees. On the side of the employers, their desire is the control of an efficient and profitable enterprise. For the employees, their desire is to increase wages, fringe benefits and control their day-to-day working methods. Through the process of collective bargaining, the two parties may voluntarily reach an agreement on the terms and conditions of employment. However, it is not always the case that the parties can resolve their disputes at the bargaining table. Either the trade union or the employer may reject contract proposals made by the other side. If the parties really are to be free to agree, then they must be

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52 SOR/44-1003, enacted under the War Measures Act, R.S.C. 1927, c. 206.

53 R.S.C. 1952, c.152.
entitled to disagree. Logically, the system should consist of the mechanisms to break those unavoidable deadlocks at the bargaining table. Thus, the legislature allows the parties to use a number of methods to try to force their opponents to settle on their own terms. The strike is considered to have significant value to advance the interests of the employees in industrial relations. The lockout is the counter-part to the strike on the employer’s side of the equation. Discussion of the “lockout” is outside the scope of this thesis.

This part of the chapter provides an introduction to the right to strike under Canadian labour law. It is composed of four sections: requirements of a strike, definition of “strike”, employment relationship during a lawful strike and support of a lawful strike. Both statutory provisions and case law are used in each section to illustrate the basis of the Canadian system - conflicted interests between the two parties of labour relations, in which, within limits, each side is entitled to pursue its own interests.

1. Requirements of a Strike

This section on the requirements of a strike consists of two parts. One is the procedures to declare a legal strike. The other is the prohibition on a strike including timeliness restrictions and purposive restrictions. The first part is mainly set out under the statutory provisions, while the second part is mainly described under the case law.
a. Procedures in a Strike

There are strict limitations in the statutory legislation when a strike can legally occur. The discussion of this issue focuses on the *Canada Labour Code*.\(^54\) Section 89 of the Code sets out all of the conditions under which a strike becomes legal.\(^55\) Section 91 is the provision under which the employer may apply for a declaration of an unlawful strike.

Section 89 provides:

(1) No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless

(a) the employer or trade union has given notice to bargain collectively under this Part;

(b) the employer and the trade union
   (i) have failed to bargain collectively within the period specified in paragraph 50(a), or
   (ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;

(c) the Minister has
   (i) received a notice, given under section 71 by either party to the dispute, informing him of the failure of the parties to enter into or revise a collective agreement, or
   (ii) taken action under subsection 72(2); and

(d) seven days have elapsed after the date on which the Minister
   (i) notified the parties of his intention not to appoint a conciliation officer or conciliation commissioner or to establish a conciliation board under subsection 72(1),
   (ii) notified the parties of his intention not to appoint a conciliation commissioner or to establish a conciliation board under section 74, or

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\(^55\) These limitations also apply to a lockout by an employer.
(iii) released a copy of the report of a conciliation commissioner or conciliation board to the parties to the dispute pursuant to paragraph 78(a).

(2) No employee shall participate in a strike unless
(a) the employee is a member of a bargaining unit in respect of which a notice to bargain collectively has been given under this Part; and
(b) the requirements of subsection (1) have been met in respect of the bargaining unit of which the employee is a member.

Section 91 reads as follows:

(1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.

(2) Where an employer applies to the Board under subsection (1) for a declaration that a strike was, is or would be unlawful, the Board may, after affording the trade union or employees referred to in subsection (1) an opportunity to be heard on the application, make such a declaration and, if the employer so request, may make an order.
   (a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;
   (b) enjoining any employee from participating in the strike;
   (c) requiring any employee who is participating in the strike to perform the duties of his employment; and
   (d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph(b) or (c) to any employee to whom it applies.

Section 89 sets out detailed procedure for the trade union to declare a legal strike. According to the provision, no trade union should declare or authorize a strike unless the trade union has given notice to bargain collectively, negotiations have failed to produce or revise a collective agreement, conciliation procedures have failed,
and seven days have elapsed from the date on which the Minister advised the parties of her intention not to appoint a conciliation officer or board, or seven days have elapsed since a copy of the report of the conciliation board has been released to the parties of the dispute. Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated in or are likely to participate in a strike, such an employer may apply to the Board for a declaration that the strike was, is, or would be unlawful under section 91. The Board may, after affording the trade union or employees a hearing, make such a declaration.56

Section 89 and Section 91 go hand by hand respecting the procedure of a legal strike. On the one hand, the legislature recognizes that inflicting economic harm on the employer is the ultimate lever by which a union extracts concessions in collective bargaining, and thus it empowers trade union the right to declare or authorize a strike. On the other hand, the thrust of Canadian labour law is to confine the use of strike weapon to the negotiation of new contract terms, and in turn the statute grants the employer the right to allege an illegal strike. These two kinds of provisions seek to regulate striking as an economic sanction of employees for the purpose of the settlement of collective agreements.

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56 Section 89 is the general rule in regard to the right to strike. In specific cases, the general law can be overridden by a specific law that makes illegal what would otherwise be a legal strike or lockout, for example, back to work legislation passed by Parliament. However, to meet the contingency that there is no Parliament to pass the back to work legislation, the Governor in Council may make an order to defer the strike or lockout in accordance with Section 90(1) of the Canada Labour Code. This section provides the limitation on the right to strike during the period between Parliaments. The rationale is that it is in emergencies that back to work legislation would normally by resorted to.
b. Timeliness Restrictions

Under Canadian law, a strike for collective bargaining objectives would be unlawful if it is untimely. Generally speaking, the timeliness restrictions mean strikes are prohibited before certification and are banned during the terms of all collective agreements.

(1). Prohibition of Strikes before Certification

 Strikes cannot be used to force an employer to bargain. Employees must obtain bargaining rights through the procedures provided in labour relations legislation. Any economic pressure designed to secure union bargaining rights, by which a trade union can claim to act as bargaining agent of employees and negotiate with the employer for a collective agreement, is forbidden.

This is a sound restriction since the purpose of the statutory protection of striking is to enhance the economic interests of the workers vis-à-vis employers. On the recognition that it is impossible for the employees to deal with their employer on an individual basis, Canada labour law grants the employees the right to have trade union representation in order to bargain collectively to promote their economic interests. The purpose of the legislation is to build a unified, disciplined centre of power for the employees as a counterpoise to the economic power wielded by their employer. Since the certified or voluntarily recognized union obtains legal exclusive power to represent all employees covered by the certification or voluntary recognition
agreement, it is as capable as any other kind of power of being abused: of being a
source of oppression to those workers whom it is supposed to serve. Thus, the same
labour laws which nurture union power have the responsibility to ensure the union
leadership is fully accountable to the employees. For this reason, in every Canadian
jurisdiction there now exists a statutory procedure, known as certification, or an
alternative, known as voluntarily recognition, to guarantee that the union enjoys the
support of a majority of employees. A strike before certification, however, is designed
to secure bargaining rights for a specific union. Although it is the result of the
economic conflicts between employers and employees, it should not be protected
under the legislation because a recognition strike runs contrary to the purpose of the
statute. The Supreme Court of Canada illustrated this subject in the following case.

In *Gagnon et al. v. Foundation Maritime Ltd.*, the defendants caused a
stoppage of work by employees due to peaceful picketing after their request for
recognition of their unions with a view to entering into a collective agreement was
refused by the respondent on the ground that the unions had not been certified. The
Supreme Court of Canada held, on further appeal by the defendants, the work
stoppage was clearly a strike in contravention of s. 22(1) of *Labour Relations Act*,
which was applied to prohibit a strike without prior compliance with the provisions of
the Act respecting certification. Kerwin C.J.C wrote:

> The purpose of this statute and others of the same nature in Canada is the
> prevention of strikes and lock-outs and the maintenance of industrial peace.
> As none of the unions said to be represented had been certified or, so far as the

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58 R.S.N.B. 1952, c. 124.
evidence in this case goes, authorized in any manner to act on behalf of any of the employees, the attitude taken by the officers of the respondent on July 15th was correct.

In respect to the fact that the defendants brought the work stoppage in order to compel the respondent to contract with their unions which had not been certified, Kerwin C.J.C shared the opinions held by Ritchie J. and Bridges J.A. and asserted that the cessation of work was an unlawful strike as being contrary to the provision of the Act.

I agree with the learned trial Judge and with Bridges J.A., that the action of the defendants in causing or inducing them to cease to work was a tortious act for which they are liable in damages. It is clear from the evidence that the purpose of setting up the picket line was to inflict injury upon the respondent by halting the work for the purpose of compelling it to contract with the unions whom, as far as the evidence goes, represented no one.

As indicated above, a collective agreement is between the employer and her employees containing the terms and conditions of employment. Striking as an economic weapon should be used for the purpose of negotiation of a new collective contract. The underlying recognition of the case is that it emphasized that the union is prohibited from exercising economic sanction in its efforts to acquire bargaining right under the legislation. Prior to the introduction of the certification system, an employer could refuse to negotiate a contract with a trade union even if it had 100 percent support of employees. However, the certification system brought different means of resolution of what used to give rise to recognition strikes. For the unions, certification results in compulsory collective bargaining. The employer must deal with a certified union about the conditions of employment for the employees concerned, whether they are in favour of the union or not. This bargaining authority remains in effect until and
unless the union is displaced or decertified in the same kind of formal board proceeding which produced the initial certification. Thus, instead of initiating a recognition strike, the trade union receives legal bargaining authority through certification when it secures the support of the majority of the employees in the unit defined by the labour board. Understandably, an uncertified trade, since it has not been regarded as the representative of any of the employees, cannot cause a work stoppage in order to compel the employer to contract with it. The right to strike set out in the system of collective bargaining is for the purpose of the stability of industrial peace. It is not a weapon that any one can use for any purpose.

(2). Prohibition of Strikes during the Terms of Collective Agreements

A collective agreement which is in effect has binding force on both the trade union and the employer as well as the individual employees. Section 56 of Canada Labour Code provides:

A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this part, binding on the bargaining agent, every employee in the bargaining unit and the employer.

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59 Section 36(1) of the Canada Labour Code provides: Where a trade union is certified as the bargaining agent for a bargaining unit, (a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit; (b) the certification of any trade union that was previously certified as the bargaining agent for any employees in the bargaining unit is deemed to be revoked to the extent that the certification relates to those employees; and (c) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto.
This provision changes the general unenforceability of collective agreements at common law. In accordance with legislation, disputes concerning the interpretation, administration or violation of a collective agreement must be submitted to grievance arbitration or some dispute resolution mechanisms other than strikes or lockouts. This requirement represents a fundamental commitment to industrial peace and stability once a collective agreement has been negotiated.

As mentioned above, the industrial relations under capitalist production embody a structural antagonism of interest between employers and employees. The main concern of labour relations legislation is to achieve industrial peace. For this purpose, the legislature sets forth collective bargaining for the two parties to advance their own interests. On the one hand, both of the parties are granted the rights to use economic sanctions to compel the other side to settle on their own terms in the bargaining process. On the other hand, once an agreement is reached, both of them should follow its terms. Since the legislation has ordained that a strike may be used only as a collective bargaining sanction when negotiations break down, it prohibits a trade union that is bound by a collective agreement from striking during the term of an agreement. Unions, in exchange for the right to bargaining, are pledged to settle their disputes with the employers by arbitration or other mechanisms, without any work stoppage. Therefore, a strike in the lifetime of a collective agreement, which is

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60 In Young v. Canadian Northern Railway, the Privy Council held that an agreement between a body of employers and a labour organization is not a contract between any employer and any individual employee, still less with a person not a member of the labour organization. [1931], 1 D.L.R. 645 (P.C.)
not used to induce an agreement, would not be protected under the legislation in the light of governing labour-management relations.\(^6\)

c. Purposive Limitation

Generally, a lawful strike is designed to gain economic objectives and is used only as a collective bargaining sanction when negotiations break down. Since a strike for political protest is not the direct result of the conflicted interests in labour relations, whether it is under the umbrella of the statutory legislation depends on whether the work stoppage is aimed specifically at an employer behind the political motivation in the cessation of work. The best example to address this issue is the one-day work stoppage at the time of the "National Day of Protest" called by the Canadian Labour Congress on October 14, 1976 to protest the federal anti-inflation program which placed limits on the wage increases obtainable through collective bargaining.

\(^6\) A related issue is the treatment of the "hot declaration" clauses in collective agreements. Hot declaration clauses typically give members of a bargaining unit the right to refuse to execute work that has come from or is destined for an employer who has been declared by the union to be unfair. The question arises whether it constitutes a strike where unions and their members are acting pursuant to such clauses. In Ontario, such clauses have been characterized as unlawful attempts to contract out of the statutory prohibition on collective job action during the term of a collective agreement and a collective employee work refusal that relies on such a clause is nevertheless a strike. Case noticed: Empress Graphics and GCIU, Loc. 500 M (Re), [1989] O.L.R.B. Rep 587. In British Columbia, the approach to hot declaration clauses is quite different. Before 1987 the Labour Relations Board had held the refusals to work by employees pursuant to hot declaration did not constitute a strike, not because of the subjective element in the definition of strike, but because they were exercising rights expressly given to them under their collective agreement. See Pacific Press Ltd. (1986), 13 Can. L.R.B.R. (N.S.), 74. In 1987, British Columbia adopted legislation to nullify contract clauses (since repealed), thereby, ensuring that action in accordance with hot declaration would constitute disobedience of a lawful order of one's employer. The Industrial Relations Council (the successor to the British Columbia Labour Relations Board) continued to hold, however, that the hot declaration clauses were still effective to the extent they related to work coming from a person whose collective agreement was regulated by the Canada Labour Code. See Pacific Press Ltd. (1988), 18 Can. L.R.B.R. (N.S.) 373 at 386-387.
Labour boards and courts across Canada held different opinions on whether the work stoppage was a strike.

The British Columbia Labour Relations Board argued that the work stoppage was not a strike under the provincial *Labour Relations Code,*\(^6^2\) which contained an express purposive component:

`strike’ includes
(i) a cessation of work, or (ii) a refusal to work, or (iii) a refusal to continue to work, or (iv) an act or omission that is intended to, or does, restrict or limit production or services, by employees in combination, or in concert, or in accordance with a common understanding, for the purpose of compelling their employer to agree to terms or conditions of employment, or of compelling another employer to agree to terms or conditions of employment of his employees, and ‘to strike’ has a similar meaning;

The Board reasoned that since the work stoppage had a political rather than a collective bargaining purpose, it did not amount to a strike within the precise legal meaning of that term under the *Labour Relations Code.* Chairperson Weiler stated:

The Code deals with the entire range of labour / management disputes and establishes this Board, broadly representative of both labour and management, as the tribunal to administer that body of law. By contrast, political work stoppages involve disputes between unions and a government. Neither the resources of the Code nor this Board have much, if anything, to contribute to the resolution of those problems (even less than we have to contribute, for example, to the administration of the criminal law on a picket line...). If the law inserted the Code and the board into the middle of that type of political dispute, the effect would likely simply be to damage the ability of these instruments to make a valuable contribution to labour/management relations in the long run. For that reason as well, we decline the invitation of Hydro to expand on the explicit definition of “strike” under the Code so as to draw the Day of Protest under the umbrella of the Code and within the jurisdiction of this Board.\(^6^3\)

Chairperson Weiler’s decision should be given particular attention as he stated

\(^6^2\) *S.B.C. 1973 (2nd Sess.), c.122, ss. 1(1), 79, 88.*

that the Code deals with the relations between the employer and the trade union, not those between the trade union and a government. His ground for not treating the work stoppage as a strike focused on its political purpose - designed to influence the Trudeau government to change its mind about wage controls. Since it was not an instrument to try to compel an employer to settle a dispute about its conditions of employment, it will not be controlled by a labour statute or a labour board.

The Nova Scotia statutory definition of a strike is similar to the one in British Columbia statute. The *Trade Union Act* provides the definition of strike:

1(1) In this Act,

(v) “strike” includes a cessation of work, or refusal to work or continue to work, by employees, in combination or in concert or in accordance with a common understanding, for the purpose of compelling their employer to agree to terms or conditions of employment or to aid other employees on compelling their employer to agree to terms or conditions of employment; and “to strike” had a corresponding meaning;

In *Re Robb Engineering and United Steelworkers of America, Local 4122*, a Nova Scotia arbitrator had held that participation in the National Day of Protest did not violate the strike prohibition provision in the valid collective agreement due to the purposive restriction in the provincial definition of strike. The Nova Scotia Court of Appeal struck down the arbitration award. The court argued that other types of cessation of work such as the case at bar which was motivated by political protest, were also encompassed by the definition. Mackeigan C.J.N.S. said:

64 R.S.N.S. 1972, c.19, s.104.

If s. 48(2) and the related general prohibition of strikes during the life of an agreement do not ban on organized concerted stoppage of work by a union or other leadership when the stoppage is not aimed specifically at an employer, a completely illogical gap would appear in the legislative scheme for achieving industrial peace. I respectfully reject the argument that to define a strike so broadly is to interfere with freedom. Workers are free to participate individually in politics and are free, indeed, to cease work individually for any reason or for no reason, subject to job rules as to absenteeism. They are not free to combine by agreement to quit work. Unions’ political activities are similarly not restricted, but political freedom does not permit disregard of the law. Unions in exchange for the right of bargaining are pledged to settle, by arbitration or otherwise, “without stoppage of work” (s. 40(1) of the Act), all differences with employers, and are required not to cause any work stoppage. The Legislature has ordained that a strike may be used only as a collective bargaining sanction when negotiations break down.

The distinguishing feature of Mackeigan C.J.N.S.’s judgment is his recognition that strike should be confined in the area of collective bargaining. The Chief Justice of Nova Scotia Court of Appeal agreed that workers are protected under the legislature to participate individually in politics and to cease work individually, but they are not protected to organize concerted stoppage of work by a union or other leadership at any time. Strike actions, which will bring economic harm on the employer whatever the motive, should be used only when negotiations break down. Therefore, the National Day of Protest as an organized work stoppage is an illegal strike.

Without a subjective-purpose component in its provincial definition of strike, the Ontario Labour Relations Board held the work stoppage on the National Day of Protest was an unlawful strike. Strike is defined in section 1(1)(n) of the Labour Relations Act as including, “a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common

understanding, or in a slow-down or other concerted activity on the part of employees designed to restrict or limit output". This definition differs substantially from those adopted by some Canadian jurisdiction without the reference to a purpose of compelling the employer or another employer to agree to terms or conditions of employment.

In *Domglas Ltd. v. United Glass and Ceramic Workers of North America et al.*, the board held the provincial definition of strike encompassed activity that was politically motivated. Chairperson Carter wrote the following:

> Our conclusion is that the definition of strike found in The Labour Relations Act is wide enough to encompass the conduct in question. The overriding purpose of the Act is to regulate all aspects of the relationship between the employer and the employees represented by the union of their choice. Freedom to organize employees for collective bargaining purposes is protected by the law, and is no longer a matter of self-help. There now exist strict prohibitions against employer interference with organizing activity, supported in some cases by the procedural device of a reverse onus of proof. The self-help remedy of strike action, in turn, has been severely restricted, to be used only as a method of ultimately resolving collective bargaining disputes. All other strikes, including politically motivated strikes, have been prohibited in order to keep to a minimum conduct disruptive to production and harmful to general labour relations harmony. The strike, in our view, was intended by the legislature to be only a collective bargaining sanction, to be applied in a particular labour relations situation, and to be used in no other context, whether political or otherwise.

These remarks are tremendously significant. Not only do they emphasize the overriding purpose of the labour relations legislation, which is to regulate all aspects of industrial relations, but also they specify the circumstance under which a political protest should be included in the definition of strike. The Day of Protest by the employees acting as a collective group was organized by their union and was effective.

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67 76 C.L.L.C. 16,050 (O.L.R.B.).
to shut down the operations of their employer. This job action did inflict harm on the employer - the interruption of production. Thereby, it was sufficient to amount to an illegal strike.

2. Definition of “Strike”

Most Canadian labour relations statutes contain a definition of “strike”, which has three components: (1) a cessation of work or a refusal to work, (2) by employees, (3) in combination or in concert or in accordance with a common understanding. In addition, several provincial statutes introduce a further component: the purpose of compelling an employer to agree to terms or conditions of employment.68 The federal definition of strike contains the three components as noted. The federal definition of strike is that:

‘strike’ includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output;69

Generally, strikes are activities of employees in combination or in connect or in accordance with a common understanding designed to restrict or limit output. It is unlikely that there could be a one-person strike.70 However, it is not enough to

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69 *Canada Labour Code*, s. 3(1).

constitute a strike that more than one employee stops work. There must be a common character of the employees’ action. That is, the job actions that are taken in concert or in accordance with a common understanding must be aimed at limiting or restricting output.

The purpose of the strike is very important in the system of collective bargaining. It is understandable that collective bargaining between union and employer deals with the terms and conditions under which labour will be purchased by employers and will be provided by employees, and the two parties have very different perspectives on this subject. Since the employers have the rights of property and of capital, they are able to propose the terms upon which it will purchase labour for its operations. In turn, the employees have the collective right to withdraw their labour rather than to accept their employer’s offer.

Clearly, the stoppage of work initiated by the union affects both sides. The employer’s operations may be shut down without any employees to run them. The employer loses the flow of revenues. At the same time, the employees are out of work, deprived of their earnings, but generally getting some strike pay. Both sides are being hurt economically. Why does the trade union choose to bear the economic loss on its members rather than to accept the offer of the employer? The union wants to force the employer to reach a mutually acceptable agreement about the terms and conditions of employment. In this way the economic purpose of strikes plays an important role in a collective bargaining relationship. The following two cases analyze the basic point of strike as a form of economic pressure.
In British Columbia Terminal Elevator Operations' Association on behalf of the Saskatchewan Wheat Pool v. Grain Workers' Union, Local 333, the employer alleged an unlawful strike on the evidence of a concerted refusal by its employees to work any overtime following the employer's decision to lay off a number of employees due to a lack of work. The trade union argued that, since the collective agreement contained a clause which gave employees the right to refuse overtime work, the refusal, even if concerted, did not amount to an illegal strike. Regardless of whether work was obligatory and whether direct evidence was presented that the union authorized or orchestrated the employees' refusal to work overtime, the Board held that the refusal constituted an unlawful strike for the following reasons:

Here the parties were in the midst of collective bargaining. The employees in the bargaining unit had engaged in a concerted refusal to work overtime in circumstances where, in the normal course, a sufficient number would have accepted work. In addition, the employer had been told that the union was clearly opposed to the concept of resorting to overtime when lay-offs were in effect. In light of the above, and in the absence of any evidence to the contrary, the Board must conclude that the union was the architect of the employees' concerted refusal. We found therefore that a strike contrary to section 89 was in effect.

...it must be clear that the statutory definition of 'strike' cannot be changed by an agreement of the parties. Nor can the public purpose of 'industrial peace' behind the no-strike provision be avoided by 'contraction out' of the legal obligations of the Code.... Of course, the parties can negotiate an employee's individual right to refuse to work and these clauses will be applied in accordance with their given interpretation, subject to arbitration. However, the union or its members cannot use such a clause to circumvent the Code by giving employees the right to refuse collectively to work contrary to section 89. Each separate segment of the Code definition of 'strike' is significant and must be read in conjunction with the other segments. Actions which are acceptable, for individual employees, because of the collective agreement provisions, may constitute an unlawful strike when done 'in combination, in

71 94 C.L.L.C. 16,060.
concert or in accordance with a common understanding,' that is aimed, in relation to their work, at restriction or limiting output....

There are several points underlying the logic of the definition of “strike” in these remarks. However, the most important one is the point of the strike as an economic sanction. That is, the principle in deciding whether a refusal to work constitutes a strike depends on a finding of the purpose to restrict output of the employer. As discussed above, a collective action by employees will affect both sides. On the employer’s side, its revenues may stop flowing because she may have to stop the whole or some of her business. It is for this purpose that the trade union wants to initiate the work stoppage. Being afraid of the continuous economic loss, the employer will be forced to come back to the bargaining table. Therefore, if a refusal to work is aimed “at restriction or limiting output”, it falls within the statutory definition of “strike”.

By contrast, an overtime ban was not found to constitute an illegal strike in the case of Otis Elevator Co. v. I.U.E.C. Local 82 72 since the action was not designed to elicit an economic response from the employer. Although the ban had been introduced late in the collective bargaining process and was to run until a new agreement was reached, the union’s action was aimed at preserving excess work to offset an anticipated layoffs in construction starts. There was no attempt to compel the employer to alter the terms of employment in the job action. The Board held that the ban on overtime was not a strike because the purpose of the ban was to improve the

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union's position upon expiration of the collective bargaining by preserving work. The Board made the point after a legislative analysis of the definition of strike:

It is only activity which is calculated to bring an economic response from the Employer which can be said to have been done “for the purpose of compelling an employer to agree to terms and conditions of employment”. When the end is properly an objective of negotiations, the activity is proscribed on the basis that pressure may only be exerted in a legal strike under the Code. But here the implementation of the ban in and of itself achieved the object the Union sought - preservation of work for some future date. No response was required from the Employer who was not envisaged as part of the solution which the Union decided to seek. In short, there was no response sought or required from the Employer which might improve the position that the Union had already adopted. In these circumstances it cannot be said that the “purpose” of the ban was to compel the employer to terms and conditions of employment.

The significance of these remarks is the recognition of the purpose for the refusal to work. It is the central test for determining whether a collective action taken by the employees is or is not a strike. As mentioned several times, collective job actions by the employees should be confined in the area of collective bargaining because striking will cause economic harm to both the employees and the employer. It is the economic loss on both sides that makes the two parities soon realize that it is much less painful to agree, even if they do have to move considerably closer to the terms proposed by the other side. Even more important, it is the credible threat of the impending strike action that makes it more powerful than the actual result of a strike. Thus, without any attempt to compel the employer to the terms and conditions of employment, the work stoppage did not constitute a strike.
3. Employment Relationship during a Lawful Strike

The right to strike is not expressly granted by Canadian labour legislation or the constitution. It is implied from the right of employees to take part in the "lawful activities" of unions. A general principle in Canadian labour law in regard to the employment status of a striker is that an employee who participates in a lawful, timely strike is protected under the statutes with respect to the return to work. In the meanwhile, the statutes establish prohibitions against employer retaliatory action designed to eradicate the union or punish strikers. Section 94 (3)(a)(vi) of Canada Labour Code provides:

No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person has participated in a strike that is not prohibited by this Part or exercised any right under this Part.

Issues that arise are the approach towards the legality of hiring permanent strike replacements. In Canada, there is no general prohibition on the use of

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73 Although the federal jurisdiction guarantee strikers' pension rights, I will not discuss the effect of strikes on employment benefits such as pensions, sick pay, vacations and holiday pay. For this discussion, see G. England, "The Legal Response to Striking at the Individual Level in the Common Law Jurisdictions of Canada" (1976) 3 Dal. L.J. 440.

74 British Columbia sets out a definition of replacement workers in its Labour Relations Code. A replacement worker is defined as a worker who (1) is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins; (2) ordinarily works at another of the employer's places of operations; (3) is transferred to a place of operation in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins; or (4) is employed or engaged by the employer, or supplied to the employer by another person to perform (5) the work of an employee in the bargaining unit that is on strike or lockout, or (6) the work ordinarily done by a person who is performing the work of an employee in the
replacement workers. Among the provincial legislation, Quebec gives particular protection of employment relationship during a lawful strike. The anti-strike-breaking provisions in Quebec Labour Code greatly curtail the employer's ability to maintain operations during a strike. Legislation of that province not only prevents the employer from using newly-hired employees to perform the work of the struck unit, but also prevents her from using any employees in the struck bargaining unit or other bargaining units for that purpose. What the employer is allowed to maintain production is to use those managers employed at the struck plant to perform the work, or subcontract some, or all, the operation with the prohibition against using the struck establishment. The British Columbia provisions have followed Quebec and prohibit employers from using the services of a paid or unpaid replacement worker during a lawful strike or lockout. The provisions, however, allow employees in the struck unit to return to work while the strike continues. In Ontario, provisions to prohibit the use of replacement workers were enacted in 1992 but repealed in 1995. The former Ontario provisions, unlike Quebec, permitted employers to re-deploy bargaining unit employees at the strike location to perform struck work subject to these employees exercising their right to refuse such assignments.

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77 B.C. Labour Relations Code, S.B.C. 1992, c.82, s.68.

78 Ontario Labour Relations Act, S.O. 1992, c. 21, ss. 31-33.
However, even where replacement workers are generally permitted, they are only recognized as having a temporary, precarious status. As noted, Canadian labour law seeks a balance of power between the trade union and the employer. The underlying issue is the fundamental difference between the parties about what bargaining rights entail. From the union’s perspective, employees retain a permanent connection to their job and see it as an invasion when someone else takes over their job. From the employer’s perspective, the obligation to bargain is an obligation to bargain over the terms and conditions of work for the employees in order to operate her business. In turn, the legislation maintains employees’ status during a lawful strike and protects them against retaliation for exercising their rights to strike on the one hand, and on the other, the employer is allowed to insulate itself from the economic pressure by hiring replacements in order to continue operation during a strike.

In the case of Canadian Airline Pilots’ Association and Eastern Provincial Airways Ltd.,79 the employer hired 18 new pilots to maintain operation during a lawful strike of the pilots. The employer also promised those new employees that they would retain their jobs after the strike in preference to the strikers. Some nine weeks into the strike, the employer proposed a clause in the “return to work agreement” which would keep the new pilots and those pilots who crossed the picket line during the strike on the active work force out of seniority. The clause also provided the employer with a 60 day opportunity to selectively recall those pilots it wished, out of seniority, or

alternatively not to recall those that it did not wish to recall. Furthermore, the union and the pilots would be required to forego their right under the collective agreement to grieve their displacement by junior pilots. The Board held that the clause offered by the employer in the “return to work agreement” which suspended seniority rights and ensured the continued employment of the new pilots was an unfair labour practice.

Vice-Chair Jamieson presented the argument when he wrote:

EPA takes the position that in the absence of statutory provisions providing for the reinstatement of employees at the end of a strike, and, where there is nothing to restrain an employer from operation during a strike or restricting the hiring of new employees, its insistence that the new pilots not be replaced by returning strikers, is not unlawful.

If the Code only contained s. 107(2), which is a standard provision in most jurisdictions [preserving the ‘employee status’ of strikers], it would be open to argument that to retain ‘employee status’ does not necessarily mean a guarantee of a job. But, Parliament went much further than s.107 (2) to protect the continued employment of those who exercised their rights under the Code. The construction of s.184 (3)(a)(vi) could leave absolutely no room for doubt that employees cannot be deprived of any term or condition of employment whatsoever because of participation in a lawful strike. If an employee is so deprived, a reason, other than the exercise of the right to strike, must be present.

These remarks were made in the context of the employee status during a legal strike and there were two important issues underlying the logic of this argument. First, Vice-Chair Jamieson believed that the legislation does not prohibit the employer from operation during a strike. The employer can have replacement workers to maintain her operation. However, the replacement workers are only recognized as having a temporary, precarious status. As noted, striking as an economic sanction is used by the employees to advance their interests in the course of collective bargaining. Since replacement workers are always used to counteract the pressure exerted by a strike,
their interests are not only divergent from but also squarely opposed to those of the permanent workers. As a matter of conflict of interest, their interest lies on the side of the employers. Thus, the use of replacement workers puts a risk on both the strikers’ jobs and the future of free collective bargaining.

Second, Vice-Chair Jamieson emphasized that the legislature prohibits employer’s disciplinary action against the employees due to their participation in lawful strike activities. The protection against discipline or other forms of penalty for having participated in a lawful strike is apparent in the Canada Labour Code. The legislature has characterized the refusal to re-employ striking employees as an unfair labour practice. In accordance with the Code, anything done in concert to restrict output is a strike and such activity is protected when it is undertaken at the right time. The employer’s retaliatory action designed to eradicate the union or punish strikers is an unfair labour practice. In addition, Canadian labour law has granted extremely broad protections to employees’ organizational rights. The employees are protected in taking various kinds of more imaginative job-related activities other than the traditional strike to apply pressure on employers. They may choose to impose an overtime ban, a work to rule campaign, a work slow down, or a partial work stoppage. All these activities are lawful if they are done at the right time.80

What rights and resources does the employer have in response to a legal strike initiated by a trade union? In essence, an employer, for its part, is free to take measures designed to limit the disruptive effect to the strike activities. The employer

is also free to exercise its right to lockout employees. The employer is not, however, free to take any of the actions spelled out in the Code against employees for engaging in a lawful strike.\textsuperscript{81}

4. Support of Lawful Strikes

In the course of a strike or a lockout, union picketing has always been a focus of the conflict. Employers want to continue operations during a strike. They attempt to maintain access to the premises, so that supervisors and employees in nonstriking units can come to work and materials are moved in and out. In the most hotly contested disputes, employers may hire replacement workers. Strikers want to inflict economic harm on the employers. They seek to disrupt an employer’s normal operation by dissuading their own members and fellow bargaining unit employees, as well as customers, suppliers, and other employers from doing business with their adversary.

Since picketing may occur with or without a strike in progress and the strike may or may not be a lawful one, it emerges as a phenomenon “distinctly separate from, though more often than not tactically intertwined with, a strike or strike-like pressure”.\textsuperscript{82}

\textsuperscript{81} The precise extent of the protection afforded striking workers depends on whether the strike is legal. In \textit{McGavin Toastmaster Ltd. v. Ainscough}, [1976] 1 S.C.R. 718, the Supreme Court of Canada discussed the issue as to whether it is unfair labour practice that employer terminate the employment relationship due to an illegal strike.

Although Alberta, British Columbia, New Brunswick and Newfoundland have defined the legal problems surrounding picketing in their respective labour statutes, most Canadian legislation is silent on this issue. Courts and Labour Boards play a significant role in developing the regulation of picketing.

There is no general prohibition on the use of replacement workers under Canadian labour law. As discussed in the above section, except in Quebec, British Columbia and formerly Ontario, the legislature leaves the employer free to use supervisors or hire replacements to operate the business during a strike, or take other steps to limit the disruptive effect of strike activity. Thus, the employer has been given the legal freedom to frustrate a lawful strike, to dilute any financial harm to its business. Understandably, the trade union will assert that the law must take the same attitude toward its own efforts to enlist the aid of other unionized employees to try to compel the third parties to stem their flow of assistance to the struck employer. The classic weapon used by trade unions for that purpose is the picket line.

The legitimacy of union picketing has always been one of the most controversial topics in Canada labour law. The purpose of a strike is to cause a collective work stoppage and the picket line is intended to and does cause work stoppage by the employees. But the strike action is legal only in order to resolve a dispute with an employer about the negotiation of a new collective agreement.

Logically, the immediate target of the picket line should be the party directly involved

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83 Generally, picketing is understood to involve these elements: (1) the target directed toward the employees in the same unit and other observers, (2) the presence of one or more persons, (3) communication by spoken or written messages, or through behaviour, and (4) an intention by presence or communication to disrupt employer's operation and secure a sympathetic response from third persons.
in the dispute. Since picketing potentially involves intimidating third-parties and infringing the rights and freedoms of such parties in addition to the struck employers, Canadian courts make a clear distinction between primary and secondary picketing.

Picketing at the place of business of the struck employer is primary. Both labour boards and courts tend to allow a wide scope for primary picketing in support of a legal strike. As noted, the peculiar virtue of the strike weapon is that its impact is felt by both sides. The strikers are out of work and without their wages; the employer’s operations may be shut down and its revenues may stop flowing. If the law is willing to tolerate that impact from the typical strike, it is reasonable that peaceful picketing should be allowed to produce the same result.\footnote{The law governing primary picketing is essentially the general tort law and criminal law. The presumption in favour of picketing in support of a lawful strike will yield to the prohibitions against physical obstruction, assault, property damage and trespass coming from the general law. In Harrison v. Carswell, (1976) 2 S.C.R. 200, the appellant charged the respondent under The Petty Trespasses Act, R.S.M. 1970, c. P-50, of unlawfully trespassing on the sidewalk of a shopping centre during a lawful strike. Considering the respective values to society of the right to property and the right to picket, the court held the owner of the land was able to vindicate his property rights by a trespass action. This decision, however, was dissent from the one of Chief Justice Laskin, the member of the Supreme Court of Canada with the most significant labour background. Laskin C.J.C. held in his judgment that the respondent picketer was entitled to the privilege of entry and to remain in the public areas without obstruction of the sidewalk or incommoding of others when she pursued legitimate claims against her employer through the peaceful picketing in furtherance of a lawful strike.}

Picketing of anyone other than the struck employer (for instance, a corporation which continues to sell the struck employer’s goods) is secondary. The approach to secondary picketing has generally been to prohibit or restrict it. Some scholars have listed three reasons which have been relied upon to totally or partially prohibit the use of secondary picketing. First, the existence of secondary boycott causes potential harm to the primary employer’s business, which may be much greater than that of a strike and picketing at her premises. Second, secondary boycotts may injure the
interests of other businesses and of consumers, who are not engaged in the dispute. Third, where secondary boycott takes the form of appeals to other workers to cease work, such action not only prevents them from earning their living but also creates dangers to the society through widespread industrial disruption.\textsuperscript{85}

In \textit{Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.}\textsuperscript{86}, the Supreme Court of Canada suggests that peaceful picketing is protected by the \textit{Charter of Rights and Freedoms} under the guarantee of freedom of expression, subject to demonstrably justified limitations; in accordance with which secondary picketing against the third party is unlawful. In this case, the appellant union was the federally certified bargaining agent for the employees of Purolator Courier Incorporated. The respondent, Dolphin Delivery Ltd., was a company engaged in the courier business in Vancouver and the surrounding area. In June 1981, Purolator locked out its employees in a labour dispute. Prior to the lockout, Dolphin made deliveries for Purolator in its area and afterward, for Supercourier, a company connected with Purolator. Dolphin carried on its business in roughly the same manner with Supercourier as it had formerly done with Purolator. 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. Such a finding would have rendered lawful the picketing of Dolphin's business premises under British Columbia legislation, and consequently would have


\textsuperscript{86} [1986] 2 S.C.R. 573.
affected its business in that its collective agreement provided that the employees' refusal to cross a lawful picket line was not a violation of the agreement or grounds for disciplinary action or discharge. The appeal was dismissed.

McIntyre J. held in his judgment that the respondent was a third party not concerned in the labour dispute. The anticipated picketing was secondary picketing which was protected as freedom of expression under s. 2(b) of the Charter, but was saved by s. 1. The following remarks are in the context of secondary picketing:

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....

The approach to the legitimacy of picket line is that the permissible target of picket line should be the primary employer - that employer with whom the union is negotiating, and whom it is trying to compel to make favourable concessions in order to settle the agreement. As mentioned above, there is no general prohibition on the use of replacement workers under the legislation. The employer is free to replace striking employees, to try and operate the business during a strike if it can, thus effectively diluting the financial harm of a lawful strike. Since the strikers are now out
of work, subsisting on meagre strike pay, the same legislation protects unions' right of picketing to frustrate that employer's endeavour. Therefore, the legislation keeps a balance between the two parties of labour relations; it does not want to favour whatever side. However, secondary picketing of third parties is not in connection with a lawful strike. To a certain degree, the secondary employer is unconcerned in the primary disagreement and it does not have the power to make the concessions that will settle the new contract terms between another employer and her employees. The secondary employer may have power to put pressure on the ones who do have power to make the concessions, but the union is not allowed to take advantage of that indirect power in a free collective bargaining system because it is inconsistent with the neutral legal principle in the legislation.

Aside from this view, McIntyre J. gives another convincing argument that picketing should "be regulated and sometimes limited". The argument is that legislature should maintain a balance between the rights of unions to employ picketing in the primary dispute against their employer, and the rights of the secondary employers to remain free from the effect of labour disputes between other parties. Thus, the legislature does not allow trade unions to expand rights associated with economic conflict beyond the parties directly involved in the conflict.

In a primary picketing case, British Columbia Government Employees' Union v. Attorney General of British Columbia, Attorney General of Canada, Intervenor, the question was whether the limit on picketers' right to freedom of expression under

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87 88 C.L.L.C. 14,047.
s. 2(b) was justified as reasonable by s. 1 of the Charter. This case deals with the balance between the rights of trade unions and the rights of Canadian citizens.

In this case, the appellant union established picket lines at all law courts in British Columbia in the course of a lawful strike. All persons who crossed the picket line, however, were considered to have honoured it if they first obtained a pass from the union. Although it was primary picketing which is in general permitted, the Chief Justice of British Columbia Supreme Court granted an injunction restraining picketing and other activities calculated to interfere with the operations of any court. The Supreme Court of Canada upheld the injunction. This view was offered by Dickson C.J.C. when he wrote:

An issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the Charter. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the Charter.

The Court has held that picketing in the context of a labour dispute contains an element of expression which attracts the protection of s. 2(b) in Dolphin Delivery. However, Canadian citizens have fundamental rights to unfettered access to courts. If the injunction limits right to freedom of expression, that injunction is wholly proportional pursuant to s. 1 of Charter.

It follows from the foregoing that the s. 2(b) claim falls to be decided under s. 1. Freedom of expression protected by s. 2(b) of the Charter is obviously a highly valued right as in the individual liberty reflected in a modern democratic society by the right to strike and the right to picket. A balance must be sought to be attained between the individual values and the public or societal values. In the instant case, the task of striking a balance is not difficult
because without the public right to have absolute, free and unrestricted access to the courts the individual and private right to freedom of expression would be lost. The greater public interest must be considered when determining the degree of protection to be accorded to individual interests.

Considering that the Court upheld the decision in *Dolphin Delivery*, this case is a good example to express the purpose of the Canadian legislature to regulate industrial conflict. On the recognition of the inherent conflicted interests between the employers and the employees, the Canadian legislature attempts to control the conflict. It is clear that the work stoppage of a strike caused economic harm to both sides of the labour disputes. Beyond this, the damage inflicted by strikers in the social interest should be taken into account. By and large, the attitude of Canadian legislature in the context of industrial conflict is to confine the use of the strike weapon to the negotiation of new contract terms, to economic interest disputes. Union picketing, a basic strike weapon, should be used to exert economic pressure on its adversary in order to the settlement of an agreement. The most that can be said is that the courts generally do not interfere with peaceful picketing in support of a lawful strike. But the protection of primary picketing is subject to restraint by injunction when it is outweighed by other competing interests, such as the preservation of the fundamental rights of Canadian citizens. Thus, the trade unions are neither permitted to exert economic pressure on a neutral third party that is not in connection with a lawful strike occurring between other parties, nor permitted to expand the right of picketing to inflict damage on other public interests. Furthermore, the legislation sets

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88 Since the legality of picketing mainly depends on whether it is primary picketing or a secondary one, the centre issue in many cases becomes one of characterization. The borderline between lawful primary picketing and unlawful secondary picketing may turn on elements of geography, of the relationship
forth a legal ban to essential public services in limited circumstances. The legislative
prohibition of right to strike is accompanied by a mechanism for dispute resolution -
compulsory interest arbitration. As a substitute for strikes, interest arbitration is
designed to invite in a third party to break the deadlock at the bargaining table when
the right to strike is removed by statute.

Summary

The issue of the right to strike in Canada is not only in the context of labour
law. Under the Charter, the right to strike is not a fundamental right. Although the
Supreme Court of Canada gave a negative answer in the “collective bargaining
trilogy”, the real concern of the Court is to avoid making decisions about collective
bargaining policy. However, the Canadian courts have long been making policy
decisions about the balance of power in industrial disputes, and thus the case law is an
important part of the right to strike under Canada labour law.

The Canadian system of collective bargaining is based on the assumption of
conflicting interests between the employers and the employees. This system does have
its dark side: industrial conflict and work stoppage. A characteristic feature of

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between striking employees and a neutral third party. See Consolidated Bathurst Packaging Ltd. and

More discussion of interest arbitration will be provided in further chapters.
Canadian labour law is that it intends to limit and regulate collective employee actions.

The discussion of the right to strike under Canada labour law in this chapter consists of requirements of a strike, definition of “strike”, employment relations during a legal strike and the law of picketing. Each of them may look legally and conceptually distinct, but is connected by its purpose to control the conflicting interests. More broadly, the regime of regulation of strikes in Canada is about regulating economic conflict between parties with conflicting interests. The requirements of a strike give a peculiar legitimacy to a collective employee action, which is, a lawful strike as an economic sanction must occur in a certain time. It is to justify strike action as a means of the settlement of a new collective agreement. The definition of “strike” puts emphasis on the purpose of the job action, which is designed to restrict or limit production. It is to confine the use of strike weapon to the resolution of economic interest disputes. In accordance with the neutral legal principle expressed in the Alberta Reference case, the legislature provides protection of employment relationship during a lawful strike on the one hand, and on the other hand, sets forth restriction on secondary picketing to control the industrial conflict. Hence legislatures play a positive role in industrial stability and collective bargaining at the same time.
CHAPTER II
THE RIGHT TO STRIKE UNDER THE CHINESE CONSTITUTION

Introduction

The first Constitution of the People's Republic of China and the Constitution in force today do not protect a right to strike in China. However, the right to strike once appeared in the 1975 and 1978 constitutions. This chapter attempts to provide a historical analysis of the right to strike under the Chinese constitutions, illustrating the reasons China had a right to strike in its 1975 and 1978 constitutions as well as the reasons for no right to strike under the 1954 and 1982 constitutions.

This chapter is divided into two parts: the investigation of the four constitutions and the analysis of no right to strike in today's China. A larger portion of this chapter will concentrate on the second part because the theoretical basis of the unity interests theory is the basis of the whole Chinese legal system of labour relations.
A. The Four Constitutions

The People's Republic of China was founded in the year 1949. In the period of less than 50 years, the Chinese government has promulgated four constitutional codes after the New China was born. They were promulgated in 1954, 1975, 1978 and 1982 respectively. Among these four constitutional codes, the 1975 and 1978 codes expressly recognized the right to strike. However, the 1954 and 1982 codes did not guarantee the right to strike in China. This section is to provide background information for these four constitutions, focusing on the provisions in regard to the fundamental rights and duties of Chinese citizens. On the basis of these provisions, this section will discuss respectively the legislative purposes of these constitutions.

1. The 1954 Constitution

The first Constitution was promulgated on September 20, 1954. From 1949 to 1954, the so-called Common Programme took the place of constitutional principles. In January 1954, a Committee for the Drafting of the Constitution was set

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90 In order to make a distinction between the Republic China (1912-1949) under the government of the Kuomintang and the People's Republic of China (1949-) under the Chinese Communist Party (CCP), the CCP calls the Republic China the Old China and the People's Republic of China the New China.


up under the Chairmanship of Mao Tse Tung, the Chairman of the Central
Government. After the draft was ready, it had been discussed in the highest regional
circles by, in all, 8,000 people.93 The final draft was published on the 14th of June.
The first Constitution was passed on 1st September 1954 by the First National
People’s Congress.

The 1954 Constitution had four chapters, which were preceded by a Preamble
that described briefly how the country was united and how all nationalities in China
lived in harmony. The four chapters were General Principles, the State Structure,
Fundamental Rights and Duties of Citizens, and National Flag, State Emblem and
Capital. The first Constitution granted the Chinese people freedom of: speech,
correspondence, the press, assembly, association, procession, demonstration, and
religion. It did not guarantee the freedom to strike. Article 87 of the first Constitution
was:

Citizens of the People’s Republic of China have freedom of speech, freedom
of procession, and freedom of demonstration. By providing the necessary
material facilities, the state guarantees citizens enjoyment of these freedoms.

In addition, article 100 of the 1954 Constitution imposed a duty on Chinese citizens
to uphold labour discipline and keep public order.94

The 1954 Constitution was based on the model of the Constitution of USSR,
which did not set out a right to strike.95 Being a socialist country, one of the few
socialist countries in the world at the time when it was established and today, the

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94 Article 100 of the 1954 Constitution provides: Citizens of the People’s Republic of China must abide
by the Constitution and the law, uphold discipline at work, keep public order and respect social ethics.
People's Republic of China learned a lot of things from the Soviet Union, the first socialist country in the world. In most cases the Chinese government adopted the system from the Soviet Union without any change. The 1954 Constitution was one of the results of learning from the Soviet Union because it was drafted in often word-for-word imitation of the 1936 Russian Constitution.96

The second reason that there was no right to strike in the first Constitution relates to the situation of the national economy. After eight years of devastating war with Japan followed by a prolonged civil war, the Communist government faced a war-torn economy suffering from severe inflation and unemployment.97 The nation's new leaders attempted to improve the economic situation by increasing production. The First Five-Year Plan, a nation-wide economic plan, was launched on January 1, 1953.98 A number of economic campaigns were under way.99 China entered a new phase of economic development. Under this circumstance, the right to strike, which

95 Article 125 of the 1936 USSR Constitution reads: In conformity with the interests of the toilers and to the end of strengthening the socialist social order, citizens of the USSR are guaranteed by law: (a) freedom of speech, (b) freedom of the press, (c) freedom of assembly and meetings, and (d) freedom of street parades and demonstrations. These civil rights are assured by granting to the toilers and their organizations the use of printing establishments, stocks of paper, public buildings, streets, means of communications, and other material conditions essential for their realization. See A.Y. Vyshinsky, The Law of the Soviet State, trans. H.W. Babb (New York: The Macmillan Company, 1948) at 618.

96 "Russian Influence in 1954" (1954) 64 C.N.A. 1 at 2;


98 Ibid. at 157.

may interfere with economic development, was not appropriate to be guaranteed by the first Constitution.

The Chinese government regards the first Constitution as “a very good” constitution; whereas some Chinese scholars referred to it as “a socialist constitution” which “promoted socialist transformation and advance of socialist construction, and guaranteed Chinese success in its transition from a New-Democratic to a socialist society in accordance with the national conditions.” The 1954 Constitution, however, played a very slight role in Chinese social life since the Communist China was not ruled by law; it was ruled by man. During the Cheng Feng Reform in 1956, the best-know legal experts from outside the Party were invited to a “free discussion” about law and legal life. A distinguished lawyer and journalist Ku Chih-chung spoke about the Constitution, which - he said - existed merely in name. For example, Art. 87 decreed ‘Freedom of speech, freedom of the press, freedom of assembly, freedom of association’, in fact, it was not so. Mr. Ku said there was no freedom of the press, and associations all stand under the arbitrary power of the magistrates. “Everybody considers the Constitution a useless paper, and from the committee Chairman Liu down to the ordinary citizen nobody cares for the Constitution.”

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Mr. Ku's statement provided a picture of the nature of the Chinese constitution: the constitution is a constitution for show. As the Editorial of the People's Daily wrote in October 1957: "All important questions of politics and law must be decided by the Party". The constitution in China is only in the legal notions and the Party can take away whatever rights and freedoms are guaranteed by the Chinese constitution. The right to strike, even if it had been protected under the 1954 Constitution, would not have been necessarily respected. But there was not even any pretext of the protection of a right to strike!

Were there any actual strikes under the 1954 Constitution? The simple answer is yes. Before the year 1966, strikes in China, although they were not initiated by Chinese unions, were mainly for the economic purpose, such as the increase of wages and welfare. The policy of dealing with the strikers was the traditional Chinese way of self-humiliation. That is, the troublemakers have to "be humble and cautious". When it failed, the party committees or the police would take disciplinary action or institute

The record of the protection of human rights in China is not good. A famous case is that even Liu Shaoqi, the late chairman of the PRC, did not enjoy the fundamental rights supposedly protected by law. See L. Dittmer, Liu Shao-chi and the Chinese Cultural Revolution (Berkeley: University of California Press, 1974); Li Tien-min, Liu Shao-chi, (Taipei: Institute of International Relations, 1975).


105 Mr. Ku was regarded as a rightist after his "free" speech about the Chinese constitution. His name was mentioned on Chinese Youth Daily with such comments: "Mr. Ku Chih-chung made a shameless attack on the Constitution. He should learn that the Constitution protects the freedom of the People; but he will be disappointed if he hopes that the Constitution will protect the freedoms of speech, press, and assembly, of traitors, counter-revolutionaries and rightist elements".

106 The following analysis of the 1975 and 1978 constitutions, under which the right to strike are guaranteed, will provide more discussions on this issue.
criminal charges against them. Meanwhile, the trade union should persuade the workers that their complaints were ill founded.\footnote{107}

In the period of the Cultural Revolution, there were large-scale work stoppages in China.\footnote{108} However, these were not strikes in the usual Canadian sense. The work stoppages in the Cultural Revolution were politically inspired for class struggle because the masses were to liberate themselves by class struggle against the people within the Party who were in authority and were taking the capitalist road. In addition, the ACFTU, the only legal union in China was disbanded as reactionary at the beginning of the Cultural Revolution.\footnote{109} As discussed in chapter I, strikes in Canada are confined in the area of collective bargaining. It should be used as an instrument to try to compel an employer to agree the terms and conditions of employment.\footnote{110} Although there have been some political strikes in Canada, the legislation scheme is based on the assumption that strikes are economic. Whether a strike for political purpose is under the umbrella of the statutory legislation depends on whether the work stoppage is aimed specifically at an employer behind the political motivation.\footnote{111} The large-scale work stoppages in China during the Cultural Revolution were not aimed at economic interests. The workers were enabled to

\footnotetext[107]{107}"How to Deal with Unruly Workers?" (1957) 183 C.N.A. 1 at 2.

The Cultural Revolution is from the year 1966 to 1976, which is also called 10-year internal disorder.

\footnotetext[109]{109}ACFTU means All-China-Federation of Trade Unions. More discussions of the ACFTU will be provided in the next section of this chapter.


\footnotetext[111]{111}See purposive restriction on strikes in chapter I.
“smash revisionism, seize back that portion of power usurped by the bourgeoisie”.

The strikes were used as a weapon to ensure that China “continues to advance in giant strides along the road of socialism”. These work stoppages, therefore, did not constitute strikes in the usual Canadian sense.

2. The 1975 Constitution

The Draft Revised Text of the 1975 Constitution was submitted by the central committee of the Communist Party of China to the First Session of the Fourth National People’s Congress in January 1975 for its deliberation. It was unanimously adopted by the Congress on January 17, 1975. The 1975 Constitution, like the first one, was starting from the Preamble, which recorded “glorious history of the Chinese people’s heroic struggle”. It was divided into four chapters with the same titles as those of the first Constitution. However, the number of articles had been reduced from 106 to 30.

One notable difference between the 1975 Constitution and the first Constitution is that the 1975 Constitution added one freedom to those of 1954, freedom to strike. Art. 28 provided:

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113 Ibid.


115 Ibid. at 19.

116 The English translation of the 1975 Constitution is in (1975) 4 BR 12.
Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism.

Chang Chun-chiao in the official explanation of the Constitution said that freedom to strike was added to Art. 28 of the Constitution "in accordance with Chairman Mao's proposal". This is the main reason that the right to strike was included in the 1975 Constitution. At the same time, the 1975 Constitution deleted the duty to uphold labour discipline and keep public order which was under the 1954 Constitution.

Why did Mao suggest the right to strike should be included in China's constitution? It is necessary to examine Mao's doctrine respecting strike actions. In Mao's 1957 speech "On the Correct Handling of Contradictions Among the People", he pointed out there were two qualitatively different types of contradictions - those between ourselves and the enemy and those among the people themselves, and different methods should be used to resolve these different contradictions. "To point it briefly", Mao stated, "the former are a matter of drawing a clear distinction between ourselves and the enemy, and the latter a matter or drawing a clear distinction between right and wrong".

117 Supra note 114 at 19.
119 Ibid. at 586-588.
120 Ibid. at 588.
Under the capitalist system, the capitalist class is the dominant class as the result of the private ownership of the means of production. The working class is a class which is economically exploited and politically oppressed. In accordance with Mao’s theory, the contradiction between the capitalist class and the working class is a contradiction between the enemy and ourselves. Only when the capitalist class is overthrown will the working class become the master of the country and change their status in the society.

The right to strike is a very important right for the working class to fight against their enemy - the capitalist class. Through the work stoppage in a strike, the working class could improve their working conditions and their living standards by placing economic pressure on the capitalists. The more significant function of a strike is in the political area, that is, a strike will possibly direct revolutionary activity. Since the employees’ striking action means not to follow the discipline and the orders made by the capitalist, it is to deny the existing distribution of power and authority, which is a kind of class-consciousness. Further, only if the working class had the class-consciousness could they organize themselves and fight for the state power against the capitalist class and win it from the capitalist class at last.\footnote{G. England, “Some Observations on Selected Strike Laws” in K. Swan & K. Swinton, eds., \textit{Studies in Labour Law} (Toronto: Butterworth, 1983), 221} Hence, the right to strike is of significant value for the working class in a capitalist society.

In socialist China, class contradictions and class struggle still existed.\footnote{Preamble of the 1975 Constitution.} On the Eighth Term Tenth Plenary of the Central Committee held in September 1962, the
Party Central Committee Plenary promised an increase in class struggle. The Party declared that during the whole period of proletarian revolution and proletarian dictatorship, there would be class struggle between the proletarian class and the bourgeois class, between the two ways, socialism and capitalism. The Party warned people that Chinese socialism faced the following dangers: the reactionary ruling class that had been overthrown in its search for a restoration, the influence of the bourgeois class and the power of old habit as well as a capitalist tendency in the activities of small producers. In addition, there were persons who had not yet been reformed by socialism who wanted to quit the road of socialism and turn to capitalism. Under these circumstances, class struggle was inevitable and all the Chinese people should remember class struggle and keep on fighting against the capitalist class.\(^{123}\) Hence, the Chinese constitution should guarantee the right to strike for the Chinese proletarian class as a way to bar the restoration of the bourgeois class.

More specifically, Mao pointed out, the prevailing contradictions in the socialist China are the contradictions among the people.\(^{124}\) These contradictions comprise the contradictions between the government and the people, between the leadership and led, and the contradiction arising from the bureaucratic style of work of certain government workers in their relations with the masses.\(^{125}\) The way to settle the contradictions among the people “is by the democratic method, the method of


\(^{124}\) Supra note 118 at 587.

\(^{125}\) Ibid.
discussion, of criticism, of persuasion and education".126 Mao regarded bureaucracy as a major obstacle to his ideal society and endorsed the strike “as a means of struggle against the bureaucracy”.127 Mao’s support played a significant role in Chinese official recognition of the right to strike in the 1975 Constitution.128

The 1975 Constitution, although it had been greatly welcomed within and without the Party at the time when it was published, was “rather imperfect”.129 It was regarded as reflecting the views of the leftists by some Chinese scholars130 and the work of “radical tide” by some foreign scholars.131 The 1975 Constitution played a slight role in the legal history of Chinese constitutional law and it had lasted for only a few years.132

Although the 1975 Constitution granted the right to strike to Chinese citizens, there was no effective mechanism for ensuring its implementation. In the year 1975, China had very few statutes on labour relations. The 1950 Trade Union Law, the only important statute, provided Chinese workers the right to have union representation,

126 Ibid. at 589.
128 Ibid.
In addition, strikes as a sign of protest against bureaucracy also received the support of Premier Zhou Enlai. See Lewis & Ottley, “China’s Developing Labour Law” (1982) 59 Wash. U. L.Q. 1165 at 1175.
130 Ibid.
132 In the article of “The Nature of the Draft”, the author predicted that the draft of the 1975 Constitution was not “a constitution that could lay a foundation of legal stability for many years to come.” See (1970) 823 C.N.A. 2.
but the main function of the Chinese trade union was to guarantee fulfilment of the enterprises’ production target. There was no provision giving concrete expression to the constitutional right to strike.\textsuperscript{133} As noted in the above section, although there were work stoppages in the period of the Cultural Revolution, they are not the strikes of the same meaning in the Canadian sense.

3. The 1978 Constitution

The 1978 Constitution was adopted on March 5, 1978 by the Fifth National People’s Congress at its First Session. It was designed for a new period of development “in China’s socialist revolution and socialist construction”.\textsuperscript{134} Like the first and the second constitutions, the contents of the 1978 Constitution were Preamble, General Principles, The structure of the State, The Fundamental Rights and Duties of Citizens, and The National Flag, the National Emblem and the Capital.

Compared to the 1975 Constitution, the 1978 Constitution had been enlarged to 60 articles.\textsuperscript{135} It guaranteed the Chinese citizens freedom to strike, which was not there in 1954 and appeared in 1975. Article 45 reads as follows:

Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and have the right to “speak out freely, air their views fully, hold great debates and write big-character posters.”

\textsuperscript{133} The following chapters will provide more discussions of the 1950 Trade Union Law.


\textsuperscript{135} The English translation of the 1978 Constitution is in (1978) 11 BR 5.
Furthermore, the 1978 Constitution reasserted a duty upon Chinese citizens to "take care of and protect public property, observe labour discipline, observe public order, respect social ethics and safeguard state secrets", a duty in the first Constitution.

It seems that the Party was very unwilling to provide a constitutional guarantee of the right to strike under the 1978 Constitution. Yeh Chien-ying in his report focused attention on reassertion of the duty to observe labour discipline and public order.¹³⁶ He quoted Mao’s 1959 call for "unity and iron discipline" and maintained it as the spirit embodied in the 1978 Constitution.¹³⁷ Yeh did not even mention freedom to strike in his report. That the Chinese constitution is a constitution only for show is not a wholly new idea, for the discussion of the first Constitution provided much the same about this issue. However, the fact is the party had to tolerate retention of freedom to strike in the 1978 Constitution, which was inserted into the 1975 Constitution by the "great leader and teacher Mao Tse Tung", even if it was just for show.

The 1978 Constitution was argued as a compromise constitution.¹³⁸ On the one hand, it did not entirely abolish Mao’s thoughts because it preserved the provision of the right to strike.¹³⁹ On the other hand, it reflected the policy of modernization and

¹³⁶ Supra note 134.

¹³⁷ Ibid. at 20.

¹³⁸ Supra note 128 at 1196.

¹³⁹ See supra note 118 and the accompanying text. Although Mao died in the year 1976, the subsequent Chinese leaders cannot abolish Mao’s thoughts in Chinese politics life. In Yeh Chien-ying’s report on the revision of the 1978 Constitution, he quoted a lot of Mao’s saying to illustrate the Party’s policy. Supra note 135. Another important reason that the right to strike had to be kept in the 1978 Constitution is that Hua’s legitimacy as Party Chairman rested upon his alleged appointment by Mao.
rapid economics growth set out by the subsequent leadership, Hua Guofeng and Deng Xiaoping, by emphasizing work and labour discipline.\textsuperscript{140} Since the Ministry of Labour had officially denied the existence of strikes before 1993, it is difficult to get detailed information of strike incidents in China. Although the 1978 Constitution did not specify when strikes were permissible, Chinese sources indicated official support of strikes to protect workers’ democratic rights and workers’ health and safety.\textsuperscript{141} The reaction of the Chinese authorities to a strike for economic purpose is illustrated by a December 1978 incident in which a woman was shot by Chinese police who fired on a group of workers protesting low wages at a Shanghai silk factory.\textsuperscript{142}

4. The 1982 Constitution

As noted, since the founding of the People’s Republic, China has promulgated four constitutions: the 1954, 1975, 1978 and 1982 constitutions. The 1978 Constitution was adopted in March 1978. Since then, great changes and developments had taken place in China.\textsuperscript{143} The most important one was the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party held in December 1978, which “rectified” the mistakes of the Cultural Revolution in all fields and “summed

\begin{itemize}
\item \textsuperscript{140} See Art. 45 of the 1978 Constitution.
\item \textsuperscript{141} Supra note 128 at 1196.
\item \textsuperscript{142} Ibid. at 1198.
\item \textsuperscript{143} Supra note 129 at 18.
\end{itemize}
up the historical experience" gained since the founding of the New China. The 1978 Constitution, which was adopted "in a hurry", no longer conformed to the realities of the state in many ways. Thus, it was necessary to revise the Constitution to meet the new conditions.

The work to discuss and revise the Constitution lasted for two years. In September 1980, the Third Session of the Fifth National People’s Congress made the decision to set up a committee for the revision of the Constitution. In April 1982, a draft version was published for a nation-wide discussion. It was claimed that approximately 80 percent of the Nation’s adults had participated in this discussion. The final draft was adopted by secret ballot at the fourth plenary meeting of the Fifth Session of the Fifth National People’s Congress on December 4, 1982.

The 1982 Constitution contains 138 articles in four chapters. Although it has the similar chapters to the former three constitutions, the chapter of Fundamental Rights and Duties of Citizens is the second chapter in the Constitution for the purpose of emphasizing the citizen’s rights. There is no freedom of strike under this Constitution. Article 35 provides that “citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and

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144 Supra note 100 at 9.
146 Supra note 100 at 9.
149 Supra note 131 at 119.
of demonstration”. More specifically, Article 53 of the Constitution imposes on citizens the duty to “abide by the Constitution and the law, keep state secrets, protect public property, observe labour discipline and public order and respect social ethics”.

The Chinese government was satisfied with the 1982 Constitution when it was promulgated. Peng Zhen in his “Report on the Draft of the Revised Constitution of the People’s Republic of China” said that the 1982 Constitution “is distinctively Chinese and meets the needs of Chinese socialist modernization” since it had incorporated a careful summary of the experience of China’s socialist development and drawn on international experience.\(^{150}\) In addition, the 1982 Constitution had taken into account both the current situation and the prospects for developments, it would remain valid for a long period of time.\(^{151}\)

As already noted, the 1954 Constitution was regarded as “relatively flawless”, and thus the 1982 Constitution “maintains and develops the fundamental principles of the 1954 Constitution”.\(^{152}\) As for the chapter of fundamental rights and duties of citizens, “the provisions concerning citizen’s rights draw on those of the 1954 Constitution”.\(^{153}\) The 1982 Constitution reinstates the duty on the citizens of the People’s Republic of China to uphold labour discipline and keep public order, a provision which appeared in the 1954 Constitution. Simultaneously, the 1982

\(^{150}\) Supra note 100 at 11.

\(^{151}\) Ibid.

\(^{152}\) Ibid.

\(^{153}\) Supra note 131 at 119.
Constitution does not guarantee the freedom to strike, which was included in the 1975 and 1978 constitutions, but not in the 1954 Constitution.\textsuperscript{154}

The right to strike, which had been included in China’s 1975 and 1978 constitutions, was removed from the 1982 Constitution. Does it mean there is no right to strike in China? The official answer is YES.

The first reason came from a report of an official interview with Hu Sheng, the Deputy Secretary General of the Committee for the Revision of the Constitution, by Beijing Review’s correspondents.\textsuperscript{155} In this interview, Hu Sheng answered the question of why the freedom to strike was not included among the fundamental rights of citizens. Hu provided two reasons for this omission. 1. The working people in China could “utilize means other than striking to express their demands and achieve their aims”.\textsuperscript{156} 2. In socialist China, “striking is not only disadvantageous to the state, but also harmful to the interests of the workers”.\textsuperscript{157} The explanation will be examined in the following section respecting the Party’s view of no right to strike in China.

In the Canadian sense, this interview cannot be an important reason for no right to strike, but it embodied a dominant voice in China on this issue. As noted

\textsuperscript{154} Another reason that there was no right to strike in the 1982 Constitution, as some scholars argued, is the Soviet model. The 1982 constitutional code was a constitutional code that closely akin to the system originally imported from the Soviet Union in 1954. Since the Soviet Union did not set the right to strike in its 1954 constitutional law, the Chinese government made the same provision in its constitutional code. For more discussions in respecting this reason, see R. Baum “The Road to Tiananmen: Chinese Politics in the 1980s”, in Roderick MacFarquhar ed., The Politics of China (Cambridge: Cambridge University Press, 1997) 340 at 350, supra note 112. For more discussions of the constitutions in the U.S.S.R., see Kevin Block, “The Legal Status of Strikes in the U.S.S.R.” (1991) 12 COMP. Lab. L.J. 133.

\textsuperscript{155} Supra note 145.

\textsuperscript{156} Ibid. at 17.

\textsuperscript{157} Ibid.
above, the 1982 Constitution, on paper, guarantees freedom of speech and freedom of the press to the Chinese people. In practical terms, the Chinese people do not enjoy these freedoms. Since the Chinese government regards all strikes as for political purposes and being threats to its sovereignty, it prevents any idea of the right to strike from spreading in China. Therefore, on the one hand, it is rare that the Chinese press provides an opinion that is different from the one the Chinese government has, especially respecting the right to strike, such a sensitive issue to the Party. On the other hand, it is dangerous to speak publicly that the Chinese people should have a right to strike. That is the reason why all the published articles respecting the fundamental rights were the following two kinds. One was to illustrate this omission, to explain how correct it was; the other focused on the discussion of the protected freedoms without mentioning the right to strike.

The second reason was that since the right to strike had been set separately in 1975 and 1978 constitutions with other fundamental rights, it was obvious that the right to strike was not protected in the 1982 Constitution due to the absence of this right. This point of view was quite similar to the one given by McIntyre J. in the Alberta Reference. McIntyre J. provided two reasons in his judgment explaining...

158 The subsequent discussion will provide more analysis respecting the Party’s attitude toward a right to strike in China.


160 Supra note 6.
that the right to strike is not a constitutional right under the Charter. The first reason is that “the Charter upon its face cannot support an implication of a right to strike”.161 McIntyre J. made an international comparison between the Canadian Constitution and the Constitution of France, Italy and Japan. Since the right to strike is explicitly included in the Constitution of France, Italy and Japan, the omissions of similar provision in the Canadian constitution speaks strongly against any implication of a right to strike. Thus, through different comparison - one being internal comparison among the Chinese constitutions, the other being an international comparison among the constitutions of different countries - they come to the same conclusion.

However, as discussed in Chapter I, this kind of reasoning is quite weak. In the context of the Chinese constitution, the right to strike can be implied in the fundamental rights on the ground that it is internationally recognized as a very important human right under the U. N. human rights documents. China ratified the U. N. International Covenant on Economic, Social and Cultural Rights in October 1997. There are explicit provisions relating to freedom of association and trade unions in this Covenant. Art. 8(1)(d) expressly protects the right to strike.162 Although this section contains that the right to strike must be exercised “in conformity with the law of the particular country”, this qualification does not allow a signatory to eradicate or substantially erode the right so as to render the section meaningless. In accordance with these provisions, China has undertaken to ensure the right to strike. This right

161 Ibid. at 12,160.

162 Supra note 6 at 12,173-12,174.
should be protected in its domestic legislation though it is allowed to regulate the right.

The third reason is the duty to observe labour discipline and public order set forth in the 1982 Constitution. As noted, the right to strike is not protected under the 1954 Constitution. By contrast, article 100 of the 1954 Constitution required the Chinese citizens not only to uphold labour discipline but also to keep public order and respect social ethic. The right to strike was first included in the 1975 Constitution. In order to avoid inconsistency with the right to strike, the 1975 Constitution did not declare that the citizens have a duty to observe labour discipline. Being a compromise constitution, the 1978 Constitution maintained the freedom to strike and balanced it by reviving the earlier duty of citizens to abide labour discipline and observe public order. The 1982 Constitution, which "maintains and develops the fundamental principles of the 1954 Constitution",\(^{163}\) does not protect the right to strike. Simultaneously, it imposes on citizens the duty to observe labour discipline and public order.

In China, the Constitution is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organisations and all enterprises and undertakings in China must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensures its implementation.\(^{164}\) Hence, all Chinese citizens have the constitutional duty to observe labour discipline and public

\(^{163}\) Supra note 100 at 11.

\(^{164}\) Preamble of the 1982 Constitution.
order. Since neither a strike nor a lockout is protected under Chinese labour law, a strike is considered in violation of both labour discipline and public order, and thus it is illegal.

Although in the official press the right to strike is not included under the 1982 Constitution, some Chinese scholars argue that the Chinese people have a right to strike under the 1982 Constitution. According to Chinese legal theory, if the statutes do not set a clear prohibition on something, the citizens have the rights to choose whether to do or not to do it. This is the basis for the conclusion that Chinese people have a right to strike under the 1982 Constitution because it does not prohibit the right to strike despite its omission of this right. Like their Canadian colleagues, the Chinese scholars also argue that the freedom to strike can be protected by the Constitution under its guarantee of either the freedom of speech or the freedom of association. However, this kind of opinion was a kind of underground opinion because in China there is no real freedom of speech and freedom of the press. The freedoms guaranteed under the Chinese constitution are mainly for show, not for practice.

In sum, the right to strike once appeared in the 1975 and 1978 constitutions, but is removed from the current Constitution. Although it may be arguable that whether the right to strike is guaranteed under the 1982 Constitution, as was unsuccessfully argued in the Alberta Reference case, from the point of view of the Chinese government there is no right to strike in China. In addition, although the right

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165 This discussion, of course, is not a nation-wide discussion as the discussion for the Draft of the Constitution. In the course of my preparation this thesis, I have interviewed several Chinese constitutional law specialists. This part of article is based on my interviews. However, I refrain from mentioning them by name because their safety was more important.
to strike was a constitutional right under the 1975 and 1978 constitutions, there was no way for the right to be carried out in China.

B. The Reasons for the Absence of a Right to Strike in Today’s China

As noted above, one of the reasons that there is no right to strike in today’s China is to preserve the basic provisions under the 1954 Constitution in the 1982 Constitution. However, it is not the main reason. The following parts will discuss the reasons from two perspectives, from the point of view of the Chinese government and from my own point of view.

1. The View of the Chinese Government Explaining the Absence of a Right to Strike in China

There are two reasons for the Chinese government to oppose a right to strike in China. One is the theoretical reason, that is, the government holds that there is the same interest among the state, the enterprises and the workers on the ground of the socialist economic system. Although there are still labour disputes in socialist China, they are said not to be the result of antagonistic contradictions, as those in the capitalist countries. The other reason is the practical reason. The 1981 Solidarity movement in Poland greatly shocked Communist China. The government thought the right to strike played a significant role in helping the success of Solidarity and thus the Chinese constitution cannot guarantee a right to strike.
a. The Theoretical Reason

The basic theory to support no right to strike in China is that there is a unity of interest among the state, the enterprises and the workers. The subsequent discussion will provide the basis for the identical fundamental interests in China from the socialist economic system, the history of People's Republic of China and the main contradictions in today's China.

The working class is the leading class in the People's Republic of China under the 1982 Constitution. Consequently, the interests of the workers and the state are identical. Moreover, because the state economy is the basis of the Chinese economic system and is under the ownership by the whole people, there is a common interest between the state-owned enterprises and the workers. Therefore, the interests of the three are in harmony and without opposition. While a strike means a work stoppage in the enterprise, it will do great harm to the country, the enterprise and the individual workers on the basis of the character of the People's Republic of China and the state-owned enterprises.

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166 Art. 1 of the 1982 Constitution provides: The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited.

167 Art. 6 of the 1982 Constitution provides: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of "from each according to his ability, to each according to his work". Art. 7 provides: The state economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy.
However, there are some contradictions existing on the basis of "the identical fundamental interests". The form of the contradiction in the area of labour relation is labour disputes. But labour disputes in socialist China are not antagonistic contradictions as those in the capitalist countries. In the view of the Chinese government, a labour dispute in China will arise from the bureaucracy of the administrative department, the violation of labour discipline by a few labourers or the misunderstanding of laws and regulations on labour by either the labourers or management. Since the basic interest is the same, the dispute could be solved by the ways of consultation or mediation. Hence, it is unnecessary for the labourers to use the strike, a weapon used for working class to fight against capitalist class, to solve the internal contradiction among the working class itself.

Likewise, the wage system in China, a method to distinguish the interests of the individuals from the enterprises and the state, is different from the capitalist one. In socialist conditions, the working class has taken the ownership of the means of production. The profits gained from their work include two parts. One is used to be the accumulation fund and the consumption fund for the whole society. The other is the individual consumption fund in the form of the wage of a labourer, which is distributed according to the quantity and quality of labour provided by the labourer. The first part of the profits is used to protect the long-term interest of all labourers, and the second part of the profits is used to protect the recent interest of the individual

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Accordingly, the socialist wage indicates the common interest among the state, the enterprise and the individual workers.

In regard to the history of the People’s Republic of China, the Chinese government considered it unnecessary to include the right to strike for improving the living standards of the Chinese people. China is a country with one of the longest histories in the world. It was an advanced country in its early days of feudalism. However, the feudal China gradually turned into a semi-colonial and semi-feudal country after the First Opium War in 1840 and the Chinese people suffered without the national independence, democracy and freedom since then. It was under the leadership of the Chinese Communist Party that the Chinese people overthrew the rule of imperialism, feudalism, and bureaucrat-capitalism, won a great victory in the New-Democratic Revolution and founded the People’s Republic of China.

In addition, when the People’s Republic of China was newly established, the Chinese government bore the political and economic pressure from the western countries as well as the difficulties derived from the long-term wartime. The Chinese people and the Chinese People’s Liberation Army have defeated imperialist and hegemonist aggression, sabotage and armed provocation and have thereby defeated imperialism, feudalism, and bureaucrat-capitalism.

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171 Preamble of the 1982 Constitution.

172 Ibid.

173 For discussion on this subject, see Bill Bruggle China: Liberation and Transformation 1942-1962 (New Jersey: Barnes & Noble Books, 1981) at 63-64, supra note 96.
safeguarded China's national independence and security and strengthened its national
defence.\textsuperscript{174}

In all these periods, a lot of Chinese people contributed their lives. The New
China is a country resulting from the long-term struggle of the whole Chinese people,
especially the working class. The Chinese government believed that the Chinese
people realized from their personal experience that only when the people's
government was consolidated could the working class gain the final success for their
revolution and gradually improve their living standards to the best one in the world.\textsuperscript{175}
According, every Chinese citizen should work hard to build up their own country
without taking a strike which is “not only disadvantageous to the state, but also
harmful to the interests of the workers”.\textsuperscript{176}

The third reason to oppose a right to strike in China is the theory of the main
contradictions in China. As indicated, the right to strike received its first official
recognition in the 1975 Constitution due to the philosophical support of Mao Tse
Tung. Mao's 1957 speech “On the Correct Handling of Contradictions Among the
People” was the theoretical basis leading to the inclusion of the right to strike in the
1975 Constitution. Ironically, it is also the guiding ideology explaining why the right
to strike is not included in the 1982 Constitution.

\textsuperscript{174} Preamble of the 1982 Constitution.

\textsuperscript{175} Li Lisan, “The Explanation of the Draft of the Trade Union Act of the People's Republic of China (1950)”, in Guan Huai One Hundred Questions to the 1992 Trade Union Law, 278, in Chinese. Supra note 170.

\textsuperscript{176} Supra note 145 at 17
In the article of “Scientifically Understanding and Handling Class Struggle in China”, written by Jiefangjun Bao commentator, the author declared that the principal contradiction within the country was no longer that between the working class and the bourgeoisie, the contradiction between ourselves and enemy, but the contradictions among the people in their different specific interests on the basis of their identical fundamental interests, and the contradictions between the advanced and the backward and between the right and wrong in ideological understanding based on the general goal. None of these social contradictions belong to the realm of class struggle. Therefore, the method to resolve these contradictions should be democratic method, which Mao had advocated in his 1957 speech. The previous large-scale and turbulent class struggle was not the fault of Comrade Mao Tse Tung since “Comrade Mao Tse Tung, for his past, also unequivocally called on all party members to correctly understand and handle the two essentially different social contradictions”.

The author summarized that contradictions in Chinese society were contradictions between the demand of the people for rapid economic and cultural development and the existing state of China’s economy and culture, which fell short of the needs of the people. Hence, the chief task confronting the nation at that time

177 Supra note 168.
178 Ibid. at 18.
179 Supra note 118.
180 Supra note 168 at 16.
181 Ibid.
was to concentrate all efforts on developing the productive forces, industrializing the country and gradually meeting the people’s incessantly growing material and cultural needs. That was the correct and scientific method to resolve the Chinese contradictions in the meantime.\textsuperscript{182} The method of striking, a method used in class struggle, ran counter to the chief task and should not be included in the \textit{Constitution}.

The Chinese theory of no conflict of interests between the Chinese government, the enterprises and the workers is quite different from the Canadian theory. As analyzed in Chapter I, Canadian labour law, in the collective sphere, is based on the recognition of inherent conflict of interests between the employers and employees. Under the collective bargaining legislation, the right to strike is generally thought to exist. The purpose of collective bargaining is to settle the terms and conditions of employment that the two parities find mutually acceptable. If no agreement is reached, the employees may have recourse to a strike, or the employer to a lockout, as a bargaining sanction. In order to guarantee the employees’ right to take collective action, the legislation provides protection of employment status to a striker who participates in a legal strike with the prohibition against employer retaliatory action designed to punish strikers. Simultaneously, in keeping with its desire to maintain industrial peace, the legislation not only sets forth the purposive limitation and timeliness restriction on strikes, but also sets forth the restriction on secondary picketing. Therefore, instead of ignoring the conflicting interests between the employers and employees, Canadian labour law intends to recognize and regulate industrial conflict.

\textsuperscript{182} Ibid.
The Chinese theory of identical fundamental interests has been the foundation for the whole legal system since the Communist China was established. This theory, even if it had been acceptable under the planned economy, is not suitable under today’s market economy. Chapter IV of the thesis will provide discussion respecting the characteristics of labour relations under the planned economy and the market economy. At present, it is necessary to conduct a brief analysis of labour relations in today’s China in order to examine the government’s assumption of the same interests. First of all, there are private enterprises, foreign-capital enterprises as well as the public owned enterprises under the market economy. The interests between the employers and the employees in the former enterprises are conflicted due to the private ownership of production. Second, even in the public ownership enterprises, the interest of the labourers becomes independent vis-à-vis the interest of the management on the ground that the state, with the main function of macro-regulation, is no longer involved in the labour relations between an enterprise and the workers. Hence, the conflicted interests should be regulated under the Chinese law to protect the workers’ legitimate rights and to keep industrial peace in China.

b. The Practical Reason

The practical reason that there is no right to strike in today’s China was the advent of the Solidarity Trade Union in Poland. The Solidarity movement in the 1981 succeeded in weakening the power of the Communist Party and transforming Polish
society. The movement greatly shocked the Communist countries. The PRC is no exception. The right to strike has been omitted because of the lessons of Poland’s Solidarity movement. In order to elaborate an analysis of this practical reason, it is necessary to provide a brief introduction of the Solidarity movement.

Solidarity began in Poland on 14 August 1980 with the strike at the Lenin Shipyard for a wage claim. When that was followed by continuous strikes over the country, it became a movement with the main objective of free trade unions. Because of the participation of the workers from the key industries in the economy, the Polish United Worker’s Party (PUWP) and the government had stepped down and the historic twenty-one-demand Gdansk Agreement, which included the recognition of free trade union, the guarantee of the right to strike and an end to the repression of free speech, was signed on 31 August.

Existing in a totalitarian Soviet-style environment, the Solidarity Trade Union movement could not simply take up the tasks associated with the trade union activities. The Polish people wanted freedom and rule of law at least as much as they wanted improved social benefits. Thus, Solidarity could not limit itself to defending the strictly material interests of its members. As a result, the issues of truth in public life and in the media, social justice, and reform of the law which would not normally

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185 Ibid. at 39-40.

186 Ibid. at 106-108.
be the province of trade union activity were important elements of the Solidarity programme.\textsuperscript{187} Solidarity became a "national movement and struggle for the democratization of society".\textsuperscript{188} In October 1981, Lech Walesa, the President of the 10-million-member Solidarity was elected President with 55\% of the votes.\textsuperscript{189}

Solidarity has been regarded as a working-class rising against those who claim to speak in its name, a mass movement inventing its own democracy in the face of arbitrary government and bureaucracy, a nation turning to its history and its religion to give fresh life to democratic freedoms.\textsuperscript{190} Although the Solidarity movement was ended by the declaration of martial law,\textsuperscript{191} it greatly shocked the Chinese Communist Party. The Chinese government treated it very carefully. According to the China News Analysis, the press in China had certainly been sparing in reporting Polish events. The People’s Daily, which devoted two of its six pages to foreign affairs and descriptions of foreign countries, had carried only brief factual reports about Solidarity in Poland and had abstained from comment. Undoubtedly Beijing was anxious that the idea of Solidarity should not spread to China.\textsuperscript{192}

It was easy to understand the worry of the Chinese government. First, China had a similar system to the one Poland had in the year 1982. Since the Solidarity

\begin{footnotes}
\footnote{187 A. Swidicki, \textit{Political Trials in Poland 1981-1986} (New York: Croom Helm, 1988) at 1.}
\footnote{188 Supra note 184 at 2.}
\footnote{189 Ibid. at 149 - 150.}
\footnote{190 Ibid. at 13.}
\footnote{191 See Chapter I "The Rigours of Martial Law" in A. Swidicki, \textit{Political Trials in Poland 1981-1986} for more discussions. Supra note 187.}
\footnote{192 "Clerks-and -Workers Congress", (1982) 1229 C.N.A. 1.}
The People’s Daily is the most important official newspaper in China.
movement greatly challenged the socialist system in Poland, the Chinese government realized it should make every effort to prevent the independent trade union in China. Both Poland and China were socialist countries established on the model of the Soviet Union. The two countries had a similar political and economic system. The trade unions in these two countries were also the copies of the trade union in the Soviet Union. The temporary success of the Solidarity movement in Poland made the Chinese government realize the socialist model of the Soviet Union was in great danger. The Chinese government thought that the failure of the socialist trade union in Poland was the major factor for the failure of its socialist system. The Party believed that if it did not have absolute control of the Chinese unions, a Chinese Solidarity would emerge at any time. The Chinese constitution, of course, should reflect the Party’s posture toward independent trade unions in China, such as the right to strike, a very important right for an independent trade union, should not be protected under the Chinese constitution. The subsequent discussion of the Party-union relations will provide more analysis respecting the Party’s attitude toward an independent trade union.

An additional practical reason explaining the absence of a right to strike was that the CCP had made a lot of mistakes in its policies after it came to power. Since the Solidarity movement was the result of the failure of the PUWP’ domination in Poland, the Chinese government was greatly afraid that the people’s dissatisfaction

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193 For more discussion, see Chapter 20 “Shifting Trends of Trade Union Theories of Russia and Other East European Countries and Comments” in Zhongtan et al., A General Outline and Overview of Trade Union Theories In Time of Transition Towards a Socialist Market Economy (Beijing: People’s Publishing House, 1997), in Chinese.
would be aroused if the right to strike were in practice. The following is a brief description of what the CCP had done in China in the period of its domination.

After the People’s Republic of China was established in October 1949, the first business of the Communists was the political revolution, “by which they aimed to consolidate their power and forge an effective system of state and Party control throughout the country”. In the period of 1949 to 1982, China had several national political movements. These are some examples. 1. The rectification movement in mid-1950. It was a movement directed against bureaucratism and commandism in economic and financial administration. 2. The mass mobilisation movement in late 1950-51. The targets of this movement were secret agents who worked for such organizations as the Guomindang Military Secret Service or the Nationalist Youth Corps. 3. The three anti movement from August 1951 to June 1952. Its main targets were graft, waste and bureaucratism. 4. The five anti movement from January to June 1952. The five targets were bribery, tax evasion, theft of state property, cheating on government contracts, and stealing state economic information. 5. The sufan movement in mid-1955. It was a movement to deal with current problems by launching a campaign to wipe out hidden counter-revolutionaries. 6. The ante-

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194 Supra note 112 at 17.
195 Supra note 96 at 68.
196 Ibid. at 73.
197 Ibid. at 80.
198 Ibid. at 83.
199 Ibid. at 110.
rightist movement began in June 1957. It dealt specifically with 'rightist' critics who had been vocal during the hundred flowers movement. The great leap forward from 1958 to 1959. It was China’s most radical experiment to restructure the Chinese economy and society.

The most serious political movement under the government of CCP was the Cultural Revolution from 1966 to 1976, "a great revolution that touches people to their very souls". The Cultural Revolution left serious impacts on aspects of the Chinese economy, politics and social life. The following are some of the impacts of the Cultural Revolution. The total number of deaths attributable to the Cultural Revolution is not clear. "It might not be unreasonable to estimate that approximately half a million Chinese, out of an urban population of around 135 million in 1967, died as a direct result of the Cultural Revolution." The economic loss was enormous. According to Hua Kuo-feng’s report in the People's Congress, between 1974 and 1976 industrial gross output value dropped by 100,000 million yuan, steel production by 28 million tons, and state revenue by 40,000 million yuan. The whole economy was on the brink of collapse. The most serious impact of the Cultural Revolution is

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200 Ibid. at 163.
201 Ibid. at 174.
203 Ibid. at 244.
204 "The People's Congress: The Doctrine of the State" (1978) 1114 C.N.A. 1 at 3. Hua Kuo-feng was the First Secretary of the CCP at that time.
on people's daily life.\textsuperscript{205} Being afraid of the recurrence of the similar undertakings that they will suffer again in future, the Chinese people are afraid to speak, and peer carefully left and right. "When two persons met they may have spoken the truth; when three persons met they would tell lies; when four met they said nothing, merely exchanging polite jokes."\textsuperscript{206}

The rise of the Solidarity trade union movement was a result of Polish autocracy, economic failure and subservience to foreign domination under the totalitarian domination of PUWP.\textsuperscript{207} Communist China, although it has its own independence, faced the similar autocracy and economic failure in 1982 as the PUWP had in Poland.

Under this circumstance, the Chinese government was mortally afraid that the movement of Solidarity would emerge in China. Besides other political and economic reasons, the Chinese government thought that the independence of trade union and the right to strike played a significant role in helping the success of the Solidarity movement. Just as Alain Touraine mentioned in his \textit{Solidarity}, "In a situation in which a Party-state entertains totalitarian ambitions, anything which wrests any activity from its control immediately takes on a directly political character. The demand for a free trade union is therefore in everyone's eyes an eminently political act."\textsuperscript{208} In order to avoid any opportunity of independent trade union and firmly hold

\textsuperscript{205} For more discussion about of the consequences of the Cultural Revolution, see H. Harding "The Chinese State in Crisis, 1966-9" at 239. Supra note 112.

\textsuperscript{206} "The Cultural Revolution - Yes or No?" (1978) 1137 C.N.A. 1 at 6.

\textsuperscript{207} Supra note 131 at 13.

\textsuperscript{208} Ibid. at 53.
the state power, the Chinese government would not include a right to strike in its constitutional code.

2. My Point of View of no Right to Strike in China

My point of view of no right to strike in China consists of the theoretical and practical reasons. The theoretical reason is that there is no distinction between a political strike and an economic one. Since striking was mainly used for political interests in the history of the CCP, the Chinese government regards strike as a political weapon more than an economic one. The practical reason is that there is no independent trade union in China. This discussion will focus on the past and present role of the Chinese trade union.

a. The Theoretical Reason

The biggest obstacle in the right to strike in China is that the Chinese government regards every strike as being for political purpose and it is a threat to sovereignty as well as to the national economy. On the basis of assuming the same interest among the state, the enterprises and the worker, strikes have a fundamentally different character in China than they do in the capitalist countries. Because the state owns all means of production, every strike is aimed not only at management but also at sovereignty of the nation. Moreover, under the socialist planned economy,
management cannot address strikers' demands concerning wages and vacations. All these economic matters require a response from the government. Thus, every strike is political because it is a small group of strikers who place their personal needs above the needs of the state and want to influence national economic policies. As well as the discussion of the identical fundamental interests, it is important to look inside the history of Chinese industrial working class and the Chinese Communist Party to understand the conclusion made by the Chinese government in regard to the purpose of a strike.

The Chinese factory industry has a shorter history than the western one. Previous to 1895, there were isolated attempts to introduce modern methods of manufacture to China, but it was not until after the Sino-Japanese War that factory industry really began to develop. A typical characteristic of the Chinese industry in its early days was the low labour standards: low wages, long hours and bad workshop conditions. Wagner in his Labour Legislation in China described the miserable working conditions.

In many workshops men and young boys toil from early morning until late into the night, working often by the night of flickering, smoky oil lamps. Child labour, long hours, dirt, overcrowding, and a total lack of sanitation are taken for granted. The bulk of Chinese commodities are still produced in handicraft shops where workers know and expect nothing else and no government had felt responsible for protecting them.

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209 A. Wagner, Labour Legislation in China (Beijing: Yenching University, 1938) at p.3.

210 Ibid. at 17.

211 Ibid. at 2.
A further characteristic was that a considerable number of the larger factories in China were owned by foreigners located in the foreign concessions.212 This had created further special difficulties in connection with securing improvement of factory conditions.213 Hence, with the growth of factory industry, the dark days of the early industrial revolution in the West were repeating themselves in China, a semi-colonial and semi-feudal country at that time. The Chinese working class, which was proletariat exploited by the imperialism, feudalism, and bureaucrat-capitalism, had to take up the task to fight for the prestige of China since the real basis for improving the workers’ standard of living is the freedom and independence of the nation.214 Under that condition, the strikes and organizational activities, which are economic sanction in labour relationship, were used more as a political weapon than an economic one. “Strikes and organizational activities were directed chiefly toward upsetting the economic and political interests of foreigners and creating disturbance for the ‘feudal militarists’”.215

212 Ibid. at 19.
The foreign establishment in early republican China (1912-49) had many facets. Foreign concessions or settlements were one of them. Foreign concessions were established in 16 treaty ports, which were ports opened as a consequence of an international treaty or agreement. They were specific areas set aside for foreign residence in which local jurisdiction and administration were in foreign hands. The foreign residential areas in Tientsin, Hankow and Canton for example, were “concessions”. In these places, entire areas were expropriated or purchased by the Chinese government and leased in perpetuity to particular powers (Great Britain, France, Germany, Japan, Russia, Belgium, Italy and Austrian-Hungary at Tientsin; Great Britain, France, Germany, Japan, and Russia at Hankow; Great Britain and France at Canton.) The consul of the nation holding the concessional lease was the chief official of each concession. Individual foreigners could obtain sub-leases to particular piece of property. For more discussion of the foreign concessions, see A. Feuerwerker “The Foreign Presence in China”, in J.K. Fairbank ed., The Cambridge History of China vol. 12, 128 at 129.

213 Ibid. at 23.

214 Ibid. at 61 - 64.

215 Ibid. at 62.
The Chinese Communist Party was founded in 1921. “According to Ch’en Kung-po, a participant of the First Congress, the first constitution of the CCP defined the tasks of the party at organizing and educating the working masses to carry on class struggle and socialist revolution and ultimately realize the proletarian dictatorship.”216 Among the periods from the foundation of the CCP in 1921 to its having gained the state-power in 1949, the CCP directed its attention in both rural areas and urban areas to carry on class struggle.217 The rural area under the leadership of the CCP was called ‘red area’, “where the peasants, especially the armed peasants, were waging political and social battles to destroy the bastions of what they called ‘feudal China’”.218 The urban area under the leadership of Kuomintang was called ‘white area’. One of the political works in the white area for the Communists was to organize the working class to fight against Kuomintang, the representative of imperialism, feudalism, and bureaucrat-capitalism in China. To go on strike was regarded as a weapon to weaken the economic basis of the government of Kuomintang for the purpose of overthrowing the reactionary government. The labour movement in the ‘white area’ was used to promote the political revolution. In an open letter to the workers on October 16, 1928, the government of Kuomintang described the destruction to the nation due to the labour unions and strike activities organized by the Communists.219 The letter declared


218 Ibid. at 216.

219 Supra note 209 at 68.
that the Communists had taken advantage of them to incite farmers and workers to acts of violence which had weakened the nation. The Communists had been accused of organizing the workers for their own selfish purposes, taking the Labour Movement away from them, and using it for the destruction of the country.\footnote{Ibid.}

It is true that the CCP did take benefit from its former policy to organize workers and to initiate strikes. Strikes as politically destabilising events did help the CCP toward state-power. Even in the period of the Cultural Revolution, strikes were used for the political purpose of class struggle. The personal experience of the CCP is the most persuasive evidence that strikes are for political purposes. Being afraid that the same will be done to itself, the CCP cannot protect a right to strike to the Chinese people.

It is understandable that the history cannot be forgotten. However, under the open-door policy, it is more important for today’s China to learn from the outside world. In the context of the thesis topic, the Chinese government needs to revise its opinion respecting the right to strike. As discussed in Chapter I, under Canadian labour law, the right to strike is an economic right for the purpose of negotiation of collective contracts. The employees are protected to take collective job action to try to compel the employer to make concession when negotiations break down. The economic effect of a strike is not only on the side of the employer, but also on the side of the employees. It is the economic harm that makes striking a significant weapon to resolve labour disputes. As analysed in the case of National Day of Protest, where it
was held to be a strike, it was because of the economic effect on the employer, not because of the political significance.\textsuperscript{221}

b. The Practical Reason

The practical reason that there is no right to strike in China is that there is no organization which is able to organize a strike. The subsequent discussion will focus on the past and present role of the Chinese trade union.\textsuperscript{222} In order to have a clear picture of the Chinese trade union, it is necessary first to provide the organizational structure of Chinese unions.

Chinese trade unions are headed by a National Congress of Chinese Trade Unions which is held every five years by a separate institution called the Executive Committee of the All-China-Federation of Trade Unions (ACFTU).\textsuperscript{223} The National Congress has the authority to discuss and decide the policies and tasks of the national unions, revise the \textit{Charter of the Chinese Unions}, and elect the Execution Committee and the Budgetary Examination Committee.\textsuperscript{224} The Execution Committee supervises the national unions when the National Congress is adjourned.\textsuperscript{225} It is authorized to

\begin{itemize}
\item \textsuperscript{221} See chapter I for more detail.
\item \textsuperscript{222} More legislative analysis of this issue will be provided in the next chapter.
\item \textsuperscript{223} Article 15 of the \textit{Charter of the Chinese Unions} in Dept. of Law, Renmin University of China, \textit{Reference Materials to Labour Law} (Beijing: Renmin University Press, 1984) at 668, in Chinese. Supra note 92.
\item \textsuperscript{224} Ibid. art. 16.
\item \textsuperscript{225} Ibid. art. 17.
\end{itemize}
decide important matters concerning the working people and to implement the 
resolutions of the National Congress.\textsuperscript{226}

The second level of the organizational structure of the Chinese unions consists 
of sectoral unions and regional unions. Sectoral unions exist in each major industrial 
sector, such as textiles or machinery. They are arranged in a national vertical 
structure. The national sectoral union is directed by a national congress, similar in 
form to the National Congress of Chinese Trade Unions.\textsuperscript{227} Each province and large 
city also establishes a regional sectoral union under the joint leadership of the national 
sectoral union and the general regional union at the next higher level.\textsuperscript{228} Regional 
unions are organized horizontally to represent the different unions existing in a 
geographic area. A congress is held every five years and a smaller executive body 
called a union committee takes care of routine union activities.\textsuperscript{229} In general, this 
horizontal organization is established at each level of the political hierarchy. 
Therefore, the ACFTU and the National Congress of Chinese Trade Union sit at the 
top of this dual organization.\textsuperscript{230}

In a Communist country, the Party-union relations play a significant role in 
deciding the status of the trade union. The following is a brief look at the trade union 
history to understand the Party-union relations in China.

\textsuperscript{226} Ibid.

\textsuperscript{227} Ibid. art. 19.

\textsuperscript{228} Ibid.

\textsuperscript{229} Ibid. art. 20.

\textsuperscript{230} Supra note 128, at 1177.
The ideological guidance of the Chinese trade union is Leninist. According to Leninist doctrine, unions were to act as a transmission belt to transmit policy from the Party down to the masses and feedback upward from the masses. That is, the union functions as the connecting link between Party and masses.\textsuperscript{231} Since the transmission belt function is a two-way affair, the union should organize the masses to implement the Party policy on the one hand, and report on "the will, the conduction, the level of political consciousness" of the masses on the other.\textsuperscript{232} In order to function ideally in its transmission belt role, the union needs a modicum of operational independence from absolute Party control to transmit back up to the Party the actual mood and desires of the masses.\textsuperscript{233} However, this kind of independence was regarded as a threat to its rule by the Party and resulted in three crises after the New China was founded.

The first crisis climaxed in 1951, when the national union leadership under Li Li-san\textsuperscript{234} sought to function properly in its transmission belt role and emphasized economic rather than political tasks.\textsuperscript{235} The Party accused the union of seeking independence from the Party and succumbing to "economism", that is, considering only the interests of the workers.\textsuperscript{236} The result was a return to absolute Party control.\textsuperscript{237} The second crisis between Party and union was in 1957 under Lai Jo-yu's

\textsuperscript{231} P. Harper "The Party and the Unions in Communist China" (1969) 37 China Q. 84 at 86-87.
\textsuperscript{232} Ibid. at 88.
\textsuperscript{233} Ibid.
\textsuperscript{234} First Vice-Chairman of the ACFTU from August 1948 until May 1953.
\textsuperscript{235} Supra note 231 at 89 - 99.
\textsuperscript{236} Ibid. at 88.
\textsuperscript{237} Ibid. at 99.
chairmanship. The ACFTU had endeavoured to lead the union away from Party control by strengthening vertical rule through the industrial union structure. The union argued that it must have operational autonomy from the Party if the role of transmission belt was to be effective. The Party chose to interpret it as second flowering of economism and determined that the transmission belt role was to move in one direction, only-downwards. The Cultural Revolution produced a third crisis in Party-union relations. Despite the ability of some local unions to continue functioning in areas in which Party had absolute dominance, the national union system including the ACFTU, was disbanded in 1966 as reactionary.

The formal re-emergence of the Chinese unions was the Ninth National Trade Union Congress in October 1978. Vice-Premier Deng Xiaoping delivered a speech on behalf of the Party Central Committee and the State Council. He emphasized the need for trade union members to play an active role in the management of enterprises. The ACFTU set forth the workers' participation in management as its fundamental task and the June 1981 Provisional Regulations on the Staff-workers

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238 Lai was appointed as Secretary - General of ACFTU in April 1952 and elected as Chairman in 1953 until May 1958.

239 Supra note 231 at 99 - 114.

240 Ibid. at 105.

241 Ibid. at 113.

242 Ibid. at 114 - 119.

243 Supra note 128 at 1176.

244 "Mass Organizations Reactivated" (1978) 20 BR 10. The Eighth National Trade Union Congress was held in 1957.
Congress granted the employees in the state-owned enterprises the right to participate in democratic management through the establishment of staff-worker congresses.\(^{246}\)

On the 11th National Congress of the ACTU, a revised *Charter of the Chinese Unions* was adopted.\(^{247}\) According the preamble of the *Charter*, the trade unions of China are the mass organizations of the working class formed on a voluntary basis led by the Chinese Communist Party. Although the 1992 *Trade Union Law* does not state the Party leadership over the trade union, the question of Party-union relations in China has been settled since the second crisis under Lai Jo-yu, this is, the unions are to be wholly subservient to the Party.\(^{248}\)

The Party-union relations, in the eyes of the Party, then, is that, the Party must lead the trade union and the trade union should accept the Party’s leadership voluntarily. On the one hand, the Party is the vanguard of the working class, while the

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\(^{245}\) Supra note 128 at 1176.

\(^{246}\) The legislation in respect to the staff-workers congress includes: *Labour Law of the People’s Republic of China, Trade Union Law, Law of the People’s Republic of China on State-Owned Industrial Enterprises*, and *Provisional Regulations on Staff-workers Congress*. The main functions of the staff-workers congress are set forth in *Law of the People’s Republic of China on State-Owned Industrial Enterprises*. According to this Act, the staff-workers congress has five functions: 1. Examine the factory director’s reports on business policy, management planning, annual production plans, capital construction plans, major technical renovation plans, employee training plans, plans for the distribution and the use of funds retained by the factory, and plans for the exercise of the contract and leasing responsibility system, and make suggestions and proposal regarding these reports. 2. After examination, approve or disapprove the enterprise’s wage increase plans, bonus distribution plans, labour protective measures, regulations on reward and punishment and other important regulations and rules. 3. Examine and decide on plans for the use of workers’ welfare funds, housing distribution, and other major welfare projects. 4. Evaluate and supervise leading cadres at various levels and make suggestions on rewards, punishment, appointments and dismissals. 5. Elect factory directors according to the decision of relevant government department and submit the result to the relevant department for approval. For more discussion, see Shen Zuying, “Workers’ Congress: Active in Enterprise Management” (1992) 25 BR 24 at 24 and Vai Io Lo, “Labour and Employment in the People’s Republic of China: From a Nonmarket-Driven to a Market-Driven Economy” (1996) 6 Int. & Comp. L. Rev. 337 at 360.


\(^{248}\) Supra note 231 at 118.
trade union is the mass organization of the working class. The Party should
wholeheartedly depend on the working class, its basis of the leadership. On the other
hand, being a mass organization, the Chinese trade union should be under the
leadership of the Party. Although both CCP and the trade union are the organizations
of the working class, the CCP is more advanced than the trade union. Only under the
leadership of the CCP can the trade union march to a correct direction.249

The third aspect of the past and present role of Chinese unions worth
examining the relations between the trade unions and management. The Chinese
government has published two trade union acts since the year 1949; the one in force
today is the 1992 Trade Union Law.250 In regard to the relations between the trade
unions and management, it protects the trade unions' rights to conduct their activities
independently in accordance with the law and prohibit management's interference.251
However, the legislation becomes somewhat confused at this point since management
are required to provide operational funds for trade unions under the law. Article 26 of
the 1992 Trade Union Law says:

249 The principle that the trade union should operate under the leadership of the Party is not set out in
the Trade Union Law. However, Article 4 of the Act provides: "Trade unions shall obey and safeguard
the Constitution, take the Constitution as their basic principle, and independently conduct their
activities in accordance with the Charter of the Chinese Unions." Since the Four Fundamental
Principles, which are: 1. adhere to the leadership of CCP; 2. adhere to the socialist road; 3. adhere to the
Marxism-Leninism and Mao Zedong Thought; 4. adhere to the people's democratic dictatorship, are
the basic principle set in the 1982 Constitution, it is argued that the trade unions should accept the
leadership of the Party according to the Constitution.

250 The two trade union acts are the 1950 Trade Union Law and the 1992 Trade Union Law.
For English transition of the 1950 Trade Union Law, see T. Chen, The Chinese Communist Regime
(London: Pall Mall Press, 1967) 274, supra note 92. The 1992 Trade Union Law is in Guan Hua. One
Hundred Questions to the 1992 Trade Union Law (Beijing: Chinese Workers' Publishing House, 1992)
at 255, in Chinese, supra note 170.

251 Art. 18 of the 1950 Trade Union Law and art. 4 of the 1992 Trade Union Law.
Trade unions funds shall be drawn from the following sources:
(1) membership dues paid by trade union members;
(2) the management of the state-owned and collective ownership enterprises, institutional organization and organs shall allocate each month to their respective trade union organizations as trade union funds a sum equal to 2 per cent of the total amount of wages of all workers and staff members employed;
(3) the tax revenue from the enterprise or institutional organization to which the trade union belongs;
(4) subsidies from the people’s governments;
(5) other kinds of income.\textsuperscript{252}

In addition, the 1992 \textit{Trade Union Law} commits management to pay the wages, bonuses and allowances for the full-time union officials in the primary trade unions.\textsuperscript{253} This provision is a departure from that of the 1950 \textit{Trade Union Law}, which states that wages of trade union officials are paid by the trade union.\textsuperscript{254} These provisions, as well as the provision which imposes on trade union the duty to organize the workers to fulfil production targets,\textsuperscript{255} means that Chinese unions lose the last vestige of their independence vis-à-vis management which renders them nothing more than executive organ of the administration, a thorny subject the Chinese trade union had sought to resolve since the liberation.\textsuperscript{256}

The questions whether trade unions are competent to perform their job adequately depends heavily on their staff members. Although the \textit{Charter of the Chinese Unions} sets forth that the Chairperson and Vice-Chair of the primary trade

\textsuperscript{252} The 1950 \textit{Trade Union Law} had a similar provision. See art. 24 of the Act.

\textsuperscript{253} Art. 35 of the 1992 \textit{Trade Union Law}.

\textsuperscript{254} Art. 17 of the 1950 \textit{Trade Union Law}.

\textsuperscript{255} Art. 8 of the 1992 \textit{Trade Union Law} and art. 9 of the 1950 \textit{Trade Union Law}.

\textsuperscript{256} For more discussion, see “How to Deal with Unruly Workers” supra note 107 at 1.
unions shall be elected by the union members,\textsuperscript{257} many union officials are appointed by the Party committee because of their political affiliations.\textsuperscript{258} What is more, it is common that the Chairperson of a primary trade union is the director of the enterprise or the secretary of the Party committee.\textsuperscript{259} The other staff members of the primary trade union are less educated and do not know how to protect the "legitimate rights and interests" of the workers,\textsuperscript{260} a duty committed by the \textit{Trade Union Law}.\textsuperscript{261} In reality, if the staff members take a position to support the demands of the workers, they are in great risk of being dismissed by the management.\textsuperscript{262}

By contrast, the trade union in Canada is an independent organization.\textsuperscript{263}

According to \textit{Canada Labour Code}, the trade union in Canada means "any

\begin{itemize}
\item \textsuperscript{257} Art. 25 of the \textit{Charter of the Chinese Unions}.
\item \textsuperscript{258} Supra note 246 at 388-389.
\item \textsuperscript{259} Wang Hongming "Collective Consultation: A Difficult Crawl", Worker's Daily March 14, 1996, at 4, in Chinese. For more discussion, see Zhongtan et al., \textit{A General Outline and Overview of Trade Union Theories in Time of Transition Towards a Socialist Market Economy}, at 256, supra note 193. In addition, since the trade union officials are regarded as "class IV cadres", very few of the cadres are willing to be in this group. Class I cadres are the Party cadres, class II the government, and class III the engineers. These three groups can issue orders or make assignments as they wish. See P. Harper "The Party and the Unions in Communist China" (1969) 37 China Q. 84 at 110, supra note 231.
\item \textsuperscript{260} Supra note 259 at 4.
\item \textsuperscript{261} Art. 6 of the 1992 \textit{Trade Union Law}.
\item \textsuperscript{262} Supra note 259 at 4.
The Chinese trade union cadres are always face the risk of losing their personal interests if they choose to support the interests of the union members. In the first crisis of the Party-union relations, the union cadres faced the risk of losing their Party memberships if they persisted in siding with the workers against the leadership. For more discussion of this issue, see supra note 231 at 110.
\item \textsuperscript{263} The Canadian union is independent of the government and the employers. The trade union, the government and the employers are three parties to cooperate in keeping labour relations in harmony. In some Canadian provinces, the labour relations board has tripartite membership, i.e. a presiding officer who is a neutral, and equal numbers of management and labour representatives, for example the Labour Relations Board in Nova Scotia. In addition, the Canada Labour Relation Board and some other provinces which comprise neutral members only are in the course of changing.
\end{itemize}
organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees.\textsuperscript{264} On the assumption of conflicting interests, Canada labour law protects the Canadian unions to exist for the purpose of securing improvements in conditions of employment because economic is the primary reason why employees seek trade union representation. In a society where jobs are not too plentiful, the employees have no real leverage in dealing with their employer on an individual basis. But the employees can get a better deal through banding together to voice their grievances collectively. Hence, the natural task for a union is to promote economic interests of the employees. Striking as an economic weapon is to fulfil this task.

As discussed in chapter I, striking in Canada is used for the negotiation of collective agreements. In order to make it function properly, the legislature sets forth requirements of a strike. Under Canada labour law, striking is prohibited before certification. A trade union cannot initiate a strike unless it is certified or voluntarily recognized as a bargaining agent on behalf of the employees. Strikes are also banned during the term of a collective agreement. An effective agreement has binding force on both trade union and employer. In addition, the purposive restriction of a strike and the fact that the political strikes are relatively rare in Canada are sufficient to illustrate the economic function of strikes. However, as a double-edged sword, striking will cause economic damage on both sides of employment; both employees and employer will suffer economic loss during a strike. Why does the trade union choose to bear the

\textsuperscript{264} Section 3(1) of the \textit{Canada Labour Code}. 
economic loss to its members rather than to accept the offer of the employer? The answer is that the union wants to gain more for its members. It is true that the strikers are deprived of wages in the period of a strike. This loss, however, is hopefully smaller than that of the long-term loss in the lifetime of a collective agreement if the employer does not make acceptable concession about the terms and conditions of employment.

In order to protect the employees’ organizational rights, the Canadian legislature prohibits employer retaliatory action designed to eradicate the union or punish the strikers, and protects the employment relations during a lawful strike. For the purpose of protecting the trade union’s ability to represent employees effectively and authentically, Canadian labour law focuses on keeping the trade union completely free of employer control. The labour relations acts forbid the participation of management in the formation or administration of a union, its selection by employees, or its representation of them, as a bargaining agent. Even the contribution of financial or other support by the employer to the union is forbidden, except in circumstances where the autonomy of the union is unlikely to be impaired.\(^{265}\)

\(^{265}\) For more discussion, see supra note 68 at 199; Case noticed: *Loblaws Workers’ Council v. Super City Limited et al.* (1964) 64 C.L.L.C. 16,005 (O.L.R.B.).
Summary

The right to strike under the 1982 Chinese *Constitution* is similar to the one under the Canadian *Charter of Rights and Freedoms*. Neither of them contains an explicit provision in regard to the right to strike. However, in the case of China, it is not only no constitutional guarantee of a right to strike, but also no right to strike at all. Unlike the Canadian constitution, the Chinese constitution has binding force on all Chinese citizens. They must abide by the *Constitution*. More specifically, the *Constitution* sets forth a duty on Chinese citizens to observe labour discipline and public order. Since striking is not protected under Chinese labour law, it is reasonable to say that there is no right to strike in China.266

The theoretical reason for no right to strike in China from the point of view of the Chinese government is the assumption of identical interest among the state, the enterprises and the workers on the ground of public ownership. This leads to the Party's conclusion that all strikes are for political purposes. Logically, this presumption is the basis for the whole Chinese legal system in the area of labour relations. However, the labour relations under today's market economy greatly challenge the assumption of harmonious interests. Therefore, it is useful for China to take into account the Canadian example in order to keep its industrial peace.267

266 There are more discussions on this subject in the next chapter.

267 Chapter IV will provide more discussions on this subject.
CHAPTER III
THE RIGHT TO STRIKE UNDER CHINESE LABOUR LAW

Introduction

As discussed in chapter II, the right to strike in China is not a constitutional right. To speak exactly, there is a legal ban on strikes under the 1982 Constitution. Is there a statutory right to strike in China under Chinese labour law? The answer is NO.

Article 5 of the 1982 Constitution provides:

The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into. No organization or individual may enjoy the privilege of being above the Constitution and the law.

Since the Constitution is the fundamental law of the state that has the supreme legal authority and no statutes shall contravene the Constitution, the right to strike is prohibited under any Chinese statutes, including the legislation on labour relations.

This chapter deals with the right to strike under Chinese labour law. Although the right to strike is not a statutory right in China either, Chinese labour law does have some provisions relating to trade unions and labour disputes. The discussion of the right to strike under Chinese labour law will highlight these provisions which rely upon the government’s theory: the harmony of the interest among the state, the enterprises and the workers.
A. The History of Chinese Labour Law

The People’s Republic of China did not have a labour code until the year 1994. In the period of the first 45 years, the Chinese government promulgated several statues to adjust labour relations as well as the Party’ labour policies.\(^{268}\) The following discussion is designed to provide background information on Chinese labour law, with emphasis on *Labour Law of the People’s Republic of China*, the first labour code in China.

1. The Period to Resume the National Economy (1949-1953)

Socialist China was established after an eight-year Sino-Japanese war followed by a four-year civil war between the Communist Party and the Kuomintang. China suffered greatly because of such a long wartime. The existing financial difficulties made the government committed to the consolidation the country in its founding years.\(^{269}\)

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\(^{268}\) The government’s labour policies were the most important sources to be used in the area of labour relations before the *Labour Law of the People’s Republic of China* was published. However, all these policies did not take the form of statutes and the Party could change them whenever it wished to. In addition, these policies were not published to all the citizens and there are few original materials on this issue. Hence, although the labour policies played a significant role in the area of Chinese labour relations, it is difficult to have a detailed discussion on them. However, the subsequent analysis of Chinese labour law will refer to those relevant policies where there is no specific statute on the subject under discussion.

\(^{269}\) Supra note 96 at 57 - 59, 63 - 64.
As a socialist country, the state-owned enterprises should be the largest part its national economy. However, in the Republic of China, the private economy played an important role in the national economy. It was impossible to change all the private enterprises into the state-owned enterprises in one day. Accordingly, there were two kinds of labour relationships in these two kinds of enterprises. One was the socialist labour relationship in the state-owned enterprises and the other was the capitalist labour relationship in the private enterprises.

Chinese labour legislation, in this period, focused on two aspects to suit the situation. First, the labour legislation was used to help the government in restoring the Chinese national economy. The government published several regulations relating to social insurance, occupational health and safety, trade unions and the administration of labour force. Second, the labour legislation focused on promoting the development of the state-owned enterprises and transferring the private enterprises into the state-owned ones. Several policies had been published in the state-owned enterprises and private enterprises respectively in regard to the workers' participation.

In the year 1950, the Chinese government promulgated its first Trade Union Law of the People's Republic of China, which set out the characteristics, rights and

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270 In 1951 and 1953, the State Council respectively promulgated Labour Insurance Regulations of the People's Republic of China to provide coverage for injury, sickness, disability, death, maternity, and retirement pensions. This regulation is in Dept. of Law, Renmin University of China, Reference Materials to Labour Law (Beijing: Renmin University Press, 1984) at 511, in Chinese, supra note 92.

271 The state-owned enterprises were required to establish a regulation committee which should include a certain number of the representatives of their staff; while in the private enterprises, a negotiation committee made up by the capitalist and the worker should be established. Also, the capitalists were expected to conclude a collective agreement with their workers. See Guan Huai, Labour Law (Beijing: Law Publishing House, 1996) at 123, in Chinese.
obligations of the Chinese trade unions, the relationship between the trade unions and the government, and the relationship between the trade unions and the state-owned enterprises.\textsuperscript{272} The 1950 \textit{Trade Union Law}, however, did not provide the Chinese workers a right to strike. On the contrary, it committed Chinese unions the responsibility to fulfil production targets and to maintain labour discipline. In the context of resolution of labour disputes, the Ministry of Labour published \textit{Regulations on the Procedures for Resolution of Labour Disputes}.\textsuperscript{273} Different procedures were set out to solve the labour disputes in the public ownership enterprises and the private enterprises.\textsuperscript{274}

2. The Period of Economic Construction (1953-1957)

This is a period in which the Chinese government concentrated on economic construction. After nearly four years’ socialist transformation, there were no private enterprises in China. Most of the private enterprises had been changed into the public and private regulation enterprises, a kind of enterprise in which the original capitalist no longer had the ownership of the enterprise but still kept the power to manage the business and the right to share the profit of the enterprise. In 1953, the Chinese

\begin{footnotesize}
\textsuperscript{272} Ibid. at 232.


\textsuperscript{274} The following section will provide more discussion on this issue.
\end{footnotesize}
government launched its first five-year plan and the New China was well prepared for a well-planned economic construction.

The labour legislation in this period aimed to fulfil the objective of economic construction. The 1954 Constitution which set forth the principles of dealing with the labour relationship had been affirmed. More specifically, the government announced several special acts and regulations in the area of the labour relationship. In 1954, the State Council promulgated Labour Regulations in the State-owned Enterprises, a regulation to stipulate labour discipline in the workplace. The procedures to admit, transfer or dismiss the workers had been standardized in the regulation. In order to adjust the labour relationship in the public and private regulation enterprises, the Chinese government took back the power to decide the remuneration from the capitalists and regulated the wage system by itself.

The most important statute respecting the right to strike in this period is the 1954 Constitution. As analysed in chapter II, there was no right to strike under the first Constitution. It is very difficult to discuss the illegal strikes in this period because the Chinese government denied the existence of strikes in China. However, the Chinese press implied there were strikes in this period. The strikes, of course, were

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275 Articles 9, 10, 15, 16, 91 - 93, 96 in the 1954 Constitution.


277 Supra note 271 at 127.

278 Supra note 107 at 1.

In May 1957, the People's Daily issued directives on how to deal with fractious workers. The instructions were issued by Lai Jo-yu, the Chairman of ACFTU.
not organized by the trade unions. On the contrary, it was the duty of the trade union to persuade the workers that their complaints were ill-founded.\textsuperscript{279}


China had experienced its progress and drawbacks in this period. From the year 1956 to 1958, the Chinese economy was in a good condition. The government concentrated on its economic construction and succeeded in the total output value of both industry and agriculture.\textsuperscript{280} Unfortunately, the Chinese government officials, who did not have enough experience in socialist construction and were proud of the success and anxious to obtain quick results, started the movement of "Great Leap" in the year 1958 which led to economic crisis.\textsuperscript{281} However, the government corrected its mistakes in the winter of 1960 by making the policy of adjustment, consolidation, replenishment and promotion in its economic construction.\textsuperscript{282}

The labour legislation in this period is sufficient to illustrate this characteristic. Between 1956 to 1958, the State Council promulgated four important regulations in regard to remuneration on the principle of "to each according to her work". These regulations did help in arranging a reasonable wage between both the on-the-job

\textsuperscript{279} Ibid.

\textsuperscript{280} Supra note 9 at 4.

\textsuperscript{281} Ibid. at 5.

\textsuperscript{282} Ibid.
workers and the retired workers. In the period of "Great Leap", not only was there no labour legislation, but also the former labour legislation was abandoned. A new distribution system was adopted by some enterprises, which was that the workers could have free dinners and get free daily materials from the enterprise as the main part of their original wages, and with a small amount of money to support their family members. This kind of distribution system resulted in a nation-wide tendency of egalitarianism. From the year of 1960, the Chinese government began to resume its labour legislation in accordance with its economic policy and published regulations relating to wages, labour force and occupational health and safety.

There were no new statutes promulgated in the context of trade union or labour disputes. Although the right to strike was not protected under the 1954 Constitution, there were some strikes in this period. The Party followed the same policy toward the troublemakers, which is, to let them be humble and cautious first, then to punish them if it failed.


From May 1966 to October 1976, China was in its internal disorder. The Cultural Revolution began in May 1966 and all the country fell into a kind of fanaticism. Most

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283 Supra note 271 at 128.
284 Ibid. at 128 - 129.
285 Ibid. at 129.
286 "Trade Union and Industrial Workers", (1963) 482 C.N.A. 1 at 6.
factories stopped working and the internal wars were everywhere. Laws were criticized as the legacy of capitalism which should be discarded by the proletariat.

Chinese labour legislation was in the same disorder as the whole country. The published labour legislation was discarded and very few new regulations had been promulgated. The nation-wide egalitarianism and anarchism affected the labour relationship. The piecework system had been cancelled by all the enterprises and labour discipline was abandoned since they had been regarded as a kind of restraint on the workers. In addition, the national union system was abolished as reactionary in 1966.

One important thing that happened in this period is that the right to strike was first provided in the 1975 Constitution after the New China was established. But there was no provision in regard to the situations under which a strike was permissible. Nor were there any statutes providing protection of this right. Large-scale work stoppages did occur in the Cultural Revolution. However, they were not the strikes in the usual Canadian sense because the strikers were politically inspired for class struggle.

5. The Time after the Arrest of the “Gang of Four” (1976- )

There were two significant things in this period. One was the smashing of the “gang of four” in October 1976; the other was the opening of the Third Plenary Session of the 11th Party Central Committee in December 1978. The “gang of four” was regarded as the representative of the Left leadership and was alleged to have done

287 Supra note 271 at 130.
great harm to Chinese economic and political systems. After the smashing of the "gang of four", the CCP held an important party meeting, the Third Plenary Session of the 11th Party Central Committee. The CCP made a decision to make every effort toward the Chinese economic construction. The government started to adjust, reform, conciliate and promote its economic system.

The Party's commitment to rapid economic growth has been affirmed in the 1978 and 1982 constitutions. Although the right to strike was still included in the 1978 Constitution, the Constitution revived the duty to observe labour discipline and public order on Chinese citizens. Moreover, the 1982 Constitution does not provide a right to strike.

During this period, the government promulgated a number of statutes and regulations in the area of labour relationship. The labour legislation had touched upon almost every aspect of labour relationship, such as labour insurance, labour discipline, labour disputes and working hours. The following statutes and regulations are more notable in the issue of the right to strike. First, in 1987 the State Council promulgated the Provisional Regulations for the Resolution of Labour Disputes in State Enterprises. It represents the first time that a formal mechanism was used in China to resolve a labour dispute. This regulation was revised in the year 1993.

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accordance with the resolution mechanism, the Ministry of Labour published several rules concerning ways of dealing with labour disputes, in which no strike is allowed. Second, the new Trade Union Law, which gives Chinese trade unions more power than that under the previous act, was published on April 3, 1992. But the trade union is not allowed to organize a strike. On the contrary, it has the duty to maintain continuous production. Third, the Labour Law of the People’s Republic of China, the first labour code in China, was promulgated on July 5, 1994. Afterwards, the regulations concerning collective contracts came into force at the end of 1994. The system of collective bargaining, which had disappeared for 20 years, was established in today’s China.


The Labour Law of the People’s Republic of China is the outcome of an extremely protracted drafting process. The beginning of drafting dated back to the 1950s. After its first Constitution in the year 1954, the Chinese government decided to make laws in every area. In the year 1956, a committee to draft the labour law was established, consisting of law school professors and government officials. The committee did a lot of work in translating foreign labour codes and setting out the framework of Chinese labour law. Unfortunately, the committee was dissolved in the

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period of the “Great Leap” movement. After more than twenty years, the committee was reconstituted in the year 1978. They submitted its draft to the State Council in July 1983. Because the economic reform was in its first step and a lot of systems were not settled, the draft was not passed in the National People’s Congress.

The third phase to draft the Chinese labour law began in the year 1989. This time the committee included the representatives from every aspect of the economic system. They submitted their draft to the State Council in January 1991. However, the draft was not passed. In the year 1993, the Chinese government decided to establish its socialist market system. Since the labour relationship under the socialist market economy is different from the one under the socialist planned economy, labour legislation should reflect this change. On July 5, 1994, the Eighth Meeting of the Standing Committee of the Eighth National People’s Congress passed the Labour Law of the People’s Republic of China, which had been through nearly forty drafts before it was adopted. It became effective on January 1, 1995.

As noted, the right to strike is prohibited under the 1982 Constitution. In accordance with it, there is no provision in regard to a right to strike under the Labour Law. The following are relevant provisions meriting attention.

Article 3 provides:

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291 Supra note 271 at 140-142.

292 Ibid.

293 Ibid.

294 More discussion of the differences between the labour relationship under the market and the planned economy will be provided in chapter IV.

295 See the Appendix for an overview of the Labour Law of the People’s Republic of China.
Labourers shall have the right to be employed on an equal basis, choose occupations, obtain remuneration for their labour, take rest, have holidays and leaves, obtain protection of occupational safety and health, receive training in vocational skills, enjoy social insurance and welfare, and submit applications for settlement of labour disputes and other rights relating to labour as stipulated by law.
Labourers shall fulfill their labour tasks, improve their vocational skills, follow rules on occupational safety and health, and observe labour discipline and professional ethics.

Article 7 reads as follows:

Labourers shall have the right to participate in and organize trade unions in accordance with the law.
Trade unions shall represent and safeguard the legitimate rights and interests of labourers, and independently conduct their activities in accordance with the law.

These two articles are provisions in regard to the right of Chinese labourers to participate in the lawful activities of the trade union. Under article 3, the Chinese labourers have “other rights relating to labour as stipulated by law” besides the enumerated ones. Since the state guarantees the legislative rights and interests of trade unions, other rights in this article should include the right to participate in the lawful activities of Chinese unions. Article 7 specifies the labourers’ organizational rights. They are protected “to participate in and organize trade union in accordance with the law”. This provision looks similar to the one in the Canada Labour Code, which states that “every employee is free to join the trade union of his choice and to participate in its lawful activities”. However, there is a notable difference between

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296 There is no concept of employee in China. The working people are called labourers.

297 Art. 4 of the 1992 Trade Union Law.
them in regard to the right to participate in the lawful activities of trade unions. As discussed in chapter II, although there are different opinions in respect to the right to strike under the 1982 Constitution, the official answer to this question is NO. Meanwhile, the Chinese citizens have a constitutional duty to observe labour discipline and public order. Since the legislation does not protect the use of strikes to resolve labour disputes, the lawful activities of Chinese trade unions do not include a legal strike.\(^{298}\) A strike is considered in violation of both labour discipline and public order. It is illegal to organize a strike in China.

On the assumption of the harmony of the interest of the state, the enterprises and the workers, Chinese trade unions have the duty to safeguard the overall interest of the state and safeguard the legitimate rights and interests of the workers at the same time.\(^{299}\) A strike is regarded as being not only disadvantageous to the state and enterprises, but also being harmful to the interests of the workers themselves. In consequence, the lawful activities of Chinese unions do not include a strike action.

More specifically, the legislation imposes on the Chinese union a duty to promote economic development. Under both the 1950 and 1992 Trade Union law, trade unions must organize workers to fulfil the enterprises’ production targets and to fulfil the institutions’ administrative plans.\(^{300}\) Although Chinese unions are granted the right to protect the interests of the workers, this protection must be under the premise

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\(^{298}\) More discussion on the resolution of labour disputes in China will be provided in the following section.

\(^{299}\) Art. 6 of the 1992 Trade Union Law.

\(^{300}\) Art. 5 of the 1950 Trade Union Law; art. 6 of the 1992 Trade Union Law.
of doing no harm on the national interest. Because the state owns all means of production, every strike is a threat to the national interest. Thus, neither of these trade union acts protects a right to strike.

In practice, the main responsibility of Chinese union is to oversee distribution of housing - a kind of consumer good which is always in short supply, and to organize recreational activities for workers. The ability of the union to protect the interest of the workers against management is often ignored. Unions in most cases are completely reduced to being tools of management and, more particularly, of the Party Committee in the enterprise. If the union tried to consider economic interests of the workers, the Party would accuse the union of seeking independence from the Party - a threat to its sovereignty. In case of work stoppages, trade union should persuade the workers that their complaints are ill-founded and organize them to go back to work. The union has the duty to maintain continuous production.

It is different from the case in Canada. As analysed in the Alberta Reference, there is no constitutional right to strike in Canada either, but there is limited right under the statute. The Canadian constitution does not automatically settle the issue of the right to strike under the statute. It is left open to specific legislation. Under the

\[\text{Supra note 107.}\]


\[\text{See the discussion of the three crises of the Chinese unions in chapter II.}\]

\[\text{301 Art. 7 of the 1950 Trade Union Law; art. 6 of the 1992 Trade Union Law.}\]

\[\text{302 Art. 25 of the 1992 Trade Union Law.}\]
Canada Labour Code and provincial legislation, a strike is protected to for the purpose of negotiation of a collective agreement if it occurs in a timely fashion.

The Canadian trade union is an independent organization existing for negotiation of terms and conditions of labour relations on behalf of the employees. As discussed in chapter II, on the assumption of conflicting interests, the objective of Canadian unions is to extract a higher return for the employees. It is understandable that the employees and employer have a different status in labour market. For an employee, she needs a job to earn a living and jobs may be deficient. She cannot make do without her employer, although she has the freedom to quit the job if the wage is low. But any sizeable employer could always get along without a single employee, whose ability and contribution is fungible and who is easily replaced if and when she makes her exit. Thus, the employees have no real leverage in dealing with their employer on an individual basis. Gradually, the employees realize that if they band together to voice their grievances collectively, they can pool their bargaining power to get a better deal from their employer, who will find it much more difficult to do without all of them. It is the economic reason, which is the primary and the most important reason, that the employees join a trade union. On this recognition, the Canadian legislature grants the employees the right to have union representation and protects the economic function of the trade union. In order to make the Canadian trade union function effectively, the right to strike is guaranteed under Canada labour law.
B. Resolution of Collective Disputes under Chinese Labour Law

Chapter I of the thesis deals with the right to strike in Canada. As discussed in that chapter, the attitude of the Canadian legislation is to limit and regulate collective employee actions. Strikes in Canada are confined to the negation of new collective agreements, that is, to economic interest disputes. For the purpose of a comparison between Canadian and Chinese labour law, it is necessary to examine the Chinese system of collective bargaining and resolution of collective disputes.

1. The System of Collective Bargaining in China

As discussed in chapter I, provisions respecting the right to strike are in the Canadian legislation respecting collective bargaining. Striking plays a major role in the negotiation of collective contracts since it may be able to break the deadlock at the bargaining table. However, strikes are prohibited in China. An analysis of the Chinese system of collective bargaining is useful to understand this absence.

a. Historical Background

At the early days when the People's Republic of China was established, the Chinese government decided to set up collective bargaining system in both state-owned and private enterprises. In regard to the collective bargaining system in the
public ownership enterprises, the 1950 *Trade Union Law* sets out that trade unions in state-owned or collectively owned enterprises have the rights to represent staff and workers in order to participate in production management and to sign collective contracts with management.306 Along with this, several departments of the Chinese government had promulgated regulations in this respect. For example, the Ministry of Textiles and the Ministry of Railways passed some internal regulations on establishing collective bargaining systems in the enterprises under their leadership. However, there was no national regulation in respect to the establishment of collective bargaining in the state-owned or collectively owned enterprises.

As discussed in the above section, a main function of the Chinese union is to guarantee the fulfilment of production targets. A strike will affect the fulfilment of the production. In addition, on the assumption of the same interest, the Chinese union should safeguard the interest of the state and the enterprises. A strike will do harm to the interest of the state and the enterprises. Consequently, none of the above regulations guarantees a right to initiate a strike to the Chinese unions.

In regard to the collective bargaining system in the private enterprises, the 1949 *Common Principle* set forth the general requirements under its provisions.307 In accordance with the temporary constitution, the ACFTU published a policy on how to establish collective bargaining system in private enterprises.308 The capitalists of the

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306 Art. 5 of the 1950 *Trade Union Law* states: Trade unions in enterprises operated by the state or by cooperatives shall have the right to represent the workers and staff members in taking part in administering production and in concluding collective agreements with management.

307 Art. 32.

308 *Guanyu Siying Gongshang Qiye Laozi Shuangfang Dingli Jiti Hetong de Zanxing Banfa* [*Provisional Ways concerning the Conclusion of collective Agreements between the Capitalists and the*]
private enterprises were required to engage in collective bargaining with the trade union in the enterprise on the principle of benefiting both of the parties.\textsuperscript{309} In addition, article 6 of the 1950 \textit{Trade Union Law} authorized the trade unions in private enterprises to enter into collective contracts with the capitalists.\textsuperscript{310} However, there is no allowance for strikes for the negotiation of collective agreements in any of these statutes.

The theoretical basis for no right to strike in China, as analysed in chapter II, is the harmony of the interests of the state, the enterprises and the workers. This theory, no matter whether it reflects the reality of labour relationship under the planned economy in China, is not a sound one respecting labour relationship in the private enterprises. It is understandable that there is a conflict of interest between the capitalists and the labourers. On this recognition, the Canadian legislation grants the employees a right to strike. The legitimacy of strike in Canada is that, as an economic sanction, strikes should be used for the purpose of negotiation new collective agreements; as a resolution mechanism, strikes should be confined to economic interest disputes. The regime of regulating strikes is about regulating economic conflict between parties of conflicted interests. Therefore, it is unreasonable to have a


\textsuperscript{309} Ibid. Art. 1.

\textsuperscript{310} Art. 6 of the 1950 \textit{Trade Union Law} provides: Trade unions in private enterprises shall have the right to represent the workers and staff members in conducting negotiations and talks with the employers, in taking part in the labour-capital consultation councils, and in concluding collective agreements with the employers.
simple legal ban of strikes in the system of collective bargaining in private enterprises in China.

b. Today's Collective Bargaining in China

From the year 1958, China was under the leadership of the Left and there was a tendency to cancel the system of collective bargaining, a system originated from capitalism. None of the enterprises kept collective bargaining with the related trade union from then on. In accordance with the Party's policy of rapid economic growth set out in the year 1978, a lot of regulations on collective bargaining had been published and the legal system of collective bargaining was re-established in today's China.

The Chinese system of collective bargaining includes the following statutes and regulations. The 1994 Labour Law is the first statute which merits attention. In chapter three and five of the first labour code, there are several articles dealing with collective bargaining. Moreover, the Ministry of Labour published the Regulations concerning Collective Agreements on December 5, 1994. It is the most important regulation in regard to collective agreements in China. Since the regulation details the general provisions set out in the labour code, it is sufficient to discuss the regulation in order to understand the Chinese system of collective bargaining.

311 Articles 33 - 35 and 84 of the Labour Law.

The Regulations concerning Collective Agreements is made up of five chapters and forty-one articles. In chapter I there are several general provisions dealing with the purpose of the regulation, the regulatory scope of the regulation, the legal enforcement of a collective agreement, and the approval of a collective agreement. Chapter II sets forth requirements on the conclusion of a collective agreement. It provides the concept, content and the term of a collective agreement. It also details the procedure of collective consultation to conclude a collective agreement by stating the concept of collective consultation, the representatives of the collective consultation, the principle of collective consultation and the time limit of a collective consultation. Chapter III is about the approval of a collective agreement. It declares the authority of the labour

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313 Ibid. Art. 1.
314 Ibid. Art. 2.
315 Ibid. Art. 3.
316 Ibid. Art. 4.
317 Ibid. Art. 5.
318 Ibid. Art. 6.
319 Ibid. Art. 16.
320 Ibid. Art. 7.
321 Ibid. Art. 8 - 11.
322 Ibid. Art. 12.
324 Art. 34 of the Labour Law provides: A collective contract shall be submitted to the labour administrative department after its conclusion. The collective contract shall go into effect automatically if no objections are raised by the labour administrative department within 15 days from the date of the
administrative department on approval of a collective agreement. In order to keep with the authority, this chapter addresses the content, procedure and time limit of the approval of a collective agreement. Chapter IV deals with the disputes regarding collective agreements. Although the disputes regarding collective agreements include both a dispute arising from the conclusion of a collective agreement and a dispute arising from the implementation of a collective agreement, it puts emphasis on the dispute arising from the conclusion of a collective agreement and establishes a procedure for dealing with this kind of dispute by consultation. The resolution mechanism concerning a dispute arising from the implementation of a collective agreement is set out under the Regulations of the People's Republic of China on Handling Labour-Disputes in Enterprises. Chapter V states that a labour dispute arising from the conclusion or implementation of a collective agreement in the institutional organizations with industrial management will be covered by this receipt of a copy of the contract. This chapter is to detail the procedures of the approval of a collective agreement which is set out in the Labour Law.

325 Art. 21.

326 Art. 24 of this regulation provides: The approval of a collective agreement includes the following contents: 1. whether the two parties of a collective agreement are qualified parties; 2. whether the collective consultation is in accordance with principles and procedures set out in the laws and regulations; 3. whether the standards on working conditions in a collective agreement are lower than those as stipulated in laws and regulations.

327 Art. 25.

328 Art. 26.

329 Art. 32, 39.

330 Art. 31 - 38.

331 Art. 39.
In addition, it addresses the date on which the regulation will come into force. The following are some highlights in this regulation.

Article 7 of the regulation states:

The collective consultation is the activity of the representatives of the trade union in the enterprise and the representatives of the corresponding enterprise to consult to reach a collective agreement.

Article 12 provides:

The collective consultation should be in accordance with the provisions of laws, rules and regulations and follow the principle of equality and cooperation. Neither of the parties should conduct any extremist activities.

On the basis of the concept of collective consultation provided in article 7, article 12 sets forth an important principle in the consultation to reach a collective agreement. The principle is that no matter what happens in the course of the consultation, neither of the parties can take extremist activities. In China, there are no such words as strike or lockout in the statutes and regulations. However, every Chinese knows the word "extremist activities" in the area of labour relationship means strikes and lockouts. That is to say, according to the Regulations concerning Collective Agreements, it is not lawful to declare a strike or lockout in order to reach a collective agreement.

The treatment of strikes and lockouts is a notable difference between the system of collective bargaining in China and that in Canada. As analysed in chapter I, free collective bargaining in the Canadian sense means the parties of labour relations...
are free to agree or disagree. Within only limited constraints, either the employees or
the employers must be entitled to accept or reject the contract proposals made by the
other side. In order to break the occasional and unavoidable deadlocks at the
bargaining table, a strike is permitted to perform its role in the collective bargaining
process. The thrust of Canada labour law is to confine the use of the strike weapon to
the negotiation of new contact terms, to economic interest disputes.

Under Chinese labour law, no strike is allowed for the purpose of collective
bargaining. The Chinese legal ban on strikes comes from the theory of harmony of
interests. The assumption of the harmony of the interests of the state, the enterprises
and the workers is the basis of the whole system of Chinese labour law. In accordance
with this, neither the enterprises nor the workers have independent interests; their
interests are protected through the work for the interest of the state. Under this
circumstance, collective bargaining is relatively meaningless. This assumption
whether it is correct or not under the planned economy is not the subject that the
thesis is dealing with. The starting point of the thesis is that it is not a correct one
under today’s market economy. Since the role of central planning has decreased in the
market-driven economy, the government planners no longer control economic
management at the factory level. The individual enterprises are given the authority of
self-management and they become independent from the state. Likewise, the workers
today enjoy the freedom to establish and terminate labour relationship with an
enterprise on the basis of labour contracts. Since a labour contract concerns the
exchange of labour power for appropriate compensation, the interest of the individual
workers are their individual economic and property rights, a different interest from the one the enterprise has. Therefore, the labour relations under the market economy, which is similar to the one in Canada, have a different character than the ones under the planned economy. It is time for China to examine the Canadian attitude to strikes in free collective bargaining. To maintain the simple legal ban on strike action is totally unacceptable if China is going to have free collective bargaining.\textsuperscript{334}

2. Resolution of Collective Disputes

As discussed earlier, the thrust of Canada labour law is to confine the use of the strike weapon to the negotiation of new contract terms. In a free collective bargaining system, the two parties are entitled to agree or disagree with the contract proposals made by the other side. On the recognition of the conflicted interests between the employees and the employers, the Canadian legislature provides several mechanisms to break the deadlock when a collective agreement cannot be reached. Strike is one kind of these resolution mechanisms. However, the Canadian legislature set out restrictions for striking in order to reduce the use of it. On the assumption of the same interest, strikes are banned in the process of collective bargaining under the Chinese legislation. How does one deal with a collective dispute in accordance with Chinese labour law? The following discussion intends to provide an answer to this question.

\textsuperscript{334} The chapter will provide more discussion on this topic.
a. Legislative Background

The formal mechanism to resolve labour disputes did not come into practice in China until the 1980s. In the early 1950s, the Ministry of Labour promulgated *Regulations on the Procedures for Resolution of Labour Disputes*, which set out the procedures of consultation, arbitration and lawsuit for a settlement of a labour dispute.\(^{335}\) In the year 1987, the Chinese government promulgated *Provisional Regulations for the Resolution of Labour Disputes in State Enterprises*, but the regulation was suitable only for the resolution of labour disputes in state-owned enterprises. The 1987 regulation was revised in 1993 with an extension to cover labour disputes taking place in all kinds of enterprises. The following is designed to provide background information on Chinese legislation on the resolution of labour disputes for the subsequent analysis of today's resolution mechanism concerning collective disputes.

(1) The 1950 Regulation

The *Regulations on the Procedures for Resolution of Labour Disputes* is the first regulation concerning the resolution of labour disputes in China. Under the law, where a labour dispute takes place in an enterprise, it shall be settled through

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consultation between the parties concerned.\textsuperscript{336} If the consultation fails, a labour dispute in a state ownership or a co-operative ownership enterprise shall be settled through consultation held by the higher trade union of the involved trade union and the higher responsible institution in charge of the involved enterprise; a labour dispute in a private enterprise shall be settled through the help of the industrial union in which the involved trade union belongs to.\textsuperscript{337}

If a labour dispute cannot be solved through the consultation in which the related trade union has participated, the parties may apply for mediation held by local labour administrative department; if the mediation fails, the labour dispute arbitration committee shall make an adjudication.\textsuperscript{338} Where a party involved in a labour dispute is not satisfied with the adjudication, the party may notify the labour administrative department within fifteen days from the date of receiving the ruling of arbitration, and bring a lawsuit to a people’s court.\textsuperscript{339}

The 1950 regulation does not provide a procedure respecting the resolution of collective disputes. But it sets forth a prohibition of strikes and lockouts. Article 9 states that in the process of the consultation, mediation and arbitration, the enterprises are not allowed to lockout; while the labourers should maintain normal production. The 1950 regulation is somewhat confused at this point. As discussed above, in spite of the assumption of the same interest, which is strongly arguable, there is nonetheless

\textsuperscript{336} Art. 5.
\textsuperscript{337} Ibid.
\textsuperscript{338} Art. 6.
\textsuperscript{339} Art. 7.
a conflict of interest between the capitalists and the labourers in private enterprises, which existed in the 1950s' China. The importance of the right to strike in the regulating of industrial conflict has been fully discussed in the thesis. In a socialist country where the workers are the masters of the state, how can it be omitted by the legislation?

In sum, the 1950 regulation establishes a formal mechanism to resolve labour disputes. In principle, this mechanism includes the resolution of labour disputes through third party arbitration, as happens in Canada, but places more emphasis on consultation held by related trade unions. In practice, the effectiveness of the regulation is minimal. Most employment-related disputes were resolved through the consultation between the workshop directors and the disaffected worker. Trade unions rarely became involved.

(2) The 1987 Regulation

In order to facilitate the implementation of the labour contract system as introduced in 1986, the State Council promulgated Provisional Regulations for the Resolution of Labour Disputes in State Enterprises. The 1987 regulation reaffirms the

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340 More comparison of the Chinese arbitration and the Canadian arbitration will be provided in the following part.


342 In the year 1986, the State Council promulgated four important regulations with respect to hiring and dismissal of workers in the state-owned enterprises. The four regulations are the following: 1. Guoying Qiye Shixing Laodong Hetongzhi Zanxing Guiding [Provisional Regulations on the
procedures of consultation, mediation, arbitration and lawsuit to resolve a labour dispute. Since the regulation specifies the procedure of mediation and arbitration, it is more practicable than its predecessor, the 1950 regulation.

The 1987 regulation is suitable for the resolution of labour disputes in state-owned enterprises.\(^{343}\) The regulation provides a resolution process generally consisting of three steps: mediation, arbitration and lawsuit. This regulation reaffirms the trade union's role in the resolution of labour disputes.

In accordance with the regulations, each enterprise should establish a mediation committee to conduct mediation.\(^{344}\) The mediation committee would consist of representatives from the workforce, the enterprise, and the trade union.\(^{345}\) The chairperson of the mediation committee should be elected by the committee members.\(^{346}\)

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\(^{343}\) The regulations provide different ways concerning different kinds of labour disputes. When a dispute arises out of the performance of a labour contract, the parties may request mediation from the enterprise's labour dispute mediation committee or directly apply for arbitration from the local labour dispute arbitration committee. However, if the dispute arises out of expulsion, removal of name, or dismissal for violation of discipline, the parties should directly request arbitration.

\(^{344}\) Art. 6.

\(^{345}\) Art. 7.

\(^{346}\) Art. 8.
In the context of the arbitration committees, the regulation states that each county, municipality, or district under municipal administration should establish an arbitration committee.\footnote{Art. 9.} The arbitration committee will be composed of representatives from the labour administration department, the trade union, and the organ with administrative responsibility for the enterprise involved in the dispute,\footnote{Art. 10.} and it will be chaired by highest ranking administrator in the labour administration department.\footnote{Art. 11.}

Therefore, the Chinese unions are granted the right to participate in the resolution of labour disputes, a right that the Canadian unions have under Canada labour law. The Chinese unions, however, cannot function properly in its representation of workers due to its subordination to the command of the Party.

The 1987 regulation has one article in regard to collective disputes. Article 4 states:

\begin{quote}
Where there are ten or more workers who have a common grievance, the case shall be handled as a class action. The class should appoint one to three representatives to participate in the mediation or arbitration proceedings.
\end{quote}

The regulation does not provide any detailed procedures on the resolution of collective disputes. However, Article 1 says that the regulation is enacted in order to safeguard the normal production process and public order. Since the regulation is
suitable for the resolution of labour disputes in state-owned enterprises, this provision reaffirms the Chinese attitude toward strikes on its assumption of the same interest.

b. Resolution of Collective Disputes in Today's China

The Regulations of the People's Republic of China on Labour-Dispute Handling in Enterprises was published in 1993. The basis provisions of this regulation are the same as those of the 1987 regulation. The 1993 regulation, however, covers all kinds of labour disputes taking place in all kinds of enterprises.\(^{350}\) The following discussion of the resolution of collective disputes in China will highlight the provisions concerning the resolution of a labour dispute arising from a collective contract in the 1993 regulation.

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\(^{350}\) The notable differences between the 1993 and 1987 regulations are the followings: First, the 1993 regulation extended its coverage. The 1987 regulation only covered contract disputes or cases involving the termination of workers in state-owned enterprises. The 1993 regulation covers labour disputes taking place in all kinds of enterprises. The labour disputes may arise in respect of wages, fringe benefits, and occupational safety and health as well as the disputes arising from a labour contract. The extension of the 1993 regulation to all kinds of enterprises in China reflects the government's policy of having the same procedure applied to resolve labour disputes in both domestic and foreign-investment enterprises. Moreover, the extension of the 1993 regulation to all kind of labour disputes emphasizes the policy of resolution of labour disputes through administrative channels. Second, the 1993 regulation deletes mediation a necessary procedure before arbitration. Art. 6 of the regulation allows the parties involved in a labour-dispute to seek mediation or directly seek arbitration. This provision grants more freedom to the parties involved in a labour dispute in choosing the resolution process by themselves. It reflects the government's attitude toward the "long-term mediation without decision (Jiu Tiao Bu Jue)", which is regarded as harmful to the stability of labour relationship.
(1) Prohibition of Strikes in the Resolution of Collective Disputes

The provisions in regard to dealing with a collective dispute are mainly in 

*Labour Law of the People's Republic of China, Regulations concerning Collective Agreements, Regulations of the People’s Republic of China on Labour-Dispute Handling in Enterprises*, and *Rules concerning Ways the Labour Arbitration Committee Dealing with Labour Disputes*. According to all these regulations, the most important principle that should be followed in dealing with a collective dispute is that neither of the parties is allowed to take “extremist activities to intensify the conflict”.

Article 6 of *Regulations of the People's Republic of China on Labour-Dispute Handling in Enterprises* reads as follows:

Where a labour dispute takes place, the parties involved should seek a settlement through consultation; if either party does not want consultation or the consultation fails, the parties involved may apply to the labour dispute mediation committee of their unit for mediation; if the mediation fails, either party may apply to the labour dispute arbitration committee for arbitration. Either party may also directly apply to the labour dispute arbitration committee for arbitration. If one of the parties is not satisfied with the adjudication of arbitration, the party may bring the case to a people's court.

In the course of dealing with a labour dispute, neither of the parties is allowed to take any activity that may intensify the conflict.

Article 40 of *Rules concerning Ways the Labour Arbitration Committee Dealing with Labour Disputes*\(^{351}\) says:

After the notice of receiving a collective dispute is served or is publicly announced, the parties involved should not conduct any activity that may intensify the conflicts.

As discussed in the above section, in China, there are no such words as strikes or lockouts in the statutes and regulations. However, a strike by the workers is regarded as an activity that will intensify the conflict. It is prohibited in the process of a collective dispute. It is easy to understand this prohibition because the right to strike is prohibited under the 1982 Constitution, the fundamental law of the People's Republic of China.\footnote{A relevant principle is set out in article 44 of the Regulations of the People's Republic of China on Labour-Dispute Handling in Enterprises, which reads as follows: "The labour dispute arbitration committee should make a report to the local government immediately after the settlement of a collective dispute." This article empowers the local government to participate in dealing with a collective dispute. It indicates the government's posture toward a collective dispute, which is, in order to prevent strike action, the government is allowed to involve itself in the resolution of collective disputes. In practical terms, the way to deal with a collective dispute is as follows. On the one hand, where a dispute arises, the local labour dispute arbitration committee will organize related organizations to conduct mediation. The related organizations include the higher trade unions of the union involved in the dispute and the government department that is in charge of the enterprise involved in the dispute. Usually, the mediation committee will call the trade union and the enterprise involved in the dispute to consult. Both the labour dispute arbitration and the upper trade unions will make suggestions to the trade union and the enterprise. The local labour arbitration committee will make reports to the local government and follow its direction in all these process. On the other hand, the trade union involved in the dispute should make a report to its upper trade unions in the course of the resolution. Because the Chinese unions are organized in a national vertical structure and all the local trade unions are under the leadership of ACFTU, the higher trade unions of the trade union involved in a collective dispute have the power to take part in the dispute. The higher trade unions will get praise from ACFTU by this participation if it works in solving the dispute.}
(2) Resolution of a Dispute Arising from the Conclusion of a Collective Agreement

The dispute arising from the conclusion of a collective agreement is a dispute of the two parties in regard to whether they want to reach a collective agreement, what they want to set in a collective agreement or other things related to the collective consultation. The way used to deal with a dispute arising from the conclusion of a collective agreement in China is to handle the case “in co-ordination”.

Article 84 of Labour Law of the People's Republic of China provides:

Where a dispute arises from the conclusion of a collective contract and no settlement can be reached through consultation by the parties concerned, the labour administrative department of the local people's government may organize the relevant departments to handle the case in co-ordination.

Article 32 of Regulations concerning Collective Agreements reads:

Where a dispute arising from the conclusion of a collective agreement and no settlement can be reached through consultation by the parties concerned, either of the parties may apply in writing to the labour dispute co-ordination organ under the labour administrative department for co-ordination; the labour administrative department may conduct a co-ordination if it regards necessary even if the parties involved do not apply for mediation.

According to these provisions, the parties involved in a dispute concerning the conclusion of a collective agreement should first try to settle the dispute by consultation. If they cannot reach a settlement, they may apply for the co-ordination taken by the labour dispute co-ordination organ under the labour administrative department, the daily body in charge of dealing with a dispute arising from a

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353 Art. 32 of the Regulations concerning Collective Agreements.
collective agreement. However, it is not a kind of absolute freedom since the labour administrative department can deal with the dispute if it regards necessary.

Under the law, the labour administrative department should deal with a dispute arising from the conclusion of a collective agreement it in a prompt way. The case should be solved within 30 days from the date the labour administrative departments made the decision to accept it. Extension of the time limit due to the complexity of the case or other objective reasons needed to extend shall not exceed 15 days. When the dispute arising from the conclusion of a collective agreement is solved, the labour administrative department should make a ruling of the coordination. Both of the parties involved should carry out the ruling.

The role of the Chinese arbitration in the settlement of a collective dispute arising from the conclusion of a collective agreement is similar to that of the Canadian interest arbitration. Interest arbitration in Canada is deigned to replace strikes as the mechanism for resolving bargaining disputes. It is used as substitute when the right to strike is removed by statute. In interest arbitration, the board is

354 Ibid.
355 Ibid.
356 Art. 35. Other kinds of labour disputes should be resolved within 60 days starting from the date of receiving the application for arbitration. See art. 82 of the Labour Law.
357 Ibid.
358 Art. 38.
359 See A. Ponaak & L. Falkenberg, “Resolution of Interest Disputes” in a. Sethi, ed., Collective Bargaining in Canada (Scarborough, Ont.: Nelson, 1989) 260. In this article, the authors argued that the compulsory interest arbitration has reduced the likelihood of negotiated settlements through the give-and-take of the bargaining process in all democratic countries.
free to fashion its own solution by setting out in its award a new collective agreement it feels is most appropriate under the circumstances.

The Chinese arbitration in respect to the disputes arising from conclusion of collective agreements can be defined as interest arbitration. Like the interest arbitration, it is used to arrive at the terms of a collective agreement in situations where the parties are forbidden from resorting to strikes or lockouts to realize their collective bargaining goals. However, interest arbitration is most likely to be obligatory for Canadian public employees, such as fire fighters, polices and civil servants; while in China, strikes are prohibited in both public and private sectors.

The notable difference between the Chinese and Canadian arbitration originates from the different assumption of these two kinds of legal systems. As discussed in chapter I, the recognition of a conflict of interest between the capitalists and the labourers is the basis for Canada labour law to provide the right to strike to the employees. As opposed to the strike-based system to resolve a labour dispute, the interest arbitration prohibits strikes in the public sector. However, the premise of this prohibition is that the Canadian legislation leaves the strike as a viable option in the collective bargaining system. The purpose of the legislation is to balance society’s interest in safety and the workers’ interest in collective bargaining.\(^{360}\) A fundamentally different doctrine of the harmony interest among the state, the enterprises and the workers is the basis for the Chinese legal ban on strikes. The

\(^{360}\) Professor Paul Weiler provides an excellent illustration of how the conflicting interests can be balanced in essential industrial disputes. See P.C. Weiler *Reconcilable Differences* (Toronto: Carswell, 1980) at 209-214, 235-237.
Chinese legislation prohibits all strikes, no matter it occurs in the public sector or the private one.

(3) Resolution of a Dispute Arising from the Implementation of a Collective Agreement

The dispute arising from the implementation of a collective agreement is a dispute of the two parties of the collective agreement in regard to the implementation, modification or termination of a collective agreement. The usual cases in regard to the disputes arising from the implementation of a collective agreement are the disputes arising from the allegations that the parties do not carry out the collective agreement, do not wholly carry out the collective agreement or do not carry out the collective agreement in a proper way.

Article 84 of Labour Law of the People's Republic of China provides:

Where a dispute arises from the implementation of a collective contract and no settlement can be reached through consultation by the parties concerned, the dispute may be submitted to the labour dispute arbitration committee for arbitration. Any party that is not satisfied with the adjudication of arbitration may bring a lawsuit to a people's court within 15 days from the date of receiving the adjudication.

Rules concerning Ways the Labour Arbitration Committee Dealing with Labour Disputes sets out a special procedure to deal with a dispute arising from the implementation of a collective agreement. According to chapter XII of the rule, the labour arbitration committee should make up a special arbitration court, with an odd
number which is bigger than three, of the arbitrators to deal with such case.\textsuperscript{361} The special arbitration court should follow the principle of “nearness”, which means to hear the case at a place which is near to the place the dispute happened.\textsuperscript{362} The arbitration court should make a decision on whether they will accept or refuse the case within three days after they have received the application. The final decision of the case should be made within 15 days after the arbitration court is made up.\textsuperscript{363} Extension of the time limit due to the complexity of case or other objective reasons needed to extend shall not exceed 15 days with the permission of the labour arbitration committee.\textsuperscript{364}

The Chinese arbitration in respect to a dispute arising from the implementation of a collective agreement has the same function of the Canada grievance arbitration due to its base of the existing collective agreements. In Canada, the grievance arbitration is an adjudicative method of settling industrial disputes arising out of the application of the collective agreements’ terms. The arbitrator’s role is to determine the legal rights of the parities under the existing collective agreements, based on the evidence and arguments presented at the hearing.\textsuperscript{365}

\begin{footnotesize}
\begin{enumerate}
\item Art. 37. According to art. 17 of the rule, the labour dispute arbitration committee may assign an arbitration to deal with a simple labour dispute.
\item Art. 38. Most of the Chinese labour arbitration committees have their own courts and the majority of the cases are heard in the courts.
\item Art. 82 of the \textit{Labour Law}.
\item Art. 43.
\end{enumerate}
\end{footnotesize}
As discussed earlier, Canadian collective bargaining legislation stipulates that strikes are prohibited during the lifetime of collective agreements. For this reason, the legislation sets forth the grievance arbitration process to resolve the disputes arising during the terms of a collective agreement. Although the grievance arbitration in Canada is for the purpose of prohibiting the use of strikes in the resolution of labour disputes, it does not have the same meaning as the Chinese legal ban of strikes in its resolution of labour disputes arising from the implementation of collective agreements.

The thrust of Canada labour law, as noted in chapter I, is to confine strike to the negotiation of a collective agreement. On the recognition of the conflict of interest between the employees and the employers, the Canadian legislation protect the employees' right to strike. Once a collective agreement is achieved, it has binding force on both sides. Disputes concerning the interpretation, administration or violation of a collective agreement must be submitted to grievance arbitration or some dispute resolution mechanisms other than strikes or lookouts. This prohibition of strikes is on the basis that strike is protected to realize the collective bargaining goals. However, on the assumption of the harmony of interest among the state, the enterprises and the workers, the Chinese legislation has a legal ban on all strikes, no matter the purpose of a strike is for negotiation of a new collective agreement or for resolution of a dispute during the lifetime of a collective agreement. Putting it in other way, the Chinese workers have no right to strike at all.
In accordance with the *Constitution*, the Chinese legislation on labour relations does not grant the Chinese workers a right to strike. Chinese labour law, upon its face, is partially similar to the Canadian one. However, since the Chinese system of labour law relies upon the theory of the same interests, strike action is regarded as being harmful to the state, the enterprises and the workers, and thus it should be prohibited in the resolution of both the disputes arising from the conclusion of collective agreements and the disputes arising from the implementation of collective agreements.

The socialist market economy established in recent years greatly challenges the theory of the harmony of interests. The stage has been reached where the conflicting interests between the two parties of the labour relations cannot be ignored any longer. Hence, it is necessary to undertake legal reforms on the Chinese system of labour law.
CHAPTER IV

LAW REFORM PROPOSALS

IN RELATION TO THE CHINESE LEGAL SYSTEM

Introduction

This chapter deals with law reform proposals in relation to the Chinese legal system in regard to the right to strike. The first part of the chapter discuss the necessity of the right to strike in today's China on the basis of conflicting interests under the socialist market economy. As analyzed in Chapter II, the theoretical reason of no right to strike in China, in the point of view of the Chinese government, is the harmony of interests among country and the two parties in labour relations. The following investigation of labour relations under the market economy is designed to provide the theoretical reason of the conflicting interests and the statistics of labour disputes are designed to provide a practical reason. The second part of this chapter respecting specific legal reform recommendations on the relevant statutes noted in chapter II and III is based on the comparison between the Canadian and Chinese legislation.
A. The Necessity of a Right to Strike in Today’s China

As noted in Chapter II, the basic reason of no right to strike in China in the view of the Chinese government is the identical interest between the two parties in labour relations and that of country as a whole. In accordance with the theory, the workers are the masters of the state under socialism. The state owns the means of production, including the assets of all state enterprises, on behalf of the working class. Thus, the fundamental interests of the state, the enterprises and the workers are identical. This kind of view, whether it is correct in the year 1982 is beyond the discussion. This section attempts to examine the characteristics of labour relations under today’s China to reach the conclusion of conflicted interest between two parties in labour relations - the basic assumption of a right to strike under the Canadian legislation.

1. The Theoretical Reason

As mentioned several times, the theoretical reason that there is no right to strike in China from the point of view of the Chinese government is the harmony of interests among the state, the enterprises and the workers. Even if it had been an acceptable view in the year 1982, it is not suitable in today’s China on the ground that the labour relations under the market economy are different from the ones under the planned economy.

In the year 1982, the Chinese economy was a kind of planned economy. First, the planned economy played the leading role in the Chinese economic system in the
year 1982. Hu Yaobang in his “Create a New Situation in All Fields of Socialist Modernization”, emphasized the significance of the planned economy in the Chinese economic system. According to the report, the socialist public economy with state-owned economy as its leading sector had long occupied the predominant position in China. It was both necessary and possible to practise a planned economy. In other words, the main body of production and circulation, including the key products needed by production to increase fixed assets and expanded reproduction, must be put under unified planning. The capitalist market economy should not be adopted in the socialist China.

Second, although China had its open-door policy in 1978 and the *Law of the People’s Republic of China on Joint Ventures Using Chinese and Foreign Investment* was published in July 1979, the foreign investment enterprises were very few in the year 1982. In December 1981, there were only 40 joint ventures in China with an aggregated investment of 189 million US dollars. Under this circumstance, the public ownership labour relations were the most important labour relations.

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366 Hu Yaobang, “Create a New Situation in All Fields of Socialist Modernization - Report to the 12th National Congress of the Communist Party of China”, (1982) 37 BR 11, at 18-19. Hu was the First Secretary of the CCP at that time.


369 In an article “Prospects for China’s Capacity to Absorb Foreign Investment “ by Ji Chongwei, adviser to the Foreign Investment Bureau under the Ministry of foreign Trade and Economic Relations, the author stated that from July 1979 to December 1981, the Chinese government had endorsed 40 joint ventures in China with an aggregated investment of 189 million US dollars. The enterprises were selected on the basis of how well they met the needs of China’s economic readjustment and growth.
The labour relations under the planned economy did not have the same characteristic as the ones under the market economy because the two parties in the labour relation were the state (via the enterprises) and the labourers. Neither the enterprises nor the labourers had an independent status. Under the planned economy, the planning bureaucracy played a major role in allocating outputs to production, setting prices for finished goods, and making output. The enterprises had very little authority over their economic management, and all their profits had to be handed in to the state. Under this excessive and rigid control of government planners, wages, fringe benefits and working conditions were largely determined by the state. There was no place for the free collective bargaining between workers and management. Unlike in Canada, there was no need for a framework of statutes dealing with workers' representation and the use of economic weapons by workers and management under the planned economy in China.

In the context of labour relations, the enterprises had no rights in labour allocation. Labour in urban areas was allocated by administrative government. Under this system, which began in the late 1950s, all urban workers in China were employed either by state-owned or collective enterprises through administrative assignment.

They included 15 light industrial and textile projects, 3 foodstuffs and beverages enterprises, 9 factories producing machinery and electrical appliances for civil use, 8 tourist, publishing and other service projects, 3 farming and animal husbandry projects, one pharmaceutical plant and one rental service. Of the 40 joint ventures, 35 were projects with investments of less than 10 million US dollars, 27 had opened for business. See (1982) 17 BR 19, at 19.

Some Chinese scholars called the labour relations under the planned economy labour administrative relations. See Zhongtan et al., A General Outline and Overview of Trade Union Theories In Time of Transition Towards a Socialist Market Economy (Beijing: People's Publishing House, 1997) at 91, in Chinese. Supra note 193.

The administrative assignment was undertaken by the government's labour and education bureaus. The Chinese government uses an urban household registration system to control migration from the
Neither the enterprises nor the job seekers had much formal control over this process. Since such assignment offered a lifetime job to the urban citizens,\textsuperscript{372} the system came to be known as the "iron rice bowl" - a guarantee that once a worker was hired, she could never be fired and could only be promoted, not demoted.\textsuperscript{373}

The labour relations under the planned economy were called "co-operation between comrades" by the government. This doctrine of labour relations put emphasis on the difference of social division of labour between the enterprises and the labourers, assuming that the state represented the interests of the whole society, while the enterprises represented the interests of the labourers working there. Since the interests of the labourers were involved in the interests of the state and the enterprises, they would be protected in the process of working in the interests of the state and the enterprises. It was unnecessary to provide a specific protection of the interests of the labourers. Because this doctrine of labour relations excluded the possibility of conflicted interests in labour relations, it obviated the need for special legal procedures for their resolution, especially the right to strike.

\textsuperscript{372} This system not only guaranteed a lifetime job to the urban citizens, but also to their children, a so-called substitution system. Under the substitution system, a retiree from a permanent job in a public ownership enterprise could designate one of her children to succeed her as a permanent employee in the same enterprise, although not necessarily the same position as that held by the parent. Ibid. at 214.

\textsuperscript{373} These workers in China were called permanent workers. They enjoyed immunity from dismissal, except in case of egregious misconduct such as chronic absenteeism, criminal behaviour, or political offences. Even if their enterprise partially or totally ceased operation, permanent workers were usually assured of full wages or relocation by the state to other permanent jobs. Permanent workers also could expect an increase in income over their working lives and a pension retirement. Ibid. at 210-211.
The term of the socialist market economy first appeared in Jiang Zemin’s report “Acceleration Reform and Opening-Up” at the 14th national Congress of the Party. In this report, Jiang stated explicitly that “the object of the reform of the economic structure will be to establish a socialist market economy that will further liberate and expand the productive forces”. Then, the First Sessions of the Eighth National People’s Congress, held on March 15-31, 1993, adopted constitutional amendments. For the first time in the history of the People’s Republic of China, a socialist market economy was written into the Constitution, and the planned economy lost its dominance in China after four decades.

The labour relations under the market economy in today’s China are different from those under the planned economy. First of all, there are private enterprises, foreign-capital enterprises as well as the state and collective ownership. The interests

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Socialist market economy, according to the opinion of a Chinese economist Liu Guoguang, is a market economy under the socialist system with market economy traits and basic socialist characteristics. Liu stated that a socialist market economy, sharing general characteristics with a capitalist market economy, has other distinct economic features that distinguish it from the capitalist market economy. 1. From the political system point of view, the most important is the leadership of the Communist Party and the people’s government. 2. With regard to the basic economic system, socialist ownership is associated with the public domain including state and collective ownership as the main entities, and individual, private and foreign-funded economies as supplements. 3. The socialist allocation system mainly follows the principle of to each according to his work, and allocation of other production elements as an attachment, giving consideration to both efficiency and social fairness. For more discussion of the characteristics of Chinese socialist market economy, see “Economist on China’s Market Economy”, (1992) 46 BR 28.

375 Ibid. at 18.

376 Supra note 3 at 14.

377 Ibid.
between the employers and employees in the private and foreign-capital enterprises are conflicted interests due to the private ownership of production. The conflicted interests under the socialist China in these enterprises are the same as the ones in Canada. As discussed in chapter I, the employees in the labour relations have different interests than the one that the employer has. From the employees' side, their desire is to increase wages, fringe benefits and control their day-to-day working methods. The employer, as the purchaser of labour, wants to gain more profits and determine what is done by employees at work. Thus, the private ownership of production embodies a structural antagonism of interests between employees and employer. China is no exception.

Second the labour relations in today's public ownership enterprises are different from the ones under the planned economy. Since the role of central planning has decreased under the market economy, the enterprises have greater independence and control over their own business. The individual factories are empowered to make decisions on production and sales in response to the market forces of supply and demand, rather than in response to directives from the government planning bureaucracy. Instead of handing over all of their profits to the state, as was done under the planned economy, the factories are required to pay an income tax, a business tax, and a fixed assets tax to the state. More importantly, they are allowed to retain any profits above these taxes for expanding production, improving worker welfare, and paying higher wages and bonuses.\footnote{Supra note 128 at 1168.} Under these circumstances, the public-ownership
enterprises share the same interest of pursuing more profits, as the private enterprises do.

In the area of labour relations, the labour contract system has replaced the labour allocation by government. The labour contract system, beginning in 1986, authorizes employers to hire regular employees under fixed-term contracts. In turn, the workers are allowed to select their own employment initially or to change employer once a contract expired. The parties to the contract each enjoy greater freedom to terminate the employment relationship than the previous administrative assignment.

The labour contract system is designed to reduce the problems generated by the practices of labour allocation. The most telling evidence of the success of this system is China's rapid rate of economic growth in recent years. However, this system has brought great challenges to the Chinese workers. In today's socialist China, just as in a capitalist one, a worker needs to exchange her labour power for appropriate compensation on the basis of the employment contract. The most concern of the Chinese workers today is job security. Since there is a fixed term in a labour contract, it means a worker may lose her job once the labour contract is

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381 Generally speaking, the labour contract system plays a positive role in protecting individual economic and property rights. However, this system is perilously close to the system of capitalist exploitation condemned by Karl Marx. The Chinese political economists took pains to distinguish freedom of contract under capitalism from today's labour contract under socialist China. See H. K. Josephs "Labour Reform in the Workers' State: The Chinese Experience" (1988) 2 Journal of Chinese Law 202 at 226-229, supra note 289.
expired. Having felt comfortable under the “iron rice bowl” system for almost 40 years,\textsuperscript{382} the individual workers need some promise from the enterprises of job security, which is difficult to get. In addition, conflict arising out of the employment relationship also includes the issues of wages, fringe benefits and working conditions. On the workers’ side, they require higher wages, more benefits and better working conditions. On the side of management, they pursue more profits. Therefore, under the labour contact system the workers have differing rights and interests vis-à-vis management in the public ownership enterprises.

In sum, under the market economy, the interests of the two parties in labour relations, in every kind of enterprises, are conflicted interests. It is necessary to set up special legal procedures for the resolution of the conflicts in labour relations, especially the right to strike, as in the Canadian legislation.

2. The Practical Reason

The different character of labour relations under the market economy is the theoretical reason for the necessity of a right to strike. The following investigation on labour conflicts and working conditions under today’s China is sufficient enough to illustrate the conflicted interests in practical terms.

According to the official statistics based on National Mediation Centre and Labour Bureau records, labour disputes increased by approximately 65 percent in the

\textsuperscript{382} Supra note 128 at 1203.
year 1994, and 73 percent during 1995. Most of the labour disputes arose from the employer's misconduct. Of the 12,358 cases brought for arbitration in the year 1993, approximately 40 percent of the cases closed were resolved in favour of the worker(s), and 20 percent in favour of management. The rest resulted in a compromise. In the year 1994, there were 135,205 cases brought before arbitration committees. 8,585 cases were closed in favour of the worker(s), which constituted 47.8 percent of all the cases closed, and 3,592 in favour of the employers, which constituted 20 percent. The rest resulted in a compromise. In some cases, the misconduct of the employers was so serious that the disputes have resulted in strikes.

The labour disputes concerning working conditions, especially those which occurred in the foreign-funded enterprises, need to be highlighted. In the year 1994, 258 disputes of this kind occurred in public-owned enterprises and 84 in foreign-funded ones. The average number of workers involved in each of the 258 disputes in public-owned enterprises was 28.6 while those in each of the 84 disputed in foreign ones was 51.3. Although the absolute number of the labour disputes in foreign-

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386 Infra note 411.

funded enterprises is smaller than that in public-owned enterprises, the dispute proportion in the former enterprises is much higher than in the latter ones because the public-owned enterprises is still the majority of enterprises in China.  

As foreign investment has increased dramatically in China in recent years, notorious illegal actions by foreign enterprise managers have been brought to light, especially the poor working conditions they provide for the workers. These events include extending working hours without additional pay and hazardous living and working conditions. There are three unbelievable cases. In November 1993, 84 female workers were killed in a fire in a Shenzhen toy factory run by a Hong Kong businessman. They were burnt to death because all the exits were locked for fear that workers might steal the toys. One month later, 62 workers were killed in a Taiwanese-invested factory in Fujian Province for the same reason. In early May 1994, 11 people were killed and two dozen injured when a five-storey factory dormitory building collapsed in Shenzhen. The factory’s Hong Kong manager housed more than 100

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388 The completed investment in fixed assets of the country in 1995 was 1,944.5 billion yuan. Of this total, the investment of state-owned units was 1,082.2 billion yuan, the investment of collective units was 297.8 billion yuan, and urban and rural residents’ investment was 238.1 billion yuan, the investment of other types of ownership was 326.4 billion yuan. See “Statistical Communiqué of the State Statistical Bureau of the People’s Republic of China on the 1995 National Economic and Social Development (March 1, 1996)” (1996) 14 BR 22 at 24.

389 In 1995, foreign capital actually utilized amounted to US$ 48.4 billion, up 11 percent over the year 1994. By the end of 1995, there had been 234,000 overseas-funded enterprises in China, or 28,000 enterprises more than that at the end of 1994. Ibid. at 26.

390 The labour disputes involving Chinese workers and foreign bosses have increased in recent years. According to data provided by the ACFTU, the number of labour disputes which occurred in foreign-funded enterprises in the year 1994 was 3.57 times that in the year 1993. Among all the collective labour disputes occurring in the year 1994, 45 percent of them occurred in foreign-funded enterprises. In some cases, the tension between bosses and Chinese workers intensified and the angry workers would not only go on strike but also cause physical injury and even destruction of equipment. See supra note 385 at 48; Supra note 387 at 17-18.
workers in the building despite the fact that he knew it was not safe. The poor
working conditions and mistreatment of workers in the foreign-funded enterprises has
stirred up popular resentment and induced the government to respond. The State
Council promulgated a decree in April 1994 to promote the establishment of trade
unions in the foreign-funded enterprises in order to protect the legitimate rights of the
workers. According to this decree, the new firms must be unionised within one year
of operation. At the same time, ACFTU took an active role in the establishment of
trade unions in the foreign-funded enterprises. 391

Why do the employers not improve the working conditions and follow the
rules? Because they would be required to pay money for it, and thus they cannot gain
more from their business. What rights and resources do the employees have in
response to the employers’ misconduct? Although there is no real leverage for the
employees in dealing with their employer on an individual basis, they should have the
collective right to refuse to work: to withdraw their labour rather than to accept the
employers’ poor offer. This is the significance of a strike. The right to strike must be
legally available under the market economy where the conflicted interests cannot be
ignored any longer.

B. Law Reform Proposals

The analyzed conflicted interests between the workers and management, which are the assumptions of the framework of a right to strike under the Canadian legislation, are the basis to rely upon for the following law reform proposals on the specific statutes discussed in chapter II and III respecting a right to strike in China. The purpose of this section is to make some practical recommendations within the Chinese legal system. Each subsequent recommendation is on the basis of the former recommendations.

1. Under the Constitution

The Canadian constitution does not include an explicit provision in regard to a right to strike, comparable to what had appeared in the 1975 and 1978 Chinese constitutions. But it guarantees the freedom of association under the Charter of Rights and Freedoms. As discussed in chapter I, in the Alberta Reference, Dickson C.J.C. argued that the right to strike is protected under the freedom of association. The Chief Justice's judgement, although it was dissenting, is more impressive than the judgement of LeDain and McIntyre JJ., and thereby it is the most important inference respecting a right to strike under the Chinese constitution.

The legal reform suggestion in regard to the right to strike under the Chinese constitution is that it is not necessary to set forth a clear provision of a right to strike under the fundamental rights and duties of citizens in the Constitution. However, the
right to strike should be implied in the protection of freedom of association, which is protected under the 1982 Constitution.

The reason for the omission of the right to strike under the Chinese constitution is to take account of the Chinese conditions. Jiang Zemin in his report at the 14th National Congress of the Party, emphasized the Party’s motivation of economic growth and required all the Party members to redouble their efforts to promote economic development.\footnote{Supra note 374 at 22-23.} One of the major tasks that the Party members were asked to fulfil was to put forward reform of the political structure and bring about great advances in socialist democracy and in the legal system.\footnote{Ibid. at 23.} Jiang stressed the need to maintain social stability to Chinese economic development and declared that the Party must adopt effective measures to put an end to the disorder.\footnote{Ibid.}

To a certain extent, striking represents a potential threat to social order. As mentioned in chapter II, the practical reason of no right to strike under the 1982 Constitution is that the government regarded the right to strike as an eminently political act which will put its sovereignty in danger. It is the last thing that the Party wants to bear since the Party’s authority rests primarily on its ability to maintain stability, as well as the success of economic reform. Not to include a right to strike in the Constitution is not only in accordance with the Party’s motivation of economic growth, but also with the Party’s emphasis on utilizing means other than striking to resolve labour disputes. It is more practical to omit a clear provision of a right to

\footnote{Supra note 374 at 22-23.} \footnote{Ibid. at 23.} \footnote{Ibid.}
strike in the Constitution and detail it in the relevant statutes than to add it in the Constitution which will make the Party become sensitive to this issue and have no possibility to protect a right to strike in China.

However, the right to strike is so important a fundamental human right that it should be implied under the freedom of association under the Chinese constitution. As discussed in chapter II, article 35 of the 1982 Constitution provides protection of freedom of association to Chinese citizens. The right to participate in and organize trade unions is specifically protected under the Labour Law of the People's Republic of China and Trade Union Law. Thus, in the context of the right to strike, the circumstance in China today is similar to the one which the Supreme Court of Canada had faced in the collective bargaining trilogy, which is whether the constitutional protection of freedom of association includes the protection of “freedom to engage in conduct which is reasonably consonant with the lawful objects of an association”.395

As discussed in chapter I, in the judgment of Dickson C.J.C., the Chief Justice held that the constitutional guarantee of freedom of association, in the specific context of labour relationships, should protect the freedom of the individuals to engage in activities for which the organization was established. It is not unreasonable to take account of the Chief Justice's interpretation of freedom of association under the Chinese constitution. More specifically, freedom of association, in the area of the

395 Supra note 6 at 12.169.
labour relations, should include the workers' freedom to organize, to bargain and to strike.\textsuperscript{396}

As Dickson C.J.C. argued in his dissent, the right to strike is internationally recognized as a fundamental freedom under the U. N. \textit{International Covenant on Economic, Social and Cultural Rights}\textsuperscript{397} and U. N. \textit{International Covenant on Civil and Political Rights}.\textsuperscript{398} Since Canada has acceded to both Covenants, the Canadian legislation is not allowed to abrogate the right or make it meaningless. In the Chinese context, the right to strike should be protected in its domestic legislation because China ratified the U. N. \textit{International Covenant on Economic, Social and Cultural Rights} in October 1997 and the right to strike is expressly protected under this document, although China is allowed to regulate the right to strike under its statutes.

Furthermore, it is necessary that the right to strike should be included in freedom of association, a freedom which is constitutionally protected. As discussed above, the significance of the Chief Justice's judgment is his recognition of the value of striking in potentially promoting greater justice for working people. As analyzed already, the labour contract system, starting in 1986, brought an end to the life-long employment through administrative assignment in China. Since then, the workers in China have to face the challenge to hire out their labour on a labour contract basis. In general, the Chinese labour force, both in urban and rural areas, is characterised by an oversupply of manpower. In the year 1996, there were more than 100 million surplus

\textsuperscript{396} Ibid.

\textsuperscript{397} 1966, G. A. Res. 2200 (XXI).

\textsuperscript{398} Ibid.
rural labourers in China, as well as some 5.2 million unemployed urban residents. Under this circumstance, the Chinese working people, who are in name the masters of the state, are actually “liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer.” The Constitution should function to enable the workers “who would otherwise be vulnerable and ineffective meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.” The right to strike, if it is implied in the freedom of association, is the just means through which the workers can seek to attain their purposes and fulfil their aspirations.

The Chinese constitution, as indicated in chapter II, is not only binding on the government, but also on the people. The 1982 Constitution imposes on Chinese citizens a duty to observe labour discipline and public order. Since strikes are prohibited under Chinese labour law, a strike is considered in violation of both labour discipline and public order. However, the legal reform suggestion respecting the Chinese constitution is that the right to strike should be included in the protection of freedom of association. It is, therefore, necessary to re-evaluate the meaning of labour discipline and public order.

As suggested above, the protection of a right to strike is implied under the protection of freedom of association; there is no explicit provision in regard to a right

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399 Supra note 388 at 29.
401 Supra note 6 at 12,179.
402 Ibid.
to strike in the Constitution. This is an important change in the interpretation of the Chinese constitution. Because the Constitution has supreme legal authority, it is difficult to conduct relevant reform respecting a right to strike under Chinese labour law if there is no change in the interpretation of the meaning of labour discipline and public order under the Constitution. Furthermore, since the detailed provisions in regard to the requirements and procedures of a strike will be set out under Chinese labour law, which will be discussed later, a lawful timely strike should not be regarded as in violation of labour discipline or public order.

2. Under the Labour Code

The discussions in chapter III respecting the right to strike under the Labour Law of the People's Republic of China are in Chapter I General Provisions, Chapter III Labour Contracts and Collective Contracts and Chapter X Labour Disputes of this code. The legal reform suggestions on the Labour Law are in these specific chapters on the assumption that the right to strike is constitutionally protected under freedom of association in the Constitution.

a. Under Workers' Rights

The general provisions in chapter I of the Labour Law include the provisions of the rights to the Chinese labourers. In the trade union context, labourers are granted
the right to participate in and organize trade unions in accordance with the law. This right can be divided into two kinds of rights. One is the right to participate in trade unions and the other is the right to organize trade unions. The Chinese workers are assumed to have the right to organize trade unions under this provision. Although it seems clear that the right to strike should be protected within the right to participate in trade unions, it is better to provide a specific provision on this right, as in the \textit{Canada Labour Code}.

Section 8(1) of the \textit{Canada Labour Code} sets out the basic freedoms to employees by stating that "every employee is free to join the trade union of his choice and to participate in its lawful activities". Since the Code details the requirements of a legal strike, the employees are protected to participate in a strike in accordance with the Code. As discussed in the above suggestion, the Chinese \textit{Constitution} is silent on the issue of the right to strike. Thus, it is necessary to make it clear that the labourers have the right to engage in the lawful activities of the trade unions under the \textit{Labour Law}, especially the right to participate in a legal strike.

b. Under Collective Contracts

The collective bargaining in today's China is established after the promulgation of the \textit{Labour Law}. The \textit{Labour Law}, which took effect on January 1, 1995, permits workers in all types of enterprises to sign collective contracts with the enterprises. It is the first time that collective bargaining becomes a formal system in China's industrial work force. Although collective bargaining is being implemented first in non-public-ownership enterprises where capital interests are clearly delineated,
approximately 44 percent of enterprises were officially on collective contracts as of August 1996.\textsuperscript{403}

The establishment of a collective bargaining system in China is "from top to bottom".\textsuperscript{404} There are several problems coming out in this process. On the side of the management, the majority of those who have not concluded a collective contract are the enterprises that run into difficulties in production. Since in these enterprises, overtime work is usual and it is difficult for the management to pay the overtime wages, the management are afraid that the conclusion of collective contracts will put them into trouble. In regard to the enterprises that have concluded a collective contract, few of them treat it seriously and most of the collective contracts are general provisions adopted from the statutes. In some cases, the management put their regulations into the collective contracts to restrict workers.\textsuperscript{405} It is clear that all these conducts of the management arise from the guarantee of their interests, without taking account of the interests of the workers.

On the side of the workers, the problem is that most of them do not realize the function of collective contracts. They regard collective contracts as being useless on

\textsuperscript{403} Human rights report 1996, at 34. Supra note 159.

\textsuperscript{404} The labour administrative department has played a significant role in establishing and popularizing the system of collective contracts. (1) The Ministry of Labour conducted the system of collective contract after the Labour Law was promulgated at the following selected places: Guangdong Province, Beijing, Fujian Province, Shenzhen, Xiamen, Qingdao, Chengdu and Dalian. (2) The labour administrative department, together with the ACFTU, published several policies concerning the establishment of collective contracts systems. (3) According to the Labour Law, collective contracts must be submitted to the local labour administrative department for approval. See Zhongtan et al., A General Outline and Overview of Trade Union Theories In Time of Transition Towards a Socialist Market Economy (Beijing: People's Publishing House, 1997), at 253, in Chinese. Supra note 193.

the ground that the statutory legislation provides requirements on wages, labour insurance, working conditions and other issues concerning labour relations; while the labour contract details the rights and duties between the individual worker and the management.\footnote{Ibid.} Actually, if a collective contract does not deal with the particular issues in a specific enterprise or the popular issues concerning the workers in an enterprise, it needs to give way to statutes and labour contracts. Indeed, collective contracts are different from the labour relations statutes and labour contracts. The \textit{Labour Law} provides that legal collective contracts have binding force to both the enterprise and the workers, and the standards on working conditions and labour payments in labour contracts shall not be lower than those as stipulated in collective contracts.\footnote{Art. 35 of the \textit{Labour Law}.} Hence, collective contracts are assumed to be more detailed than labour relations statutes and should contain general provisions respecting terms and conditions of employment, which are not included in labour contracts.

How can collective contracts play their full functions on the side of employees? The following case provides a good answer. On March 8, 1995, a work stoppage occurred at Beijing Xiehe Aoguang Shopping Center, a foreign joint venture. Approximately one hundred workers engaged in the strike after the negotiation of a collective agreement broke down. The strike was to force the boss to make a clear answer concerning the issues of the establishment of a labour disputes mediation committee in the shopping centre, the conclusion of labour contracts with individual workers and the guarantee of wages by the employer in the collective
agreement. The dispute was resolved through the mediation organized by Beijing Labour Disputes Arbitration Committee with the conclusion of a collective contract.\textsuperscript{408}

As noted above, strikes are not permitted under the\textit{Labour Law}. It is difficult to get accurate statistics on strikes for the purpose of negotiation of collective contracts, but it is not unreasonable to say there are some strikes for this particular purpose in today’s China. As discussed in the first section, there are conflicts of interests under the market economy in all kinds of enterprises. Since the right to strike is protected under freedom of association in the\textit{Constitution}, as suggested above, and the collective bargaining system, is going to be well established and function better, it is predictable that there will be more and more strikes for negotiation of collective agreements in future.\textsuperscript{409} Therefore, a general provision needs to be put under the\textit{Labour Law} in the chapter of collective contracts, which stating that the Law protects the workers’ right to take collective action for negotiation of a new collective agreement. The detailed provisions in regard to strikes are to be set out in the legislation of collective contracts.

c. Under Labour Disputes

Another chapter relevant to the right to strike under the\textit{Labour Law} is Chapter X, regarding labour disputes. As discussed already, labour disputes have

\textsuperscript{408} Supra note 405 at 4.

\textsuperscript{409} Infra note 411.
increased dramatically under the market economy. One particular characteristic of Chinese labour disputes is the large number of collective disputes. According to official statistics provided by the Ministry of Labour and the ACFTU, in the year 1994, the number of collective disputes brought before mediation committees was 32,645, which was a 72 percent increase over the same period in 1993. During the year 1994, 1,482 collective disputes were filed to arbitration committees, which was 1.2 times of the number in 1993. The number of the workers involved in the collective disputes increased by approximately 11.4 percent in 1994, which constituted 67.7 percent of the number of all workers involved in labour disputes.\footnote{Supra note 385 at 48.}

The general mechanism for resolution of a collective dispute has been set out under Article 84 of the Labour Law, which is a method of consultation and coordination to settle a dispute arising from the conclusion of a collective contract, and a method of consultation, arbitration and lawsuit to resolve a dispute arising from the implementation of a collective contract. Neither strikes nor lockouts are permitted under the Labour Law. However it does not mean the non-existence of strikes. Indeed, worker strikes have occurred with such frequency and the Ministry of Labour has stopped officially denying the existence of strikes since the year 1993.\footnote{According to China Country Report on Human Rights Practices, in the year 1993, two cases of strikes were widely reported in the Chinese press. One was the strike of workers in eleven foreign-invested enterprises in Tianjin. They initiated a work stoppage for the purpose of disregard for local regulations by foreigners and of the need to establish unions. The other was the strike to protest poor working conditions and alleged mistreatment of the workers by the management in a foreign-owned footwear factory in Xian by 1,200 workers. During the year 1994, there were 244 labour disputes resulting in strikes. One of largest well-documented cases involved a foreign-invested enterprise in Shekou in Shenzhen special economic zone at which 1,300 workers struck over working condition. In August 1995, a strike occurred when 600 female workers at a South Koran clothing factory in Hebei Province went on protest against excessive overtime hours. The number of work stoppages in the year 1995 was 1,870. In March 1996, six hundred workers at a joint venture hardware-manufacturing
As discussed already, being afraid that strikes will put its sovereignty in danger, the Chinese government does not protect a right to strike to Chinese workers. However, it is not wise to maintain a simple legal ban on strikes despite their existence. Strikes can be regulated and controlled under the legislation, as in Canada. In order to follow the Party’s policy of social stability, it is necessary to add an article in this chapter of the Labour Law to provide general principle concerning strikes. The detailed procedures in regard to strikes are to be provided in the legislation of the resolution of labour disputes.

3. Under the Legislation of Collective Contracts

The attitude of the Canadian legislature toward a right to strike, as analyzed in chapter I, is to confine the use of the strike weapon to the negotiation of a new collective contract. The limited right to strike is set out under the Canadian system of collective bargaining. Accordingly, the legal reform suggestions concerning the right to strike are mainly in the context of collective contracts legislation. The following suggestions include the requirements of a strike, the definition of “strike”, the protection of strikers and trade unions and regulation of picketing.

...
a. Requirements of a Strike

In Canada, whether a purposive restriction should be put into the definition of strike is highly controversial. The famous one-day work stoppage at the time of the “National Day of Protest” on October 14, 1976 provided a good example to illustrate the different opinions of courts and labour boards across Canada on this issue.\textsuperscript{412} However, the requirements of a strike under the Chinese legislation should make a positive answer to this question.

As noted, the main reason that the Communist Party rejected a right to strike in China is its fear of the political aspect of a strike. The Chinese government regards every strike as a threat to its sovereignty, and thus, concludes that the right to strike should not be protected under the Chinese legislation. However, there could be a ban on political strikes retained while permitting carefully regulated economic strikes.

Indeed, in Canada, there will be some strikes mainly for political purposes,\textsuperscript{413} but the fact is that political strikes are still exceptional.\textsuperscript{414} Although the Canadian legislation does not provide a purposive restriction on strikes, the thrust of Canadian labour law is to confine the strike action to economic interests. With an explicit restriction on political strikes, the Chinese legislation can function well to limit political strikes and therefore relieves the Party’s major concern.

\textsuperscript{412} See chapter I for detailed discussion.

\textsuperscript{413} Ontario (Attorney General) v. Ontario Teachers’ Federation, Court File No. 97-CV-134721, Ontario Court of Justice (General Division).

In regard to the timelessness of a strike, there should be a legal ban of strikes during the lifetime of a collective agreement, like the Canadian legislation. Free collective bargaining in Canada means both parties are entitled to agree or disagree. Once the two parties have reached a collective agreement, it has binding force on both sides. A dispute respecting the interpretation, administration or violation of a collective agreement should not resort to strike actions. The work stoppage by employees should be confined to the purpose of settlement of a collective agreement.

The collective bargaining system in China was re-established in the year 1994 after it has disappeared for 20 years. It has not been well established in just five years. This disadvantage of the Chinese collective bargaining system can be changed to an advantage if China adopts a superior model at the beginning of its establishment. The Canadian legislation on regulating strikes to negotiation of new contract terms provides China a practicable model because it represents a fundamental commitment to industrial peace and stability once a collective agreement has been concluded. What China needs most today is a stable society for economic development. A legal ban on strikes during lifetime of collective agreements will help achieve this.

Respecting the Canadian restriction of no strikes before certification, it is unnecessary to put it into the Chinese law. As mentioned above, all Chinese unions are established on the approval of the ACFTU. No independent unions are allowed in China. Putting it in other way, the trade union established on the approval of ACFTU is the only lawful union in an enterprise; it is also the only lawful centre for the workers to contract with their enterprise. In reality, the majority of the Chinese workers belong to the union branches in their enterprises. In accordance with the 1992
Trade Union Law, every productive and administrative units that have twenty-five or more staff and workers is required to establish a primary trade union committee. The ACFTU primary attention focuses on the public ownership enterprises. In collective and state-owned enterprises, only 8 percent of workers have chosen for their own reasons not to join the union in their enterprises. In regard to the foreign investment enterprises, 91 percent of them had union branches as of the end of 1995, and 80 percent of workers in these enterprises belonged to the union branches. Although it is doubtful that the ACFTU is a union in the Canadian sense, the ACFTU is the only lawful union in today's China which has the majority support of the Chinese workers. Since the Chinese union is protected to safeguard the legitimate rights and interests of the workers and conduct lawful activities under the Labour Law and the Trade Union Law, it can take the place to organize a strike, which is not prohibited in the reformed system.

However, China faces a specific problem in regard to its union. As analyzed in chapter II, the practical reason that there is no right to strike in China, in my point of view, is that Chinese union is not able to organize a strike. Chinese trade unions are

\[415\] Art. 12.
\[416\] Human rights report 19 96 at 32, supra note 159.
\[417\] Ibid. at 33.
\[418\] Supra note 193 at 199.

As discussed earlier, since the misconduct of management in foreign-funded enterprises was very serious, the Chinese government and the ACFTU have turned their attention to the establishment of trade unions in the foreign-funded enterprises. However, diversification in types of enterprises over the last decade of reform had increased the number of workers outside the sphere of the ACFTU. It is an important subject to deal with a right to strike to unorganized workers, but not the one the thesis is dealing with because the basis of the thesis is that the nature of strike is for the purpose of collective bargaining and collective bargaining is between the union on behalf of the employees and the employers.
not independent organizations. They are under the leadership of the Party. It is not the thesis topic to solve the problem of the independence of Chinese unions. At present, it is sufficient to say that the Chinese union could function properly to organize a strike as happened in the Solidarity movement, if the Party changes its posture toward the independence of the trade union for its purpose of protection of the Chinese workers (for example, if the Party accepts the distinction between an economic and political strike). Hopefully, Chinese union and Chinese workers need not wait for an unbearably long time.

b. Definition of “Strike”

As discussed in chapter I, the Canadian definition of “strike” generally means the employees’ actions in combination or in concert or in accordance with a common understanding designed to restrict or limit output. Considering the Canadian legislation, the following items should be included in the definition of “strike” in China.

(1) The number of employees. Under some Canadian legislation, there is a majority principle, which requires that the majority of the bargaining unit vote in favour of a strike before a strike occurs. There is no conception of bargaining unit in China. The Chinese legislation grants the Chinese workers the right to organize. In accordance with the 1992 Trade Union Law, the basic unit of union organization is the primary trade union committee which is established in productive and
administrative units that have twenty-five or more staff and workers.\textsuperscript{419} In practice, a primary trade union is established in most Chinese enterprises and the majority of the Chinese workers belong to the primary union in their enterprises.\textsuperscript{420} Therefore, the majority principle in China means that the majority of the members in the trade union which is involved in the labour dispute. Based on this principle which should be set out in the procedure of a strike, the employees engaged in a strike should constitute the majority of the members in the involved trade union.\textsuperscript{421}

(2) The purpose of the action. As analyzed earlier, the purpose of a strike is very important in the system of collective bargaining. The Canadian legislation recognizes this importance and sets forth a requirement that a strike must be aimed at limiting or restricting output. It is not enough to constitute a strike that more than one employee stops work. The reason that the Chinese government opposes a right to strike, as mentioned several times, is the lack of distinction between economic strikes and political strikes in the Party's view. In order to make the right to strike practicable in China and to keep harmony with the above suggestions, a strike for political reason should not be protected under the umbrella of the Chinese legislation. Striking as an economic weapon should be restricted in the economic scope.

\textsuperscript{419} Art. 12.

\textsuperscript{420} Supra note 415 - 418 and the accompanying text.

\textsuperscript{421} There is a difference between the majority who decide to go on strike and who are actually striking. However, they have a same basis which is the whole members in the involved union.
c. Protection of Strikers and Trade Unions

A general principle in the Canadian legislation respecting the employment status of a striker is that an employee who participates in a lawful strike is protected under the statutes. It is an unfair labour practice to refuse to employ or threaten to dismiss an employee who is exercising the right to participate in a lawful strike. This principle should be included in the Chinese legislation respecting the right to strike.

As discussed above, today's labour contract system put the Chinese workers into labour market. They have to establish labour relations on the basis of a labour contract. Under these relations, the employee is bound to work and the employer is bound to pay. Moreover, both of them are entitled to terminate the relationship in accordance with the law. Thus, the legislature should prevent the employer from terminating the employer-employee relationship by reason only of the employee ceasing to work as the result of a lawful strike. In accordance with it, employees who participate in a lawful strike retain the rights to their jobs, seniority and social security. Conversely, employees who participate in an illegal strike forfeit the right to their jobs. Concerning the Party's policy to a rapid economic growth, the statute should not prohibit the employers' using replacement workers during a strike.

One specific problem in regard to this protection principle is the protection of the trade union staff. The discussion of the past and present role of Chinese trade unions in chapter II has provided an investigation of trade union staff under the new condition of the market economy. Although the 1992 Trade Union Law emphasised the unions' function of protection, most trade union staff are afraid of being dismissed
if they say NO to the management in order to protect the interests of the workers. However, as the representative of the workers, a trade union plays a significant role in organizing a strike. The legislation should provide a specific protection to the trade union staff by guaranteeing their jobs and positions and impose a legal responsibility on employers if they run counter to the legislation. Although it may be difficult to convince trade union staff that they have really protected by putting such provisions in legislation,\(^{422}\) at least the legislation on paper gives a positive recognition of their role in strikes and this recognition will gradually encourage them in making the right to strike more practicable in China.

d. Confining the Right to Strike

As indicated in chapter II, the right to strike was protected under the 1975 and 1978 constitutions. But there was no effective mechanism for ensuring its implementation. More specifically, there is no right to strike under the 1982 Constitution. Thus, union picketing is a wholly new issue under Chinese labour law. It is not appropriate for China to adopt the Canadian law of picketing right now, but the basic principle in regulating picketing could be adopted in China.

Generally speaking, the Canadian law of picketing is that primary picketing is protected in order to support a lawful strike, but secondary picketing of a third party is prohibited. The legislation does not allow trade unions to expand rights associated with economic conflict beyond the parties directly involved in the conflict. This

\(^{422}\) In reality, there are great gaps between the Chinese legislation on paper and in practice - an interesting subject that has been discussed in regard to the Chinese constitution in chapter II.
principle could be adopted under Chinese labour law to regulate strikes, and the right to strike should be carefully confined to only the employer directly affected.

The importance of this restriction, in the Chinese context, is in the political realm as well as in the economic area. As analyzed above, the biggest obstacle respecting the right to strike in China is the Party's attitude towards strike actions. For the purpose of making practicable legal reform suggestions in Chinese labour law, the Party's attitude cannot be ignored. The former suggestion in regard to the purposive restriction has set out a prohibition of political strikes in China. To confine industrial conflict in a certain scope without expanding dangers to the society through widespread industrial disruption is not only in accordance with the former prohibition, but also significant in limiting strikes in the area of industrial relations. Therefore, it should be included in the Chinese law of regulating strikes.

4. Under the Legislation for Resolution of Labour Disputes

Under Canada labour law, a strike is regarded as a weapon for negotiation of collective agreements. There is a legal ban on strikes where compulsory interest arbitration is substituted. Under Chinese labour law, the procedure to solve a dispute arising from the conclusion of a collective agreement includes consultation and co-ordination. Strikes are prohibited in the procedure.

As discussed in chapter III, the Chinese way to resolve a dispute arising from the conclusion of a collective agreement looks similar to the Canadian interest arbitration because of the prohibition on strikes in both of these procedures. However,
the difference between them is that the Chinese prohibition on strikes covers all kinds of labour disputes, no matter they occur in the public or private sector; while the Canadian prohibition is in the area of the public sector.

As suggested in the former section, strikes should be allowed for the purpose of negotiation of a new collective agreement under the Chinese system of collective bargaining. Following this, the resolution mechanism of labour disputes arising from the conclusion of collective agreements should include strikes. This reformed mechanism can keep the original procedure of consultation and co-ordination, but needs to detail the co-ordination procedure because there is no explicit provision respecting the co-ordination procedure under the current legislation. More importantly, it needs to add mediation in the pre-strike procedure.

First, where a labour dispute arises from conclusion of a collective agreement, the parties involved should apply for co-ordination when the consultation fails. The labour administrative department should organize a co-ordination committee to handle the case. The co-ordination committee, which is composed of equal number of representations from each side of the dispute, equal number of representatives from the higher trade unions and the government department in charge of the enterprise, is granted the right to examine the dispute, creating both an opportunity and an obligation for the parties to continue negotiation. If the commission reaches an agreement, it is legally binding.

Second, if an agreement is not reached in the co-ordination procedure, the parties must submit the matter to the labour dispute arbitration committee for mediation. The mediation procedure should follow a special one, which is similar to
the one set out in the *Rules concerning Ways the Labour Arbitration Committee Dealing with Labour Disputes*. That is, the labour arbitration committee should make up a special mediation committee to deal with the case. The special mediation committee should follow the principles of nearness and promptness. If the mediation procedure is unable to settle the parties’ differences, a strike is permitted after a majority vote of the trade union members in the involved union.

One question which cannot be left out here is the Canadian legislation respecting strikes in public sector. As argued earlier, the right to strike is very important in free collective bargaining. However, the legislation should protect public interest as well as safeguarding the workers’ interest. It is for this reason that the legislation prohibits strikes for Canadian public employees in some jurisdictions. The legislative prohibition of freedom of strike is accompanied by a mechanism for dispute resolution - interest arbitration - to ensure that the loss in bargaining power is balanced by access to a system which “is capable of resolving in a fair, effective and expeditious manner”. It is an important issue respecting legislative prohibition of freedom to strike for public sector employees, but not the one the thesis is dealing with. Under the legal reform suggestions relevant to Chinese labour law, it is necessary to provide a suggestion that there should be a legal ban on strikes in a series of industries that are essential to the national economy. The list of the industries need not to be provided in the legislation, but could be made in specific regulation on the basis of economic growth.

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423 Supra note 6 at 12,183-12,186.

424 Supra note 6 at 12,185.
In respect to the resolution of a dispute arising from the implementation of a collective contract, *Labour Law of the People's Republic of China* sets forth a procedure containing consultation, arbitration and lawsuit with a prohibition of strikes. As discussed in chapter III, the Chinese resolution mechanism is similar to the Canadian grievance arbitration on the ground of the prohibition of strikes. However, in Canada, strikes are viable options in the collective bargaining system. The restrictions on strikes during the lifetime of collective agreements under the Canadian legislation are to force the employees to use techniques other than strikes for dispute resolution. Since strikes are allowed for the purpose of negotiation of a new collective agreement in the reformed Chinese system, China takes the same way which sets forth arbitration procedure to solve a dispute arising from the implementation of a collective agreement, as Canada does.

**Summary**

The theoretical basis of no right to strike in China is the same interests among the state, the enterprises and the workers. Under the planned economy, neither the enterprises nor the workers had independent interests in labour relations. However, the socialist market economy in today's China has brought significant changes in labour relations in China.
In the private ownership enterprises, there is a clear conflict of interests between the employers and the employees. In the public ownership enterprises, the interest of the workers become an independent interest vis-à-vis the interest of the management on the ground that the state, with its main function of macro-regulation, is no longer involved in labour relations. Thus, the Canadian theory of conflicted interests and its practice of protection of a right to strike are undoubtedly significant. It is time now to discard indiscriminate underestimation of the Canadian experience from an opposite legal system. In the labour law theory and in actual practice, mutual exchange might be very productive in terms of promoting better working conditions and ensuring rights of workers, the basic aim of labour law.
CONCLUSION

Labour law developments in China are representative of the development of the economy and the legal system generally. At the present time, labour legislation reform is needed to meet the needs of the Chinese socialist market economy. To reflect present realities, novel approaches are required concerning legal regulation of labour issues, such as the right to strike.

As discussed in the thesis, the assumption of conflicting interests between the employees and the employers is the basis for the protection of a right to strike under the Canadian legislation. By contrast, the doctrine of the harmony of interests among the state, the enterprises and the workers is the basis for no right to strike in China. It is not the purpose of this thesis to examine the differences of the economic and political systems between China and Canada which lead to the different approaches. It is, however, appropriate to conduct a comparison between these different approaches, using it as a starting point for future development of Chinese labour law. This comparison, I believe, has several significant functions. First, it provides China a wholly different model of regulating strikes. On a fundamentally different assumption, the Canadian legislation protects the right to strike to employees, regarding it as a mechanism for regulating economic conflict between parties having conflicting interests. As analyzed in the thesis, labour relation under the socialist market economy in today’s China are similar to those in Canada. It is necessary to re-examine the Chinese recognition of the right to strike from a new perspective. This
comparative research offers China an opportunity of understanding a new approach, and thereby contributes to its finding of a better solution of regulating labour relation in today's China.

Second, this comparison is extremely useful for law reform in relation to the Chinese legal system. As argued in the thesis, it is not a wise choice to maintain a simple legal ban on strikes in China in spite of the frequency of strike actions. The Canadian model of regulating strikes provides China a solution of preventing or resolving industrial conflict. It will assist China in building its own legal system under the market economy.

In order to produce a working hypothesis for today's China, this comparison needs to provide a sharp criticism on the Chinese system. As argued in this thesis, the existence of conflicting interests in the labour relationship under the market economy needs special legal procedures for their resolution, especially a right to strike, which is absent in China. It is the basic point of the comparison that China should adopt a foreign solution that has proved satisfactory in its country, such as the Canadian model.425

425 In his book Reconcilable Difference, Professor Weiler discussed Canada's dismal record of industrial unrest. Supra note 360 at 57-64. However, the nature of Canada's strike problem has changed markedly in recent years.

Work Stoppages in Canada, 1985-95

<table>
<thead>
<tr>
<th>Year</th>
<th>Stoppages</th>
<th>Days Not Worked (000s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td></td>
<td>737</td>
</tr>
<tr>
<td>1986</td>
<td></td>
<td>660</td>
</tr>
<tr>
<td>1987</td>
<td></td>
<td>603</td>
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<td>1988</td>
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<td>489</td>
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<tr>
<td>1989</td>
<td></td>
<td>567</td>
</tr>
<tr>
<td>1990</td>
<td></td>
<td>515</td>
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</tbody>
</table>
However, this adoption does not mean a complete rejection of the whole Chinese system - indeed it is impossible. It does mean that China should conduct a serious investigation of its own national law and thereby build its own model with a consideration of a solution from a different legal system.

It is understandable that China and Canada are clearly quite different in their economic structure and political systems, not only in theory but also in practice. Their legal systems reflect the differences. As discussed in the thesis, the two countries have wholly different doctrines respecting labour relation. But it does not follow from this that a comparison of these two legal systems is impossible. Different legal systems can be compared if they solve the same factual problem, that is, answer the same legal need. In other words, a comparison of different legal systems can be meaningful with function of the compared subject as its basis.\textsuperscript{426} What is the function of a right to strike? It is to enhance justice in the workplace and society; it is to protect the legitimate rights and interests of the workers - both in Canada and in China.\textsuperscript{427}

<table>
<thead>
<tr>
<th>Year</th>
<th>Days Not Worked</th>
<th>Days Not Worked</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>412</td>
<td>225</td>
</tr>
<tr>
<td>1992</td>
<td>345</td>
<td>168</td>
</tr>
<tr>
<td>1993</td>
<td>320</td>
<td>105</td>
</tr>
<tr>
<td>1994</td>
<td>328</td>
<td>133</td>
</tr>
<tr>
<td>1995</td>
<td>194</td>
<td>98</td>
</tr>
</tbody>
</table>

Days not worked are measured in units of 10,000.


\textsuperscript{427} Art. 1 of the \textit{Labour Law of the People's Republic of China} provides: This Law is formulated in accordance with the Constitution in order to protect the legitimate rights and interests of labourers, readjust labour relationship, establish and safeguard a labour system suited to the socialist market economy, and promote economic development and social progress.
APPENDIX

A Summary of the Contents of the Labour Law of the People’s Republic of China

The 1994 labour code contains thirteen chapters and one hundred and seven articles. It touches upon every aspect of labour relationship. The following are the contents of this code.

Chapter I General Principles, covers article one to article nine. This chapter states the legislative purpose and the regulatory scope of the Code.\(^ {428}\) It imposes the responsibilities on the State in the regulation of labour relationship.\(^ {429}\) In addition, it details the rights and obligations of the employees and the employers,\(^ {430}\) and declares the legal status of Chinese trade unions in labour relationship.\(^ {431}\) This chapter is regarded as the spirit of Chinese labour law.

Chapter II Promotion of Employment, covers article ten to article fifteen. This chapter emphasizes the policy of helping Chinese citizens to establish a labour relationship.\(^ {432}\) In keeping with that policy, it prohibits discrimination on employment and gives special protection to females, persons with disabilities, minors, and

\(^{428}\) Art. 1-2.

\(^{429}\) Art. 5 - 6; 9.

\(^{430}\) Art. 3 - 4.

\(^{431}\) Art. 7 - 8.

\(^{432}\) Art. 10 - 11.
demobilized armymen. In order to guarantee the rights of the juvenile workers, it simultaneously states the minimum work age and gives special protection to juvenile workers.

Chapter III Labour Contracts and Collective Contracts, covers article sixteen to article thirty-five. This chapter is the most extensive chapter of the Code. In regard to labour contracts, it gives the conception of "labour contract", the principles in making out a labour contract and the invalidity of a labour contract. It provides the forms, contents, and terms of a labour contract. It details the conditions to terminate and dismiss a labour contract and the prohibitions on termination of a labour contract. In regard to collective agreements, the Code grants the workers the right to conclude a collective agreement with their enterprises, which has disappeared for almost thirty years in China. In order to implement this right, it specifies the

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433 Art. 12 - 14.
434 Art. 15.
435 Art. 16.
436 Art. 17 - 18.
437 Art. 19.
438 Ibid.
439 Art. 20.
440 Art. 23 - 32.
441 Art. 33.
procedure in making a collective agreement, the contents of a collective agreement, the enforcement and approval of a collective agreement.

Chapter IV Working Hours, Rest and Vacations, covers article thirty-six to article forty-five. The Code states the working hours system and stipulates restrictions on overtime work. It also declares rest in every week, the legal holidays and the annual vacation for employees.

Chapter V Wages, covers article forty-six to article fifty-one. This chapter states the principles of distribution, the level and kinds of wages. In order to protect the employees' right to be paid, it sets out minimum wages. In addition, it details the ways to pay wages and guarantees wages to be paid on legal holidays.

Chapter VI Occupational Safety and Health, covers article fifty-two to article fifty-seven. The law imposes the responsibility on enterprises in the protection of occupational safety and health. It sets forth the requirements on the facilities in working places, the specialized training for labourers engaged in specialized

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442 Ibid.
443 Ibid.
444 Art. 34 - 35.
445 Art. 36 - 37; 39; 41-44.
446 Art. 38; 40; 45.
447 Art. 46.
448 Art. 47.
449 Art. 48 - 49.
450 Art. 50 - 51.
451 Art. 52.
operations,\textsuperscript{452} and the procedure for statistics, reports, and dispositions of accidents of
injuries and deaths, and cases of occupational diseases.\textsuperscript{453} In addition, it empowers
labourers the rights to refuse to operate in dangerous conditions.\textsuperscript{454}

Chapter VII Special Protection for Female and Juvenile Workers, covers
article fifty-eight to article sixty-five. This chapter commits the State to provide
special protection to female and juvenile workers.\textsuperscript{455} In regard to the protection of
female workers, it prohibits female workers from engaging in a certain kinds of
work.\textsuperscript{456} It details the protections for female workers during their menstrual period,
pregnancy, maternity, and breast-feeding period.\textsuperscript{457} In regard to the protection of
juvenile workers, it forbids juvenile workers from being arranged to do specific
work,\textsuperscript{458} and assigns the duty upon employing units to provide regular physical
examination to juvenile workers.\textsuperscript{459}

Chapter VIII Occupational Training, covers article sixty-six to article six-nine.
This chapter describes the system of vocational training.\textsuperscript{460} In accordance with this
system, it places the responsibility on the State and people’s government to expand

\textsuperscript{452} Art. 55.

\textsuperscript{453} Art. 57.

\textsuperscript{454} Art. 56.

\textsuperscript{455} Art. 58.

\textsuperscript{456} Art. 59.

\textsuperscript{457} Art. 60 - 63.

\textsuperscript{458} Art. 64.

\textsuperscript{459} Art. 65.

\textsuperscript{460} Art. 69.
vocational training.\textsuperscript{461} Simultaneously, it requires employing units to establish a system of vocational training.\textsuperscript{462}

Chapter IX Social Insurance and Welfare, covers article seventy to article seventy-six. It declares the policy of developing social insurance undertakings with the coverage of old age, illness, work-related injury, unemployment and child-bearing.\textsuperscript{463} In order to implement this task, it addresses the level of social insurance\textsuperscript{464} and the sources and management of social insurance funding.\textsuperscript{465} In addition, it states the role of labourers and employing units in the development of social welfare undertakings.\textsuperscript{466}

Chapter X Labour Disputes, covers article seventy-seven to article eighty four. This chapter focuses on the settlement of a labour dispute. It describes the principles in dealing with a labour dispute.\textsuperscript{467} More specifically, it details the procedures of consultation, mediation, arbitration and lawsuit to resolve labour disputes.\textsuperscript{468} In accordance with the procedures, it describes the composition a labour dispute

\textsuperscript{461} Art. 66 - 67.
\textsuperscript{462} Art. 68.
\textsuperscript{463} Art. 70; 73.
\textsuperscript{464} Art. 71.
\textsuperscript{465} Art. 72; 74.
\textsuperscript{466} Art. 75 - 76.
\textsuperscript{467} Art. 78.
\textsuperscript{468} Art. 76; 79; 82 - 83.
mediation committee and a labour dispute arbitration committee.\textsuperscript{469} Further, it sets out
the procedures in dealing with collective disputes.\textsuperscript{470}

Chapter XI Supervision and Inspection, covers article eighty-five to article eighty-eight. The law empowers the labour administrative department with the right
to supervise and inspect the implementation of the laws, rules and regulations
concerning labour.\textsuperscript{471} It also authorizes relevant departments, trade unions and any
organizations or individuals to supervise the implementation of the Law.\textsuperscript{472}

Chapter XII Legal Responsibilities, covers article eighty-nine to article one
hundred and five. The law places legal responsibilities upon employing units and
labourers when they commit the acts in violation of the Law.\textsuperscript{473} It proceeds to address
the legal responsibilities on any functionaries of the labour administrative department
or other relevant departments, or the functionaries of the State or the agencies in
charge of social insurance funds when they violate the Law.\textsuperscript{474}

Chapter XIII Supplementary Provisions, covers article one hundred and
six to article one hundred and seven. This chapter declares the date when the Law
comes into force.\textsuperscript{475} In addition, it assigns a task to the people's government of
provinces, autonomous regions and municipalities directly under the Central

\textsuperscript{469} Art. 80 - 81.
\textsuperscript{470} Art. 84.
\textsuperscript{471} Art. 85 - 86.
\textsuperscript{472} Art. 87 - 88.
\textsuperscript{473} Art. 89 - 102.
\textsuperscript{474} Art. 103 - 105.
Government to work out the implementing measures for the system of labour contract according to this Law and in light of their local conditions.\textsuperscript{476}

The 1994 \textit{Labour Law of the People’s Republic of China} is Chinese first labour code. It transforms the government labour policies into the legal form as statute. It is the most important legislation in the area of labour relationship. But the whole system of Chinese labour law includes not only the labour code, but also the specific regulations dealing with each aspect of labour relationships.

\textsuperscript{475} Art. 107.

\textsuperscript{476} Art. 106.
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