

**THE B.C. HEALTH SERVICES AND SUPPORT
DECISION—THE CONSTITUTIONALIZATION OF
A RIGHT TO BARGAIN COLLECTIVELY IN
CANADA: WHERE DID IT COME FROM AND
WHERE WILL IT LEAD?**

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I. INTRODUCTION

Just a few weeks after the 25th anniversary of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada rendered its decision in *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia*.¹ To suggest that the outcome and reasons for this decision were unexpected and surprising is perhaps an understatement.² The Court's record of timidity in the development of a meaningful concept of freedom of association under the Charter, and its open reluctance to interfere with legislative choices in the regulation of collective bargaining activity, had been demonstrated time and again in the prior twenty years, dating back to its notorious decisions in what has become known as the *Labour Trilogy*.³ From that point forward, with only a couple of limited exceptions in recent years,⁴ the Court had quite consistently denied claims by unions that concerted activity in aid of collective bargaining should be

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1. *Health Servs. & Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 (Can.). This case was released on June 8, 2007 [hereinafter *B.C. Health Services*].

2. I attended a meeting of Canadian Labour Law academics known as the Canadian Labour Law Casebook Group in Montreal on June 7–8, 2007 and there was not a single member of that group who had predicted the outcome in *B.C. Health Services*.

3. Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 (Alta.); *Pub. Serv. Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424; *RWDSU, Local 544 v. Gov't of Sask.*, [1987] 1 S.C.R. 460. More will be said about these decisions below. It will suffice at this stage to note that the majority of the Court ruled in favor of a very limited notion of freedom of association under section 2(d) of the Charter to hold that strike activity was not encompassed by the freedom.

4. *UFCW, Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016; *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8.

covered by the freedoms of association and expression under section 2(d) and 2(b) of the Charter. On the specific question put before the Court in *B.C. Health Services*, whether freedom of association included protection for a right to engage in collective bargaining, the Court had ruled against such inclusion in 1990.⁵ So for the Court to release a decision that not only declared the adoption of a new broader “contextual” concept of freedom of association, one that did include protection for a right to bargain collectively on workplace issues in the labor relations context, but also expressly overruled its own precedents on this issue, might even be described as breathtaking.

My objectives in this paper are fourfold. First I will try to set out the legal, political, and economic context that preceded *B.C. Health Services*, and that perhaps helps us understand the forces that gave rise to the decision. In explaining its departure from its prior jurisprudence on these issues, the Court speaks of moving from an abstract to a more “contextual” approach to interpretation of the freedom of association. It has been criticized for so doing,⁶ but it is nevertheless important to look at the legal, political, and economic context to attempt to explain the Court’s dramatic change of heart (and mind). Second, I will analyze the decision itself, both the Court’s reasons for its new approach to the freedom and the scope and limits of the newly defined freedom. Third, I will discuss some criticisms of the *B.C. Health Services* decision that have already appeared in the academic literature. Despite the fact it has been only one year since the decision was released, it has already been the subject of several critiques. Fourth, I will try to outline some of the potential implications of the ruling for future challenges to other aspects of the regulation of labor relations activity in the public and private sector.

On the potential implications of the decision, I will refer back to a paper I wrote in 1992 on the first ten years of Charter review of our labor laws. In that paper I referred to three categories of commentators on the Charter’s potential for bringing reform to our labor laws: the liberal romantics, who viewed the Charter as holding great potential for judicial review and improvement of our labor laws to protect free collective bargaining activity from unjustified government restraint; Charter realists or skeptics who were fearful the Charter could be interpreted in a neoliberal individualistic fashion to strike down labor legislation that enabled and protected concerted collective bargaining activity; and pragmatic pluralists,

5. *Prof. Inst. of the Pub. Serv. of Canada v. Comm’r of Northwest Territories*, [1990] 2 S.C.R. 367, 2002 SCC 8.

6. Brian Langille, *The Freedom of Association Mess – How We Got Into It and How We Can Get Out of It* (forthcoming 2009) [hereinafter Langille, *Freedom of Association*]; Brian Langille, *Can We Rely on the ILO?*, 13 CAN. LAB. & EMP. L.J. 363, 365 (2008) [hereinafter Langille, *Can We Rely on the ILO?*].

who accepted the legitimacy of Charter review, shared the skeptics concerns about the institutional fitness of courts to decide Charter cases on complex labor policy issues, but felt courts would generally be able to show wisdom in exercising restraint where appropriate and only intervening where the issues were appropriate for judicial resolution.⁷ The *B.C. Health Services* decision appears to have given new hope to the romantic liberals in terms of the prospect of turning to the courts for Charter review as a promising strategy for protecting workers from governments driven by a conservative (neoliberal) agenda and values. I will attempt to assess whether this newfound faith in Charter review is justified on the basis of the Court's actual rulings on the scope and limits of the freedom of association and their application to the legislation at issue.

II. CONTEXT

Many of the earliest instances of Charter review of Canadian labor laws involved attempts by unions to use the freedoms of association and expression to protect or extend their right to bargain collectively, strike, or picket to further their workplace objectives. The proclamation of the Charter in the early 1980s coincided with the introduction of legislation in several jurisdictions to restrict severely or prevent collective action by workers.⁸ Three of the earliest cases to reach the Supreme Court of Canada concerned attempts by unions to use the freedom of association provision of the Charter of Rights and Freedoms⁹ to strike down legislative restrictions on concerted collective action. The decisions in the three cases were released on the same day and became known as the *Labour Trilogy*. In those decisions, by a four-to-two majority, the Court held that the constitutional freedom of association did not protect the right to strike. The three cases involved union challenges to a variety of legislative restrictions on the right to strike in support of collective bargaining demands: several Alberta statutes that prohibited a wide range of public servants from engaging in strikes and required compulsory arbitration to resolve interest disputes;¹⁰ federal public sector wage control legislation that substituted an extension of existing agreements with statutorily prescribed wage increases for strikes in support of collective bargaining for a two to three year

7. See Brian Etherington, *An Assessment of Judicial Review of Labour Laws Under the Charter: of Realists, Romantics and Pragmatists*, 24 OTTAWA L. REV. 685 (1992).

8. Judy Fudge, *Labour, the New Constitution and Old Style Liberalism*, 13 QUEEN'S L.J. 61, 73-75 (1988).

9. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

10. Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 (Alta.).

period;¹¹ and an *ad hoc* Saskatchewan statute that placed a temporary ban on a threatened lawful rotating strike by dairy workers and ordered interest arbitration to resolve the bargaining impasse.¹² In all three cases the unions attempted to persuade the Court that freedom of association under section 2(d) of the Charter included both the right to bargain collectively and the right to strike as a collective activity that was essential to pursuance of the association's lawful objects.

In the *Alberta Reference* case,¹³ which contained the reasoning of the Court on which all three decisions were based, four of the six justices held that freedom of association did not encompass protection for the right to strike. However, three of the six judges went further and held that freedom of association also did not include protection for a right to bargain collectively, finding that it should be interpreted narrowly to include only the freedom to join in association for a common purpose and provide protection for associational activities only insofar as they represented the exercise of another constitutionally-protected right or freedom, like the freedom of expression.¹⁴ The fourth majority judge, Judge McIntyre, found that freedom of association also encompassed protection for activities pursued in association that a person could lawfully pursue as an individual. Thus Judge McIntyre left open the possibility that some aspects of collective bargaining activity might be protected by the freedom of association.¹⁵

However, in two subsequent decisions, *P.I.P.S. of Canada v. Northwest Territories (Comm'r)*¹⁶ and *Delisle v. Canada (Dep. Att.-Gen.)*,¹⁷ the Court held that the Charter did not protect a right to bargain collectively. In the latter decision the Court held there was no violation of the Charter's freedom of association where the federal government had expressly excluded the R.C.M.P. from access to collective bargaining under its two statutory regimes for the promotion and protection of collective

11. *Pub. Serv. Alliance v. Canada*, [1987] 1 S.C.R. 424.

12. *RWDSU, Local 544 v. Gov't of Sask.*, [1987] 1 S.C.R. 460.

13. *Alberta Reference*, 1 S.C.R. 313 (Alta.).

14. *Id.* (LeDain, J., concurring).

15. The Chief Justice of the Court at that time, Justice Dickson, issued a powerful dissent in all three cases, holding that freedom of association encompassed the freedom of persons to join and act with others in common pursuits. *Id.* (Dickson, C.J., dissenting); *RWSDU*, 1 S.C.F. 460 (Dickson, C.J., dissenting); *Pub. Serv. Alliance of Canada*, 1 S.C.R. 424 (Dickson, C.J., dissenting). Therefore the right to bargain collectively and to strike were protected by section 2(d) and the restrictions imposed on those rights in the three cases had to be justified as reasonable limits under section 1 to survive. Dickson C.J. relied on the history of collective bargaining in Canada and Canada's international obligations under ILO conventions and UN documents to support his position, and significant portions of his dissent appear to echo loudly in the majority decision in *B.C. Health Services*. In fact, much of the reasoning in the latter decision can be viewed as an adoption of Dickson C.J.'s dissent in the *Labour Trilogy*.

16. *Prof'l Inst. of the Public Serv. of Canada v. Nw. Territories (Comm'r)*, [1990] 2 S.C.R. 367.

17. *Delisle v. Canada (Deputy Attorney Gen.)*, [1999] 2 S.C.R. 989.

bargaining in the private¹⁸ and public sectors.¹⁹ The Court held that freedom of association did not include a right to be represented by a particular association or to be included within a particular regulatory regime designed to protect a right to bargain collectively. In both decisions the Court appeared to be adhering to the traditional position taken in the 1987 right to strike cases that it should be deferential to legislative choices concerning collective bargaining policy and should be slow to adopt expansive interpretations of the freedom of association in the Charter that might require it to intervene and interfere with legislative policy choices.

The unions found similar disappointments in their attempts to use the fundamental freedoms to protect their right to picket from legislative and judicial restraints. In *RWDSU v. Dolphin Delivery Ltd.*,²⁰ the SCC held that peaceful labor picketing would fall within the scope of protected expression under section 2(b) of the Charter, but then went on after a very cursory section 1 analysis²¹ to conclude that restraints on secondary picketing were per se reasonable limits on the worker's freedom. Perhaps even more disappointing for liberal romantics who thought the Charter held great potential to protect workers' interests was the Court's finding that, although the Charter could apply to the common law, it could not apply to private litigation between private parties. The actions of courts in ordering and enforcing injunctions on behalf of a non-governmental employer could not constitute governmental action for the purposes of the application of the Charter. In a slightly later ruling upholding an *ex parte* injunction against peaceful primary picketing by court workers,²² the SCC further demonstrated its antipathy to using the fundamental freedoms under the Charter to protect collective worker action from government restraint.

However the Court began to signal a slight thaw in its icy reserve on use of the Charter to protect workers' rights in a series of decisions from

18. Canada Labour Code, R.S.C. ch. L-2 (1985).

19. Public Service Staff Relations Act, R.S.C., ch. P-35 (1985).

20. *RWDSU Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573. For criticism of this decision see Fudge, *supra* note 8; Brian Etherington, *Case Comment*, Retail, Wholesale and Dept. Store Union, Local 538 v. Dolphin Delivery, 66 CAN. BAR REV. 818 (1987); Allan C. Hutchinson & Andrew Petter, *Private Rights/Public Wrongs: The Liberal Lie of the Charter*, 38 U. TORONTO L.J. 278 (1988); H.J. Glasbeek, *Contempt for Workers*, 28 OSGOODE HALL L.J. 1 (1990).

21. Under section 1 of the Charter, infringements of rights or freedoms can be upheld as a reasonable limit that is demonstrably justifiable in a free and democratic society. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.). Over the years the court has developed a four part test to satisfy section 1: the purpose of the impugned law must be pressing and substantial; there must be a rational connection between the identified government purpose and the means chosen in the law to obtain that objective; the impugned law must impair the right or freedom minimally (considering alternative means available to the government); there must be proportionality between the objective of the impugned law and the deleterious effects on rights and freedoms of the measures employed by the law. This test originated in *R. v. Oakes*, [1986] 1 S.C.R. 103.

22. *British Columbia Gov't Employees' Union v. British Columbia (Attorney Gen.)*, [1988] 2 S.C.R. 214.

1999 to 2002. In two 1999 decisions it used the freedom of expression to strike down restrictions on peaceful picketing and related activities in support of a lawful strike. In the first case, *UFCW, Local 1518 v. Kmart Canada Ltd.*,²³ the Court struck down a definition of picketing in the British Columbia Labour Relations Code to the extent that it prohibited consumer leafleting, but left undisturbed most of the extensive restrictions on picketing provided for in the Code. In another decision released on the same day, *Allsco Building Products Ltd. v. UFCW, Local 1288P*,²⁴ the Court applied the same reasoning to exclude peaceful consumer leafleting at secondary (non-employer) locations from the definition of prohibited secondary picketing activity under the New Brunswick *Industrial Relations Act*. And in 2002, in its decision in *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,²⁵ the Court held that freedom of expression under the Charter required the courts at common law to treat secondary picketing as legal except where it involved wrongful action. The Court expressly overruled prior decisions that had held that secondary picketing was per se illegal at common law²⁶ and had implicitly ruled that all restraints on secondary picketing were per se reasonable limits under section 1 as indicated in *Dolphin Delivery*.²⁷

The warming trend continued in *Dunmore v. Ontario (Attorney General)*.²⁸ The Court surprised many observers when it held that the Ontario government's exclusion of agricultural workers from the *Labour Relations Act, 1995*,²⁹ after they had been protected by a separate statutory regime from 1992 to 1995, which was repealed in 1995, was an unjustifiable violation of freedom of association. In doing so, the Court recognized that the Charter freedom of association may place a positive obligation on a government to provide statutory protection for the freedom of association of agricultural workers or other vulnerable categories of workers who are likely to have the exercise of their freedom interfered with by employers in the absence of such protection. Thus where the legislature extends general protection for associational activities, legislative choices to exclude some workers may be subject to judicial intervention, particularly where the excluded workers can demonstrate they are vulnerable to management interference with their freedom of association in the absence of statutory protection. But, as indicated by several academic

23. *UFCW Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083.

24. *Allsco Bldg. Prods. Ltd. v. UFCW Local 1288P*, [1999] 2 S.C.R. 1136.

25. *RWDSU Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156.

26. *Hersees of Woodstock Ltd. v. Goldstein*, [1963] 38 D.L.R. (2d) 449 (Ont.).

27. For a comprehensive discussion of this decision, see Bernard Adell, *Secondary Picketing After Pepsi-Cola: What's Clear and What Isn't?*, 10 CAN. LAB. & EMP. L.J. 135 (2003).

28. *Dunmore v. Ontario (Attorney Gen.)*, [2001] 207 2001 S.C.C. 94.

29. *Labour Relations Act, 1995*, S.O., ch. 1, as amended.

commentators,³⁰ the extent of the protection for associational activities required by *Dunmore* was very unclear at this point. The Court did not reverse its finding in *PIPS* and *Delisle* that freedom of association does not protect a right to bargain collectively. However, it did find that some forms of collective activity, beyond the collective exercise of constitutionally protected individual activity or activity that would be lawful if done as an individual, were now encompassed by the freedom of association. But the extent of associational activities that may be protected after *Dunmore* was very unclear. The Court simply stated that “certain union activities—making collective representations to an employer, adopting a majority political platform, federating with other unions” may be central to the exercise of the freedom of association despite the fact that they have no lawful correlative in terms of individual activity.³¹

Despite the evolutionary potential of *Dunmore* to open up possible judicial intervention to challenge other forms of legislative restriction on union associational activity or to require legislative action to protect vulnerable workers’ freedom to engage in associational activity, Justice Bastarache expressly indicated that his decision should not be read as changing prior Court rulings denying constitutional protection to the right to strike or bargain collectively.³²

Given this legal narrative, what explains the Court’s decision to make an about-face only six years after *Dunmore* and step where it had previously feared to tread, into the labor policy making territory that the majority in *B.C. Health Services* described as an area the Court had previously declared a “no go” zone for *Charter* review? The reasons suggested by Professor Fudge include: (1) it was becoming increasingly difficult to justify the Court’s narrow interpretation of freedom of association alongside its expansive reading of freedom of expression; (2) the Court had begun in recent years, including in *Dunmore* itself, to give more traction to international human rights and obligations in the interpretation of the *Charter*; (3) the political context in recent years had demonstrated that the Court’s reluctance to engage in *Charter* review of labor law had enabled (and perhaps encouraged) several provincial governments to ride roughshod over labor rights and collective agreements when they found it politically

30. Michael MacNeil, *Unions and the Charter: The Supreme Court and Democratic Values*, 10 CAN. J. LAB. & EMP. L. 3, 8 (2003). See also Patricia Hughes, *Dunmore v. Ontario (Attorney General): Waiting for the Other Shoe*, 10 CAN. LAB. & EMP. L. J. 27 (2003); John D.R. Craig & Henry Dinsdale, *Freedom of Association: A “New Trilogy” or the Same Old Story?*, 10 C.L.E.L.J. 59 (2003); Steven Barrett, *Dunmore v. Ontario (Attorney General): Freedom of Association at the Crossroads*, 10 CAN. J. LAB. & EMP. L. 83 (2003).

31. *Dunmore*, 3 S.C.R. 1016, ¶ 17.

32. *Id.* ¶ 17. “That is not to say that all such [collective] activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d) . . .”

and fiscally expedient to do so;³³ and (4) there was a trend on the part of unions in Canada and other countries to turn increasingly to litigation before domestic and international tribunals as a strategy to protect collective bargaining rights and processes from legislative retrenchment by increasingly conservative or neoliberal governments.³⁴

I think it is quite plausible that the first three factors referred to above played some role in moving the Court to recognize a right to collective bargaining as a fundamental right under the Charter, and indeed there are express references to the first two factors in the Court's decision. I am not as confident about the fourth factor playing a causal role. Certainly the union's adoption of a strategy of turning to adjudication in rights disputes in the face of unfriendly neoliberal government policy is not new or unique to the context faced by the Court in 2007. This strategy was at the forefront and very widespread in Canada among unions in the 1980s and early 1990s when the adoption of the Charter came about just as Canadian governments hit on the solution of imposing severe restrictions on collective bargaining rights to deal with fiscal problems and broader economic problems like inflation. The ardor of unions for litigation waned somewhat by the mid-1990s as they were met with little or no success in Charter litigation. It is true that unions in Canada have returned to litigation in response to the judgments issued by the Court from 1999 to 2002 indicating that the Court might be warming up to the prospect of playing some role in supervising government regulation of collective action. But I don't think it can then be said that the decision in *B.C. Health Services* is a consequence of this return to litigation any more than it can be said that the Court's initial "no go" response in the *Labour Trilogy* and other early cases was a consequence of the flood of Charter litigation the Court faced in the 1980s and early 1990s. To the extent the Court might have perceived a new broader strategy on the part of unions to turn to litigation rather than legislative politics, it could

33. Judy Fudge, *The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support case in Canada and Beyond*, 37 *INDUS. L.J.* 25, 26 (2008). Fudge references the actions of the B.C. government in the legislation that led to *B.C. Health Services* and the actions of the Ontario Conservative government in immediately, upon its election in 1995, repealing the legislation that extended collective bargaining to agricultural workers that led to the *Dunmore* decision. These are but two examples of many legislative and executive acts by governments in Canada from the early 1980s to the present that quashed or interfered with existing collective agreements or collective bargaining rights. Other examples include the actions of the Quebec government that led to the decision in *Confederation des syndicats nationaux v. Quebec (Procureur general)*, [2007] J.Q. No. 13421. (S.C.) discussed below, and several other pieces of legislation passed by the Ontario government in the late 1990s and early 2000s to allow for restructuring and downsizing by government employers and quasi-public sector employers.

34. *Id.* at 26. She also suggests that the latter trend to turn to litigation as an alternative to legislative politics is part of broader "transformation in the justificatory discourse for labour's collective rights from social democracy and industrial pluralism to human rights" (*Id.* at 27).

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just as easily have said the only appropriate response was to continue to defer to the legislature to make labor relations policy.

It is perhaps more likely that the Court responded differently in 2007 than it did in 1987 because it saw legislatures taking advantage of the Court's early decision to declare the area off limits for Court supervision. Perhaps it recognized the need to indicate its willingness to step into the fray when the government became the bully, taking advantage of the lack of Charter protection. That would clearly seem to have been the main impetus for the *Dunmore* decision, given the Court's focus on the vulnerable nature of agricultural employees in justifying its decision to give some protection for associational activities under section 2(d). At the same time however, it is clear that the Court continues, in both *Dunmore* and *B.C. Health Services*, to be concerned about the need to place significant limits on the scope of the newly defined freedom to avoid being drawn into too great a supervisory role in the area of labor policy making.

III. B.C. HEALTH SERVICES: CONSTITUTIONALIZING THE RIGHT TO COLLECTIVE BARGAINING

A. *Factual Context*

In January 2002, the government of British Columbia introduced legislation to override provisions in collective agreements for health care workers. The avowed purpose of the restrictions on free collective bargaining was to respond to what the government called a crisis of sustainability in the provincial health care system. The provisions that were overridden dealt with employee rights on transfer or reassignment, restrictions on contracting out, job security programs, and layoff and bumping rights. It also changed the legislation then in place for the recognition of successor bargaining rights when all or part of a business was transferred to another entity. In addition to invalidating important provisions of existing agreements, it effectively precluded meaningful collective bargaining on a number of these issues in the future.

In short, the legislation gave health care employers much greater flexibility to reorganize their operations and contract out work in ways that would not have been permissible under existing collective agreements. These changes were enacted very speedily, with only three days between first reading and passage, and with no meaningful attempt to consult with unions prior to enactment.³⁵

35. The lack of consultation with unions has been identified by several authors as likely the fatal flaw in the government's actions. Fudge, *supra* note 33, at 33, notes that both the SCC and the ILO Committee on Freedom of Association made repeated references to this lack of notice and consultation in their decisions upholding union claims of violation of freedom of association. According to Fudge,

The unions responded by engaging in political protests and commencing a Charter challenge on the grounds that the new legislation violated both section 2(d) (freedom of association), and section 15 (equality) of the Charter.³⁶ They also filed a complaint with the International Labour Organization (ILO) asserting that the new Health and Social Services Delivery Improvement Act³⁷ violated ILO Convention 87.³⁸

Not surprisingly given the state of precedent at that time, the union's Charter claims were rejected by both the B.C. Supreme Court and the B.C. Court of Appeal. At both levels the unions relied heavily on the recognition in *Dunmore* that the freedom of association had to extend beyond activities that could be carried out lawfully by individuals to encompass certain union activities that were collective in nature but nevertheless central to freedom of association. However, the Court of Appeal held that if *Dunmore* was in fact intended to indicate a departure from precedent holding that the freedom did not encompass collective bargaining it should be left to the Supreme Court to make that new step and overrule its own prior decisions.³⁹ To the surprise of most informed observers of the previous twenty years, the Supreme Court of Canada did just that, extending the Charter freedom of association to include a right to bargain collectively.

B. *Reasons for Change*

The Court provides four main reasons for its decision to abandon its prior stance of restraint and extend the freedom to cover collective bargaining. First, that the reasons expressed by the Court in its section 2(d) jurisprudence for denying protection for collective bargaining "can no longer stand." Second, its prior stance was inconsistent with "Canada's historic recognition of the importance of collective bargaining to freedom of association." Third, international law can be used to inform the interpretation of Charter rights and freedoms, and collective bargaining is an integral component of freedom of association in international law. And

the unions involved had made known to the government their willingness to consult with the government on the issue of health care restructuring. Some labour lawyers have even suggested that right to bargain collectively as defined in *B.C. Health Services* can be limited to a duty to consult and that it was the failure to consult alone that led to a finding of violation. This cannot be right as there is nothing in the explanation of the rationale for the right, the definition of the right, or the criteria for violation that would suggest a government can do whatever it wants in term of interference with collective bargaining as long as it consults with workers and unions before taking legislative action.

36. The Charter challenge initially included a claim that section 7 (life, liberty and security of the person) had also been violated but that ground was abandoned at the B.C.C.A.

37. Health and Social Services Delivery Improvement Act, 2002 S.B.C. ch. 2.

38. International Labour Organization, Convention 87, *Freedom of Association and Protection of the Right to Organize*, July 9, 1948, 68 U.N.T.S. 17. Canada is a signatory to Convention 87 but not to Convention 98, *Right to Organize and Collective Bargaining* (1949).

39. *Health Serv. & Support--Facilities Subsector Bargaining Ass'n v. British Columbia*, [2004] 243 D.L.R. (4th) 175.

fourth, Charter protection for a right to collective bargaining is consistent with other Charter rights, freedoms, and values.⁴⁰

In terms of its main reasons from the *Labour Trilogy* and *PIPS* for refusing to protect a right to collective bargaining, the Court noted that it had been wrong to describe the right to bargain collectively and strike as modern rights created by legislation and not fundamental freedoms. To support its new view of history, it found that legislatures throughout Canada had historically viewed collective bargaining rights as sufficiently important to immunize them from potential interference, and it was this recognition of their historical importance that led them to incorporate protection for collective bargaining rights in Wagner Act type legislation in the post WWII period. In this revision of the Court's earlier take on labor law history, the incorporation of the freedom into statute in the 1940s did not detract from its fundamental nature, as the Court had held in the *Trilogy*, but instead simply confirmed it.⁴¹

The majority also declared that it had gone too far on the question of judicial restraint on questions of labor policy as a reason for interpreting the freedom narrowly. In its view, while it may still be appropriate for courts to defer to legislatures on the policy expressed in particular laws under review, it pushes deference too far to declare a judicial "no go" zone for an entire right on that ground, noting that "[p]olicy itself should reflect Charter rights and values."⁴²

Third, it had been wrong to try to limit the freedom only to protect activities that could be carried out lawfully by individuals and deny protection to activities that were inherently collective in nature in the sense that they could only be carried out collectively.⁴³

Fourth, it was wrong to deny protection for collective bargaining on the basis that this would amount to protection for the objects or goals of an association. It agreed that the freedom should not be susceptible to use to protect particular substantive outcomes of any association, but noted that it was possible to protect collective bargaining as a procedure that was distinguishable from its final outcomes or the goals of the process.⁴⁴

Finally, the Court concluded that the majority judgments in the *Trilogy* and *PIPS* had been too abstract, adopting a decontextualized approach to defining the freedom of association, which was in contrast to the more purposive approach taken by the Court in approaching other Charter guarantees. This abstract approach led the Court to ignore differences

40. Health Services & Support-Facilities Subsector Bargaining Ass'n v. British Columbia, [2007] 2 S.C.R. 319, ¶ 20, 2007 SCC 72 (Can.).

41. *Id.* ¶ 25.

42. *Id.* ¶ 26.

43. *Id.* ¶¶ 27–28.

44. *Id.* ¶ 29.

between organizations and to treat the freedoms in an identical fashion for groups as disparate as unions and book clubs. This had led the Court to overlook the importance of collective bargaining, both historic and current, to the exercise of freedom of association through collective bargaining in labor relations.⁴⁵ In this respect it noted the importance of *Dunmore* as opening up a new approach to interpreting the freedom, one that focused on three important aspects of the development of the law: interference with the associational aspect of collective activities, the need for a contextual approach, and the holding that section 2(d) can impose positive obligations on governments.⁴⁶

In terms of the three main reasons the SCC identified for now including protection for collective bargaining within section 2(d), it spent the most ink on attempting to demonstrate that Canadian labor history reveals the fundamental nature of collective bargaining. The reasons on this issue go on for twenty-eight paragraphs, in which the Court goes back to the Middle Ages to identify three major eras in the legal treatment of collective bargaining: repression, toleration, and recognition. The majority summarizes the history of collective bargaining in Canada as follows:

In summary, workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the Wagner Act model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labor movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes—the right to collective bargaining with employers.⁴⁷

The majority relies on this history, and the recognition of the importance of collective bargaining in labor relations statutes that were in place when the Charter was adopted in 1982, to find that collective bargaining was the most significant collective activity through which freedom of association has been expressed in the labor context. For the Court this new view of history supports a finding that section 2(d) of the Charter includes the notion of a procedural right to collective bargaining, one that includes a reciprocal duty to bargain on behalf of the employer.

45. *Id.* ¶¶ 30–31.

46. *Id.* ¶¶ 31–35.

47. *Id.* ¶ 63.

For some labor historians this is the most controversial and questionable part of the judgment,⁴⁸ because it is simply not accurate to suggest that Canada's labor history indicated acceptance by our common law courts or our legislatures of a concept of freedom of association that included an obligation on the part of employers to engage in collective bargaining, in good faith or otherwise, when approached by unions representing workers in their workplaces. As suggested by the Court in the last part of its summary above, prior to the adoption of statutes in Canada modeled on the Wagner Act, the best our unions could hope for was a laissez-faire attitude that would allow them to use strikes to force employers to bargain. More often than not during that period they were even disappointed in that hope by courts that were too willing to use their injunctive powers at common law to prevent unions from taking collective economic action against employers to compel them to bargain collectively. In that context, it may be a hollow claim to even assert that our law or society recognized access to collective bargaining in any sense as a fundamental right or freedom, but it is clearly not accurate to assert that it recognized a legal right to engage in collective bargaining that included an obligation on the part of employers also to engage in bargaining when approached by unions.

To further buttress this conclusion, the majority relies on a statement by the Minister of Justice in 1981 to the Special Joint Committee of the Senate and House of Commons on the Constitution. In that statement the Minister responded to a proposed amendment to include the freedom to organize and bargain collectively expressly in section 2(d) with the statement that these rights were already implicitly recognized in the words "freedom of association."⁴⁹

The majority then moved on to a brief summary of international law on a right to collective bargaining as an aspect of freedom of association and Canada's international obligations with regard to a right to bargain collectively. It began by stating the premise that "Canada's international obligations can assist courts charged with interpreting the Charter's guarantees . . ."⁵⁰ This is a premise that was accepted by the dissent of Chief Justice Dickson in the *Alberta Reference* decision in 1987, but failed

48. Eric Tucker, *The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada*, 61 *LABOUR/LE TRAVAIL* 151 (2008). See further discussion below in Criticisms section.

49. *B.C. Health Services*, 2 S.C.R. 391, ¶ 67. More will be said about this historical argument below in the Criticisms portion of the paper, but the elephant in the room that can't be avoided is why the Court finds this version of history preferable in 2007 when the same version was put before it in 1987 but rejected in favor of collective bargaining being a mere "modern statutory right," one that could therefore not be viewed as "fundamental" in the Canadian socio-historical context.

50. *Id.* ¶ 69.

to gain any real traction with the SCC until fairly recently.⁵¹ The majority expressly relies on Chief Justice Dickson's 1987 statement that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."⁵² The Court's adoption of this premise here appears to confirm its willingness to look at Canada's international obligations as an interpretive tool, if not a set of binding principles, when addressing Charter rights and freedoms.

In trying to identify relevant international law, the majority looked primarily at three instruments: the International Covenant on Economic, Social and Cultural Rights,⁵³ the International Covenant on Civil and Political Rights,⁵⁴ and the ILO's Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize.⁵⁵ Canada has acceded to both the international covenants and ratified Convention No. 87 in 1972. The majority then embarked on a brief review of the interpretation of these international instruments in Canada and internationally and found that they had been interpreted in a manner that supported the proposition that there is a right to collective bargaining in international law and that such a right should also be recognized under section 2(d). However, in addition to focusing on these three instruments and their interpretation, the majority went on to consider a recent review by ILO staff that summarized principles concerning a right to collective bargaining under the ILO⁵⁶ and the 1998 Declaration on Fundamental Principles and Rights at Work.⁵⁷ The Court has been criticized for relying on the recognition of a right to collective bargaining as a fundamental right in the 1998 Declaration on Fundamental Principles, without noting that the declaration does not create binding legal commitments on members of the ILO, other than to recognize and promote the principles underlying the four core rights.⁵⁸ However, the fact that the international consensus represented by the 1998 Declaration was only arrived at in 1998 and may not be legally binding on Canada may not be that significant for the majority, given its broad conclusions on the relevance of not only Canada's international law commitments, but also

51. The Court relies on its 2002 ruling in *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1.

52. *B.C. Health Services*, 2 S.C.R. 391, at ¶ 70.

53. International Covenant on Economic, Social and Cultural Rights, Dec. 15, 1966, 993 U.N.T.S. 3.

54. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

55. International Labour Organization, Convention 87, *Freedom of Association and Protection of the Right to Organize*, July 9, 1948, 68 U.N.T.S. 17.

56. Bernard Gernigon, Alberto Odero & Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 INT'L LAB. REV. 33 (2000).

57. International Labour Organization Declaration on Fundamental Principles and Rights at Work, June 19, 1998, 6 I.H.R.R. 285.

58. Langille, *Can We Rely on the ILO?*, *supra* note 6.

“international thought on human rights” to its interpretation of the Charter. In the passage below, the majority makes it clear that it is not limiting itself to Canada’s binding international law commitments when looking for guidance on the interpretation of Charter rights and freedoms:

the Charter, as a living document, grows with society and speaks to the current situation and needs of Canadians. Thus Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.⁵⁹

Finally, the majority found that protection for a process of collective bargaining under section 2(d) is consistent with the Charter’s underlying values of human dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy. To support that finding, the majority relied on the traditional industrial pluralist argument that collective bargaining is invaluable as an experience in self government and the introduction of the rule of law into the workplace.⁶⁰ It also noted the traditional pluralist argument that it addresses the historical inequality of bargaining power, thereby enhancing equality in the workplace and society.

IV. THE SCOPE AND LIMITS OF THE NEWLY DEFINED FREEDOM OF ASSOCIATION

In defining the scope of protection, the Court began by reminding us that the Charter only applies to state action, so the protection will only apply to legislative restraints on collective bargaining and the actions of government employers in conducting labor relations with their employees. It cannot apply to private employers directly. This was a case of a challenge against government legislation, not government bargaining as employer.⁶¹

The Court then provides a fairly broad statement of the freedom:

The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that section 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace

59. *B.C. Health Services*, 2 S.C.R. 391, ¶ 78.

60. *Id.* ¶ 82, relying on PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN COMPARATIVE LABOUR LAW 33 (1980), relying on the 1968 Woods Task Force Report.

61. *B.C. Health Services*, 2 S.C.R. 391, ¶ 88.

issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.⁶²

If the definition had ended here it would certainly provide a broad notion of the right, one clearly susceptible to coverage of other concerted activities in pursuit of collective bargaining objectives, including strike activities, despite the attempt to limit it to a procedural right. However, the Court goes on to set out several further limits on the right. First, it does not protect all associational activity in aid of collective bargaining. Rather, protection is limited to “substantial interference” with collective bargaining activity. Although the definition does not require an intention to interfere, the effect of the state law or government action must:

substantially interfere with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.⁶³

Thus the scope of the protection is limited in three ways. It is a right to a process or procedure and not particular substantive outcomes. Second, it is a right to a general process of collective bargaining, not a particular model of labor relations or bargaining regulation. Third, the interference must be so substantial that it interferes with the very process that enables workers to pursue workplace objectives by engaging in negotiations with their employer.

The Court went on to try to narrow the concept of “substantial interference” and the criteria to be used for its determination. The intent or effect of the government action must seriously undermine the activity of workers in joining together to negotiate workplace conditions and terms of employment. Examples such as “union breaking” actions or laws, denying a union access to labor laws providing for collective bargaining in

62. *Id.* ¶ 89.

63. *Id.* ¶ 90.

circumstances such as *Dunmore*, and acts of bad faith or unilateral nullification of negotiated agreement terms without meaningful discussion or consultation, were given by the Court. The issue in every case is whether a process of voluntary, good faith collective bargaining has been or is likely to be significantly and adversely affected.⁶⁴

In determining substantial interference, two inquiries or criteria should be employed: (1) the importance of the matter affected to the process of collective bargaining and the capacity of union members to pursue collective goals in concert; and (2) the manner in which the government action impacts on the right to good faith negotiation.⁶⁵

Both criteria have to be considered and satisfied to arrive at a conclusion of substantial interference. Even where the matter affected is of great importance to the process of bargaining, there will still be no violation of section 2(d) if the measure preserves a process of consultation and good faith negotiation. On the first criterion, the critical issue is whether the subject matter affected in a particular case is such that interfering with bargaining on that matter will affect the ability of unions to pursue common goals collectively. While the importance of subject matter is to be decided on a contextual basis, measures that prevent meaningful discussion about working conditions between employees and their employer or laws that unilaterally nullify significant existing negotiated agreement terms are given as examples of potential substantial interference.⁶⁶ The Court's decision to focus on the subject matter that is affected by the interference with collective bargaining, as the first criterion for substantial interference, appears to contradict its earlier stated intention to limit the right to collective bargaining to a purely procedural, as opposed to a substantive right that dealt with particular substantive outcomes.

In its analysis of the second criterion for substantial interference, the Court refers to both international principles of good faith negotiation and Canadian jurisprudence on the statutory duty to bargain in good faith that is common to all Canadian labor relations statutes. In doing so, it seems to incorporate effectively the current law of good faith bargaining under those statutes into the new constitutional definition of collective bargaining as a right within the freedom of association.⁶⁷ This appears to contradict the majority's earlier statement that it was not defining the right to collective bargaining to protect a particular model of labor relations or a specific bargaining method.⁶⁸

64. *Id.* ¶ 92.

65. *Id.* ¶ 93.

66. *Id.* ¶¶ 95–96.

67. *Id.* ¶¶ 98–108.

68. The Court's explicit adoption of the substance of the current Canadian law on the duty to bargain in good faith is made apparent by its heavy reliance on its own precedent in *Royal Oak Mines*

As these contradictions demonstrate, once again the majority's reasons appear to display a somewhat schizophrenic tendency in the definition of the scope and limits of the new constitutional right to bargain collectively, stating one view on the breadth or narrowness of the definition of the right and criteria for finding a violation of the right, and then appearing to contradict that view at another point in the judgment.

V. APPLICATION OF THE NEW DEFINITION TO THE PROVISIONS AT ISSUE

The application of the new test for substantial interference with collective bargaining rights by both the majority and partially dissenting opinion will give no comfort to those looking for certainty and clarity in constitutional standards. In the majority decision, provisions that nullified existing protections and prevented future bargaining in the areas of contracting out, layoff, and bumping were held to meet the necessary criteria for substantial interference and could not be saved as reasonable limits under section 1 of the Charter. These were said to deal with matters central to the freedom of association. However, it concluded that the same could not be said with regard to nullification of rights concerning transfers and reassignments, despite the fact that these issues were legislatively removed from future bargaining, in part because some similar protections on these issues were included in a new regulation proclaimed at the same time as the legislative reforms destroying the collective agreement terms. Even more confusing was the majority finding that legislative amendments to make it easier for health services employers to contract out work without having successor rights attach to the transfer of business, thereby making it harder for employees to retain their existing collective bargaining rights with the subcontractor as they would have done under the prior legislation, were held not to interfere with collective bargaining. The only explanation for this finding was a single sentence stating that these reforms simply modified existing protections for successor bargaining rights under the B.C. Labour Relations Code, and did not deal with the entitlements of employees based on collective bargaining.⁶⁹

It seems quite irrational for the Court to take the position that legislative changes that had the result of allowing the right to bargain collectively to be terminated more easily on the transfer of a business did not violate the newly recognized Charter protection, but that legislation that

Inc. v. Canada (Labour Relations Board), [1996] 1 S.C.R. 369 as defining the key principles that will make up the content of the new constitutional duty to bargain in good faith. In doing so the Court goes fairly deeply into the Canadian labour board model of good faith bargaining, setting out the subtle but often difficult distinction between "hard bargaining, which is legal, and surface bargaining, which is a breach of the duty to bargain in good faith." *B.C. Health Services*, 2 S.C.R. 391, ¶ 104.

69. *Id.* ¶¶ 122-23.

only nullified particular terms of agreements did substantially interfere with that protection. One could easily argue that removing access to a legislative scheme that enables the acquisition or preservation of collective bargaining rights is very analogous to what happened in *Dunmore* and should have been seen as a more substantial interference with collective bargaining than those affecting layoff and bumping provisions. In my view, protecting access to collective bargaining should be viewed as being more important than merely protecting the results of bargaining. The Court seems to have this hierarchy of the significance of measures that interfere with collective bargaining reversed.⁷⁰

Once the determination was made that the impugned provisions affecting contracting out and layoffs and bumping were sufficiently important to amount to substantial interference, the majority had no difficulty in finding that the manner or process used was also a substantial interference. Both in its failure to consult or discuss the reforms with the unions in advance, and in its inclusion of measures to prevent future bargaining or consultation on these issues, the government failed to meet the new Charter standard.⁷¹ Similarly, these two features of the legislation and the process of reform were pointed to as reasons why the government failed to meet the section 1 criteria that the impugned provisions must only constitute a minimal impairment of the Charter freedom at issue.⁷²

In a partial dissent, Justice Deschamps advocated adoption of a broader and simpler test for breach of the right to bargain collectively: whether the government measures prevent meaningful discussion and consultation about significant workplace issues, thereby interfering with collective bargaining activity, or they unilaterally nullify negotiated terms in agreements on significant workplace issues. In her view this lower threshold for violation of section 2(d) avoided the danger of moving section 1 analysis into the test for breach of section 2(d), a danger presented by the majority test for substantial interference.⁷³ However, she then embarked on a much less stringent test for section 1 justification and concluded that only the nullification of union rights to consultation on contracting out decisions

70. I hasten to add here that I am not disagreeing with the finding that the government's quashing of existing layoff and bargaining rights under collective agreements constituted a substantial interference with the right to bargain collectively. I just find the Court's refusal to find the newly defined freedom violated by amendments that would make it easier to extinguish existing access to collective bargaining rather bizarre, particularly since it purported to try to limit the new right to bargain collective to a procedural right, one that focused on access to procedures for collective bargaining.

71. *Id.* ¶¶ 132–36.

72. *Id.* ¶¶ 150–61. See also *supra* note 22 for a discussion on the test for section 1 developed in *R. v. Oakes*, [1986] 1 S.C.R. 103.

73. *Id.* ¶¶ 179–81.

amounted to a violation of section 2(d) that could not be upheld as a reasonable limit under section 1.⁷⁴

The section 15 equality arguments were rejected in both judgments, taking just a half page in the majority's reasons to dismiss without serious analysis. The appellant unions had tried to argue that the singling out of health care workers in this reform discriminated on both enumerated and analogous grounds covered by the section 15 prohibition on discrimination. The main grounds alleged were sex and occupational status as an employee in the health care sector. Despite the fact that occupations in the health service sector have been shown to be some of the most female dominated in the public and quasi public sector, the Court held there was no discrimination on prohibited grounds.⁷⁵ The Court's findings on this issue are consistent with a general refusal on the part of Canadian courts to find that regulation of employment on an occupational basis constitutes discrimination contrary to section 15, at least in part because of the Court's view that there is a tradition of occupational mobility in Canada.⁷⁶

VI. CRITICISMS OF *B.C. HEALTH SERVICES*

Early reaction to the reasoning employed by the Court in *B.C. Health Services* has been somewhat critical, despite fairly widespread acceptance of the outcome. Professor Fudge has criticized the Court for creating a very limited right to collective bargaining given the stringency of the test for substantial interference, and of blurring the distinction between a procedural and substantive approach to the right by including a consideration of the importance of the subject matter of negotiation as a critical criterion for breach of the duty of good faith bargaining.⁷⁷ She has also criticized the majority for blurring the division of labor between the section 2(d) analysis and the inquiry into whether a violation can be upheld under section 1, by considering criteria like the importance of the subject matter to the exercise

74. *Id.* ¶¶ 241–42.

75. *Id.* ¶¶ 162–65. The essence of the Court's reasons on this issue are found at paragraph 165.

Like the courts below, we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

76. This general finding is discussed more fully in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94.

77. Fudge, *supra* note 33, at 35–36.

of the right and the means used to achieve the government objective in its test for breach of section 2(d).⁷⁸ In her view the decision leaves a great deal of uncertainty in terms of the level of meaningful protection workers may have gained from the constitutionalization of collective bargaining, noting that the Court is careful to state that it does not guarantee access to any particular process of bargaining and that the right is only procedural and does not guarantee access to particular outcomes. As well, the Court's treatment of reforms to successor rights provisions protecting bargaining rights on the transfer of a business seems to suggest that rights provided by legislation, rather than collective bargaining, can be altered by government without consultation or negotiation and that will not violate the newly defined Charter right.⁷⁹

In addition, Fudge has expressed concerns with the efficacy of the remedy awarded by the Court. It adopted the same remedy as that awarded in *Dunmore* and many cases of Charter violation involving the regulation of economic activity, declaring the offending legislation invalid, but suspending the effect of the declaration for one year to give the government time to address the implications of the decision before the legislation will become of no force or effect. According to Fudge, this left us with the concern that the government would not adequately address the plight of the approximately 9000 workers who were affected detrimentally by layoffs and reduced bumping rights and that it would delay its response and provide the most minimal response allowed, similar to the action taken by the Ontario government in response to the *Dunmore* ruling. While the remedy was held in abeyance for a year, health sector employers could continue to contract out jobs.⁸⁰

78. *Id.* at 37. This is significant for the ultimate protection of the newly defined freedom because of the different location for the burden of proof under the two sections. The burden rests on the complainant to prove a violation of the newly defined freedom by proving on the balance of probabilities that the criteria set out by the Court have been satisfied by the government action. If the breach of section 2(d) is made out then the burden shifts to the government or other entity seeking to uphold the law to prove on the balance of probabilities that it meets the criteria for section 1 established by the Court. It is at least arguable that by moving some section 1 considerations into section 2 it will further limit protection for the freedom by placing a greater burden on complaining workers and unions and reduced the burden on those wishing to protect the legislation from challenge.

79. *Id.* at 41.

80. *Id.* at 39–40. As Fudge notes, after *Dunmore* declared the Ontario legislation that had excluded agricultural workers from collective bargaining rights and procedures to be invalid, the government took advantage of the eighteen month suspension of the declaration's effect to enact legislation that met the most minimal view of the Court's ruling, only requiring agricultural employers not to discriminate against employees who formed or joined employee associations and to accept representations made by employee associations. It did not impose any obligation on employers to bargain with employees in response to their representations. See Agricultural Employees Protection Act, 2002, S.O. 2002, ch. 16 (Can.).

The response of the parties to *B.C. Health Services* seems to have gone somewhat better than *Dunmore*. The unions and the government began bargaining on what should be done to address the ruling shortly after the decision and reached a tentative settlement in January of 2008 that was ratified

Undoubtedly the most severe critique of the Court's reasoning in *B.C. Health Services* has come from Brian Langille. Although he agrees with the Court's finding that its reasoning for a narrow conception of freedom of association in the *Labour Trilogy* can no longer stand, he finds that the other three reasons for going forward with a new definition of the freedom that encompasses a right to bargain collectively are fatally flawed, at least insofar as they are unable to support the conception of the right to collective bargaining that is ultimately arrived at by the Court. In short, he argues that the conception of a right to collective bargaining that includes not only a freedom to bargain collectively by workers but also a corresponding obligation on the part of employers to bargain in good faith, is not supported by Canadian labor law history, Canada's obligations under international law, or Charter values.⁸¹

On the historical argument, Langille notes that it is clear, even on the face of the Court's reasons, that prior to the adoption of the Wagner Act model in statutes in Canada in the 1940s there was no duty to bargain imposed on employers and it was only the statutes that brought compulsory bargaining to Canada. In this respect the Court's claim that the origin of a right to collective bargaining in the sense given to it in *B.C. Health Services* preceded the adoption of the present system of labor relations statutes in the 1940s simply cannot be sustained and does not support the notion that a right to collective bargaining in the form adopted by the Court has a long history as a fundamental value in our society.⁸² Eric Tucker has provided an even more critical analysis of the Court's labor history and agrees with Langille that it erroneously claims that employees enjoyed a right to bargain

by all the unions by the early summer of 2008. The settlements with the four unions include \$85 million in compensation and retraining funds for workers affected by contracting out and reduced bumping. They also apply to and amend the 2006–2010 collective agreements between the parties. The settlements also include guarantees of consultation and enhanced options for employees in the event of future proposals for contracting out. The settlements also require the government to repeal the sections of Bill 29 (the impugned legislation) that were ruled unconstitutional by the Court. The unions agreed to drop all outstanding claims and grievances based on Bill 29 and accept some contracting out that could result in layoffs. However, the settlements were without prejudice to the parties' positions on whether the SCC's ruling has retrospective effect. *B.C. Health Care Unions, Government Reach Agreement to Implement Supreme Court's Ruling Re Bill 29 In B.C. Health Services Case*, 21 COLLECTIVE BARGAINING E-BULLETIN (Lancaster House), Aug. 2008.

81. Langille, *Can We Rely on the ILO?*, *supra* note 6, at 365. It should be noted that even though he agrees the Labour Trilogy reasoning was faulty, he also feels the Court's new contextualized approach to interpreting the freedom, with the absence of consideration of abstract principles, such as the distinction between a freedom and a right is equally flawed and is partly responsible for the Court wrongly concluding that the Charter freedom includes a "right" to bargaining that includes a compelled duty to bargain in good faith on the part of employers. These arguments are mainly developed in a companion paper Langille, *Freedom of Association*, *supra* note 6.

82. Langille, *Freedom of Association*, *supra* note 6, at 13–15.

that entailed a corresponding duty on employers to bargain in good faith prior to the passage of modern labor relations statutes in the 1940s.⁸³

Langille also takes serious issue with the SCC's account of international law on freedom of association, and more particularly Canada's international obligations in the area of freedom of association. He notes that the majority does not refer to the fact that Canada has never ratified Convention 98 (Collective Bargaining) and also fails to refer to the actual wording of Convention 87 (Freedom of Association) or comments on that Convention by the Committee of Experts, or any specific rulings of the ILO Committee on Freedom of Association. Instead it refers to a recent review by ILO staff that summarized principles of collective bargaining, a review that is largely about Convention 98, a convention that Canada has not signed. He also notes that in its discussion of this summary of principles, the Court fails to address parts of the article that refer to Convention 98's central commitment to "voluntary negotiation" and the fact that the obligation to promote collective bargaining excludes recourse to measures of compulsion to enforce collective bargaining. Further, he notes that the Court relied heavily on the 1998 ILO Declaration on Fundamental Principles and Rights at Work without noting that the declaration was not intended to create binding legal obligations on ILO members who had not ratified the relevant conventions, but rather required member states to promote the principles set out in the Declaration.⁸⁴ In essence, Langille concludes that international law concerning the freedom of association does not include an employer duty to bargain and that the SCC was wrong to assert that it does.

Langille's view of international law on a right to collective bargaining as part of the freedom of association is rejected by some other Canadian academics. Most notably, Roy Adams has prepared a reply to Langille in which he notes the following problems with his analysis: (1) the SCC does not refer only to Canada's "legal obligations" but rather to its "international obligations" (legally binding or otherwise) as aids to interpretation of Charter guarantees, and the Court drew on the jurisprudence of the Committee on Freedom of Association, a body that does not make legally binding decisions but makes recommendations and issues opinions on freedom of association complaints; (2) while Convention 98 may not be legally binding on Canada, it has freedom of association obligations that flow from the ILO constitution, Convention 87, and customary international

83. Tucker, *supra* note 48. Tucker is also critical of the Court's selective extraction from the work of critical labour historians like himself while avoiding the critical insights of their work and constructing a romanticized but unreal version of labour law as progressing from repression to recognition for collective bargaining.

84. Langille, *Can We Rely on the ILO?*, *supra* note 6, at 378-84.

law, and those obligations are as extensive as those found under Convention 98 in terms of freedom of association, including a right to collective bargaining in the opinion of some ILO experts; and (3) careful consideration of the summary of principles of freedom of association by Gernigon, Odero, and Guido that was relied on by the SCC reveals that while voluntary negotiation may be the ideal, it is not an absolute principle and the summary relied on by the Court was accurate in stating that a right to bargain collectively includes a principle of good faith bargaining so as to avoid condonation of employer intransigence in bargaining. Adams notes on the latter point that the ILO oversight committees have not found legislative compulsion of good faith bargaining by employers to be inconsistent with the international norms of freedom of association and a right to bargain collectively.⁸⁵ It is perhaps also relevant to this debate, that the ILO's Committee on Freedom of Association upheld the B.C. unions' complaints filed against the reforms that were at issue in *B.C. Health Services* and came to conclusions that were quite similar to those of the SCC on the government's failure to consult and negotiate in good faith being inconsistent with the freedom of association under international law.⁸⁶

Langille goes further to suggest that the Court acted in a manner ill suited to its institutional role and capacity under the Charter by doing precisely what it said it was not doing, constitutionalizing a particular model of labor relations, indeed a model very peculiar to North American labor law concerning a duty to bargain in good faith.⁸⁷ He argues that the Court would have carried out its appropriate role under the Charter in a much better fashion if it had instead decided to deal with the case as raising equality issues under section 15 of the Charter. For Langille, this basis for confronting the treatment of B.C. health care workers would have avoided the danger of the Court taking on the task of designing a set of labor codes and would have maintained an appropriate relationship between the judiciary and labor policy.⁸⁸

While I share some of Langille's concerns with the potential for the Court's reasoning in *B.C. Health Services* to embroil the Court in an extensive and institutionally inappropriate process of devising models of

85. These arguments are set out in Roy J. Adams, *The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille's "Can We Rely on the ILO?"*, 14 CAN. LAB. & EMP. L.J. 317 (2008).

86. See Fudge, *supra* note 33, at 45, referring to Case No. 2180, Report No. 330 (Can.).

87. The same point is made by Michael MacNeil, *Romantic Liberals: Responding to Health Services*, Paper Presented at Canadian Industrial Relations Association Annual Conference, Vancouver, B.C. (June 6, 2008).

88. Langille, *Can We Rely on the ILO?*, *supra* note 6, at 390; Langille, *Freedom of Association*, *supra* note 6.

constitutional labor codes, I do not agree that the Court had a better option of turning to a section 15 equality analysis. First, as Langille himself seems to admit in his paper, the SCC has a very troubled (Langille calls it “thin”) equality jurisprudence under section 15 with significant difficulties in the area of identifying comparator groups to assess discrimination and the test for identifying analogous grounds of discrimination under section 15. There was really nothing in the Court’s jurisprudence under section 15, as it stood in 2007, that would have provided the basis for a finding that differential treatment of health care workers amounted to discrimination under section 15. Second, I do not think moving to an equality analysis would eliminate the labor relations policy making role for the Court in assessing when legislative exclusion or differentiation in treatment for different types of workers under different statutes would constitute a violation of section 15 that could not be upheld under section 1. Under the guise of equality analysis the Court would end up doing indirectly much of what it is required to do in deciding what activity is constitutionally protected under section 2(d).

Finally, at least one constitutional lawyer, writing from a non-labor-law perspective, has expressed serious concerns that the Court’s methodology in *B.C. Health Services* may have regressive consequences for the interpretation of freedom of association under the Charter in a broader, non-labor-law context. Jamie Cameron argues: (1) that by focusing on the right to bargain collectively as a due process right as opposed to a substantive right in the labor context it may have created a model for the freedom that downgrades it from a substantive freedom to a procedural one; and (2) that the Court’s heavy reliance on a contextualized approach to interpretation of the freedom, and rejection of an abstract view of freedom of association, resulted in an interpretation of the freedom that may have little relevance outside of labor relations settings, and could thereby be used to deny claims for protection in other types of infringement claims.⁸⁹

VII. THE POTENTIAL IMPLICATIONS OF *B.C. HEALTH SERVICES*

The main question on the mind of Canadian labor lawyers and academics today is the extent to which the SCC’s new approach to freedom of association in *B.C. Health Services* could lead to successful challenges to restraints on collective bargaining in future cases. It is obvious from the reasons of the majority that despite the decision to extend Charter

89. Jamie Cameron, *Due Process, Collective Bargaining, and s. 2(d) of the Charter: A Comment on B.C. Health Services*, 13 CAN. LAB. & EMP. L.J. 323 (2008). Langille expressed similar views on the potential problems created by the Court’s abandonment of any consideration of abstract principles to develop a conceptual foundation for the freedom in favor of a wholly contextual approach. Langille, *Freedom of Association*, *supra*, note 6.

protection to a right to bargain collectively, the Court took great pains to attempt to limit the scope of the right to avoid broad Charter review of legislative choices concerning the regulation of collective bargaining. This attitude is perhaps also reflected by the Court's refusal to find that legislative amendments curtailing successor bargaining rights in the case of transfers of business amounted to a substantial interference with associational activity in support of collective bargaining. However, despite the Court's apparent desire to move forward in a limited and cautious manner, there are several broad statements of the newly defined protection, particularly in early parts of the judgment, that provide hope for romantic liberals that the definition of the freedom is open to further development and progression to provide broader Charter protection for concerted collective activity in support of collective bargaining objectives. Most notable in this respect are the Court's following statements:

We conclude that s. 2(d) of the *Charter* protects the capacity of members of labor unions to engage, in association, in collective bargaining on fundamental workplace issues . . . What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*: *Dunmore*.⁹⁰

...

. . . the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief the protected activity might be described as employees banding together to achieve particular work-related objectives.⁹¹

Although the Court followed the first of these statements with a note that the case before them did not concern the right to strike, several commentators have already noted that the Court's reasons may open the door of constitutional protection far enough to allow some degree of constitutional protection for the right to strike.⁹² Fudge points to the Court's reliance on the same international law instruments (art. 8 of the ICESCR, art. 22 of the ICCPR and ILO Convention No. 87) as those relied on by Chief Justice Dickson in his famous dissent in *Alberta Reference* to support his conclusion that under international law, the freedom of association includes the freedom to pursue essential activities of trade unions such as collective bargaining and strikes. The Court will undoubtedly be confronted in the near future with a Charter challenge that

90. *Health Services & Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, ¶ 19, 2007 SCC 27 (Can.).

91. *Id.* ¶ 89.

92. Fudge, *supra* note 33, at 43; MacNeil, *supra* note 87, at 11–12.

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will require them to address the fact that the same international law that supports protection for a right to collective bargaining as part of the freedom of association provides support for protection for a right to strike under the same freedom. In such a case it will also have to confront the fact that the *Labour Trilogy* held that freedom of association did not include the right to strike on the basis of the same reasoning that it employed to deny protection for collective bargaining, the same reasoning that was rejected by the SCC in *B.C. Health Services*.⁹³

In addition to restrictions on strike activity, there are numerous other aspects of the regulation of collective bargaining activity in both public and private sector labor relations statutes that can be challenged as presenting a substantial interference with a right to engage in collective action to achieve workplace goals. The most obvious are exclusions from access to schemes for collective bargaining. Even after *B.C. Health Services*, simple exclusion by itself will not be enough to constitute a violation of section 2(d). The Court continues to require the applicant to prove that the freedom to bargain collectively would be almost impossible to exercise without positive recognition of a right of access to a statutory regime in order to prove that denial of access to a legislative scheme is a Charter violation. According to MacNeil, there were at least three cases of claims based on denial of access to a statutory scheme providing for collective bargaining in play by the one year anniversary of *B.C. Health Services*.⁹⁴

93. Fudge, *supra* note 33, at 42–43. MacNeil, *supra* note 87, at 11, reports that such a case has already been started by several construction unions in Alberta to challenge the complex provisions of the Alberta Labour Relations Act regulating strikes in the construction industry. Under that scheme the Labour Board consolidates groups of unions and employer associations into a bargaining cluster for each round of bargaining. There must be a strike vote before any strike can take place, but such a vote can only take place if 60% of unions in the sector request it and there can be no strike unless 60% of those voting approve. Also there can be no strike unless all of the unions in the cluster who have not settled give strike notice. Further, if 75% of the unions in a sector have settled, the Minister of Labour can prohibit unions that have not settled from striking by referring remaining disputes to interest arbitration. *Alberta Labour Laws Violate Charter Rights, Construction Unions Claim*, 192 Labour Law E-Bulletin (Lancaster House), Oct. 2007.

94. MacNeil, *supra* note 88, at 5. The first such claim, *Fraser v. Ontario (Attorney Gen.)*, is sometimes referred to as Dunmore No. 2, because it is a union challenge against the minimal statutory scheme put in place by the Ontario government to comply with the ruling in *Dunmore* that its prior exclusion of agricultural workers had violated section 2(d) because it denied protection for a right to engage in the associational activity of formulating and presenting collective proposals on workplace issues to the employer. *Fraser v. Ontario (Attorney Gen.)* (2006) 79 O.R. (3d) 219 (S.C.). After much delay the government passed a statute that prohibited employers from discriminating against employees for forming associations and presenting association proposals to employers but did not impose any duty on the employer to bargain with such associations, only to receive them and acknowledge their receipt in writing if they were presented in written form. The trial judge in *Fraser* denied the union's Charter challenge, making express reference to the fact that *Dunmore* did not extend protection to a right to bargain collectively. Now that *B.C. Health Services* has in fact extended freedom of association to encompass a right to some process of collective bargaining, most analysts, including MacNeil, are predicting a different outcome on the union's appeal to the Ontario Court of Appeal. The two other claims involve the exclusion of RCMP from federal collective bargaining legislation (one might refer to this as *Delisle no. 2*, given an earlier rejection of a similar claim in *Delisle v. Canada* (Dep. Attorney

Other types of regulation that are likely to be challenged are restrictions on bargaining on particular workplace issues, a type of regulation that is fairly common in the public sector in Canada. The Court's finding that the B.C. government had violated the health care workers' constitutional right to collective bargaining seemed to rely heavily on the fact that the legislative reforms prohibited bargaining on certain workplace issues that were of significant importance to the workers (contracting out, layoffs, and bumping rights). To the extent that other public sector legislation restricts or prevents bargaining on similar "important" workplace issues, it is likely to be vulnerable to challenge after *B.C. Health Services*. Two of the three largest unions in the federal public sector have already commenced a motion to challenge restrictions on bargaining under the Public Service Labour Relations Act that prohibit bargaining on staffing, job classifications, pensions, and some critical elements of job security.⁹⁵

There are many other aspects of our current statutory regimes that can be said to interfere substantially with the right of employees to associate in a process of collective action to achieve workplace goals. Various types of statutory and labor board restrictions on acquisition of bargaining rights, in particular statutory and labor board restrictions on bargaining unit structure and definition, can be argued to constitute substantial interference with the right of workers to associate in collective bargaining activity. In a recent decision by the Quebec Superior Court, the reasoning in *B.C. Health Services* has already been used to strike down a broad statutory reform implemented by the Quebec government in 2003 to alter radically the bargaining unit structures that had been in place for many years in Quebec's health care and social services sector.⁹⁶ The government was responding to a report commissioned by a previous government to find ways to cope with the growing costs of health care and social services in the province. Two of

Gen.), [1999] 2 S.C.R. 989), and the exclusion of 17,000 part-time academic and non-academic staff working at Ontario community colleges. This latter challenge is likely to be short lived as the Ontario government, apparently in response to *B.C. Health Services*, introduced legislation (Bill 90) in June of 2008 to enact a new Colleges Collective Bargaining Act, 2008 to replace the old CCBA and extend the right to bargain collectively to part-time staff, both academic and non-academic. *Ontario Government Moves to Extend Collective Bargaining Rights to Part-Time and Sessional College Workers*, 213 LABOUR LAW E-BULLETIN (Lancaster House), July 2008.

95. MacNeil, *supra* note 87, at 10, referring to a challenge by the Professional Institute of the Public Service and the Canadian Association of Professional Employees. As Mac Neil points out, while it is possible to argue that issues like job classifications, pensions and job security are analogous to layoffs, contracting out and bumping rights, the SCC will face a complex situation in this challenge, given the fact that the largest public sector union, the Public Service Alliance of Canada, has not joined as a party to the motion, and the current restrictions on bargaining have been in place since a comprehensive regime for collective bargaining in the federal public sector was first introduced in the late 1960s.

96. *Confederation des syndicats nationaux v. Quebec (Procureur general)*, [2007] J.Q. No. 13421. (S.C.).

the key recommendations to reduce costs were to reduce radically the existing number of bargaining units (which numbered 3,542 for 425 employers) and require more workplace terms and conditions to be bargained locally. After two years of failure by the previous government to reach an agreement in talks with the unions and employers, the newly elected Liberal government imposed the new legislative scheme unilaterally in 2003. The key features of the law were a dramatic reduction in the number of bargaining units (from 3,542 to 782)⁹⁷ and a mandatory requirement that twenty-six important workplace issues were to be bargained locally, including core issues like working hours, bumping rights, mobility, holidays, and paid days off.⁹⁸

In holding that the government reforms did constitute substantial interference with the freedom of association of the affected workers and the included right to bargain collectively, the Court focused on the fact that the government compelled members of related but different professions into the same bargaining units despite long-standing contention and different interests. It also found that the government failed to provide a proper explanation for why it did not consult with the unions affected, for why it could not respect the wishes of certain professional groups to be represented by a union that best suited their aspirations and interests, and for why no attempt was made to deal with the problems of multiplicity of units and overlap through mechanisms available under existing Quebec labor law (by application to the Quebec Labour Relations Board). It was also held that while the section 2(d) right to collective bargaining did not guarantee a right to the status of bargaining agent for particular unions, some of the restrictions placed on the opportunity to be certified as bargaining agent for some of the unions with prior representation rights would have important repercussions on the collective bargaining process and failed to preserve a process of good faith consultation and negotiation. Similarly the mandatory relegation of particular workplace issues to local bargaining was also held to be a substantial interference with the right to bargain collectively. The decision on which items would be bargained centrally or locally was itself an important workplace issue that had been in the past, and should have

97. The changes to unit structure grouped employees into four umbrella bargaining units, with each unit including different but related job categories. Workers in each establishment were to be organized into these four prescribed units, with the units to be represented by one of the unions with members employed in the unit, by some combination of such unions, or by some new union formed by the merger of several unions. *Charter Right to Freedom of Association Violated by Quebec Legislation, Court Holds—Supreme Court's Decision in B.C. Health Services Applied*, 17 COLLECTIVE BARGAINING E-BULLETIN (Lancaster House) Apr. 2008.

98. *Id.* This latter reform was all the more significant since Article 111.14 of the Quebec Labour Code forbade workers in the public and parapublic sectors from striking over matters bargained locally. Quebec Labour Code, R.S.Q., ch. C-27 (1964) Prior to the reforms most important matters were bargained centrally.

been in the present, the subject of bargaining or at least good faith consultations with the affected parties. It was also held that these violations could not be upheld as a reasonable limit under section 1 given that they would likely have a dramatic and exceptional effect on the rights of employees, and the means chosen did not meet the requirement of minimal impairment. The offending reforms were declared to be invalid but the declaration was suspended for eighteen months to give the government an opportunity to respond.⁹⁹

Quite apart from the extent of the decision's potential to evolve into broader constitutional protection for workers to engage in collective action to reach shared goals related to workplace issues, *B.C. Health Services* will undoubtedly lead to attempts to get the Court to reconsider its previous rulings on the freedom not to associate under section 2(d). In two important cases dealing with section 2(d) challenges against government support for union security provisions, the Court extended its stance of deference and non-interference with labor law policy making to the negative aspects of the Charter freedom. In 1991, in *Lavigne v OPSEU*,¹⁰⁰ the SCC rejected a claim that the freedom of association under the Charter was violated by statutory or collective agreement provisions that provided for compulsory agency shop dues and allowed for their use for non-collective bargaining purposes against the objections of dissenting individual employees. Although a majority of the Court (4 of 7) agreed that the freedom under section 2(d) did include a freedom to not associate, only three of seven judges felt that this negative freedom was violated by the use of compulsory dues for purposes outside the immediate concerns of the bargaining unit, and even those justices would have upheld such collection and use of compelled dues as a reasonable limit under section 1.¹⁰¹ Several years later,

99. Another notorious example of a statutory restriction on bargaining unit definition that could be challenged as a substantial interference with the right to bargain collectively is the Michelin Amendment, enacted by the Nova Scotia legislature in 1979 to overturn a labour board ruling that single plant bargaining units were appropriate for certification applications at two separate Michelin plants in Nova Scotia. The Michelin Amendment added a requirement to the Trade Union Act of Nova Scotia that required that when an employer operating interdependent manufacturing locations made a request for a single unit for all plants the labour board must find that the single multi-plant unit is appropriate. See Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523, 546-52 (1981). It would seem that if a union could establish that particular restrictions on unit structure substantially interfered with the ability to acquire bargaining rights and engage in any form of collective bargaining it could be found to discourage the collective pursuit of common goals and therefore be in violation of the newly defined freedom as set out in *B.C. Health Services*, *supra* note 1, ¶ 90.

100. *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211.

101. Brian Etherington, *Lavigne v OPSEU: Moving Toward or Away from a Freedom to Not Associate?*, 23 OTTAWA L. REV. 533 (1991). See also Etherington, *supra* note 7, at 721, noting that the Court appeared to be anxious to avoid the problems of the U.S. jurisprudence on this same issue, which has demonstrated over the course of many U.S. Supreme Court decisions, the difficulties that can arise when judges are left with the task of deciding which activities are or are not legitimate collective bargaining concerns and activities. Examples of the American approach can be found in *Abood v.*

in *R. v. Advance Cutting & Coring Ltd.*,¹⁰² the Court narrowly rejected a Charter challenge against labor legislation in Quebec that required union membership as a condition of hiring. A slim majority (5 to 4) upheld statutory provisions that applied only to the construction industry, which required employers to hire only workers who were members of one of five trade unions listed in the legislation. However, this time all but one of the judges held that section 2(d) included the right not to associate and a majority of five justices held that compelled union membership violated that negative right. The legislation was saved only by the fact that one of the five justices who found that the freedom not to associate was violated by compelled union membership held that it was a reasonable limit in this case. But it is also important to note that in his dissenting opinion, Justice Bastarache relied on international human rights documents to find that international law recognized a freedom not to associate that should be used to aid in the interpretation of section 2(d).¹⁰³ Clearly then, the Court's decision to rely on international law as an interpretative aid in *B.C. Health Services* holds the potential that it can be used to support development of both the positive and negative aspects of the freedom of association.¹⁰⁴ And on a more general level, the fact that the Court has expressly withdrawn its earlier declaration that Charter review of labor relations policy was a "no go" zone and has indicated its willingness to develop the scope of protection for collective action by workers in pursuit of workplace goals may lead to a greater willingness to reconsider the scope of protection for a freedom to not associate. Is it possible that *Lavigne* and *Advance Cutting* will get the same treatment as the *Labour Trilogy*?¹⁰⁵

Detroit Bd. of Educ., 431 U.S. 209 (1977); *Ellis v. Brotherhood of Ry., Airline & SS Clerks*, 466 U.S. 435 (1984); and *C.W.A. v. Beck*, 487 U.S. 735 (1988).

102. *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209.

103. *Id.* ¶¶ 11–15, citing the International Covenant on Economic, Social and Cultural Rights, art. 8 Dec. 16, 1966, 993 U.N.T.S. 3, and the Universal Declaration of Human Rights, G.A. Res. 217-A, U.N. GAOR 3d Sess., 1st plen Mtg. U.N. Doc. A/810, article 20 (Dec. 12, 1948).

104. This point is also noted in Fudge, *supra* note 33, at 47.

105. In asking this question, I hasten to add that I am not arguing that there is anything in *B.C. Health Services* that can be construed as supporting an expansion of the negative aspects of the freedom. However, as long as the positive aspects of the freedom did not include a right to bargain collectively, it was easier for the Court to reject claims for an individual entitlement to be free from compulsory participation in collective bargaining. As long as the Court refused to develop the positive aspects of the freedom and declared that it was not the appropriate body to balance competing interests in this area of regulation of the workplace and employment relationships, it could be criticized more easily if it interfered with the regulation of union security in a manner that might have repercussions for the balancing of collective and individual interests. Fudge, *supra* note 33, appears to recognize this as a real danger of unions adopting a litigation strategy, relying on courts employing the Charter to defend labor rights.

VIII. CONCLUSION

The decision to constitutionalize a right to collective bargaining in *B.C. Health Services* has revived many of the questions that labor law academics and practitioners faced twenty-five years ago after the original adoption of the Charter. At that time challenges were filed against many of the provisions of our public and private sector labor statutes on the basis that freedom of association included protection for a right to bargain collectively, and statutory restrictions or requirements that restrained or impeded the exercise of that right in any way, of which there are many in any collective bargaining statute, were violations of section 2(d) of the Charter. Many provisions, from the principle of exclusive representation to restrictions on the right to strike, were challenged. The Court, one suspects cowed by arguments that a flood of cases would ensue asking it to tinker with a wide array of legislative choices, refused to open the door to recognize any significant protection for associational activity in the labor context in the *Labour Trilogy* and *PIPS*. The opening of the door to encompass some protection for a right to collective bargaining, protection at least from substantial interference with the right to a process of good faith bargaining, takes us back to all the same questions that were asked twenty-five years ago concerning the impact of inclusion of a right to collective bargaining under section 2(d). The reasons of the Court, by alternating between expansive and narrow views of the newly defined right to bargain collectively, appear to indicate an attempt to limit the scope of the right, likely again motivated by the Court's own concerns for the potential of the decision to draw it too deeply into judicial supervision of legislative choices. However, the nature of the criteria used by the court to determine substantial interference with a right to good faith bargaining, looking both at the importance of the subject matter of the restrictions and the manner or measures used by the government to impose them, leave us with a great deal of uncertainty about future application of the newly defined freedom. Depending on the stance taken by the Court in future cases, with its new contextualized approach, the scope of the protection could be as narrow as constitutional protection for a right to good faith bargaining, as that term has come to be defined in Canadian jurisprudence under existing labor law statutes, or it could be found to be broad enough to encompass a wide array of concerted associational activities in support of collective bargaining, including the right to strike.¹⁰⁶

106. As a law professor the most common question one gets in the first few weeks of first year classes is "What is the ratio or main holding of this case or how do I determine the ratio of this case?" As a realist, the only legitimate answer I can give is that the ratio or main principle to be derived from the case is whatever a future court decides it is in a decision three years from now, or ten years from now or twenty-five years from now. This is especially applicable to a decision like *B.C. Health*

Just as there was in the earliest days of Charter review of our labor laws,¹⁰⁷ there is a divergence of views among academics about the wisdom of the Court's decision to step in to constitutionalize a right to bargain collectively, and to forsake its earlier vow of abstinence from use of the Charter to question legislative choices concerning the regulation of collective bargaining. There has traditionally been a strong distrust of courts among Canadian labor academics and trade unions. This has its origins in the fact that the courts were largely seen as developing and using the common law to protect employer interests when workers began to engage in concerted activity to protect their workplace interests in the century prior to the adoption of the modern statutory collective bargaining regime. At the same time, legislatures were seen as the primary source of protection for workers' interests and their right to engage in concerted activity to support collective bargaining because of the enactment of both collective bargaining statutes and employment standards legislation. The strength of this distrust in courts and trust in legislatures is reflected in the writing by Charter skeptics referred to earlier in this paper,¹⁰⁸ and the recent writings of Professor Langille expressing his concern that the Court's decision in *B.C. Health Services* has given the SCC the role of devising model labor codes for workers in Canada under the guise of Charter review. The SCC's awareness of this antipathy to judicial supervision of labor regulation was also a significant factor in its early declaration of this area as a "no go" zone in the *Labour Trilogy*.

To those who remain skeptical and believe the Court has made a fundamental error by providing some form of Charter protection, no matter how limited, for a right to bargain collectively, my response would be that the Court was driven to take some action to constitutionalize a right to collective bargaining by the actions of conservative governments in enacting increasingly aggressive measures to strip or deny collective bargaining rights for the purpose of dealing with fiscal problems. As Fudge and others have noted, the Court's prior declaration of total abstinence from supervision in the form of protection for collective bargaining seemed to embolden modern governments to ignore and even trample upon labor rights and freedoms.¹⁰⁹ It could be likened to the absence of teacher supervision encouraging the bully in the school yard to beat up on the vulnerable kids, confident that their actions would go unpunished. Given

Services, given its somewhat schizophrenic nature as described above in alternating between broad sweeping statements and narrowing limitations in attempting to define the scope of the right to bargain collectively.

107. See QUEEN'S LAW JOURNAL, *Labour Law Under the Charter* (Kingston: Ind. Rel. Centre, Queen's University) (1988)

108. Etherington, *supra* note 7, at 688-90.

109. Fudge, *supra* note 33, at 48.

the extent to which modern conservative (or neoliberal) governments have been turning to solutions involving the overriding of labor rights to solve fiscal and infrastructure problems, in cases like *B.C. Health Services* and the similar Quebec reforms addressed in *Confederation des syndicats nationaux*,¹¹⁰ the Court was compelled to step in or give up any potential for the Charter freedom of association to have meaning in the labor context.

The other main response to the skeptics has to be that the rise of neoliberalism and conservative governments in recent years means that unions and union labor lawyers no longer have inherent trust for legislatures as the champion of worker interests and are less inclined to view courts as the main threat to their interests. As other commentators have pointed out, as modern governments have increasingly come to reflect and respond to the values of neo-liberalism and global markets in formulating and implementing economic regulatory policies, workers and unions are increasingly being driven toward a litigation strategy, turning to domestic and international adjudicative bodies for the protection of their interests and seeking to have collective labor rights recognized as fundamental human rights.¹¹¹ Despite the great hopes of romantic liberals, there continue to be great dangers in placing too much reliance on litigation strategy in general, and Charter review in particular: the institutional inappropriateness of courts taking on a major role in the complex task of labor relations policy making;¹¹² the delay, cost, and frequent remedial inadequacy of *ad hoc* rights litigation to protect labor rights;¹¹³ the potential numbing or chilling effect on collective political action that can result from a focus on litigation; and the potential that courts, having stepped in to protect the positive or collective aspects of freedom of association, will develop the negative aspects of the freedom in ways that seriously undermine the exercise of collective rights and union effectiveness. But despite those dangers, as the values of neo liberalism come to hold increasing sway in both the private and public sphere, we should not be surprised when vulnerable workers and unions increasingly look to courts and rights claims to protect their vital workplace interests.

Nor should we ultimately be too surprised when the Court does step in, albeit in an incremental and limited fashion, to provide some constitutional protection for a right to a very basic process of good faith collective bargaining, when confronted with the type of frontal assault on labor rights by modern governments that was at play in *B.C. Health Services*. If law is

110. *Confederation des syndicats nationaux v. Quebec (Procureur general)*, [2007] J.Q. No. 13421, (S.C.).

111. Fudge, *supra* note 33, at 46–47, citing Ewing, *The Implications of the ASLEF Case*, 36 ILJ 425 (2007).

112. Langille, *Freedom of Association*, *supra* note 6; MacNeil, *supra* note 87.

113. Fudge, *supra* note 33, at 46.

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viewed as the bridge between the normative vision of one generation and the next,¹¹⁴ our courts have traditionally played a fairly conservative role in protecting and preserving the values and rights that are present in our law from being overwhelmed by the normative vision of the next generation. In effect, courts frequently act as a buffer against rapid change to our legal norms that might result from changes in governments, or economic and social schools of thought.¹¹⁵ If the role of courts is viewed in that historical perspective, the fact that they might finally recognize collective labor rights as fundamental constitutional freedoms in 2007, over sixty years after they gained legislative protection, but at a time when those rights are under frequent attack by conservative governments reacting to the new mantra of neoliberal values, is perhaps no more surprising than the courts' championing of property rights and freedom of contract in the face of the adoption of collective bargaining and employment standards statutes in the first half of the twentieth century. We will watch with interest the extent to which the Court responds to further pleas for protection under the newly defined freedom of association.

114. I am pretty confident that the great legal historian Robert Cover made this statement in a Legal History class that I attended at Yale in 1985–86.

115. For a discussion of our SCC playing this role in the development of the common law of employment in the 1990s, see Brian Etherington, *Supreme Court of Canada Decisions and the Common Law of Employment in the 1990's: Shifting the Balance Between Rights and Efficiency Concerns*, 78 CAN. BAR REV. 200 (1999).