INDUSTRIAL DEMOCRACY AND THE COMMON SENSE REVOLUTION: FREEDOM OF ASSOCIATION IN AN ERA OF NEO-CONSERVATISM

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A. HISTORICAL OVERVIEW

The recent judgment of the Supreme Court of Canada in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* ("*B.C. Health Services and Support Facilities*")[1] is one of the most significant decisions in Canadian labour law history. It is not very often that a Canadian court clearly recognizes and expresses the fundamental democratic role trade unions play in the legal system in the representation of workers in Canada. Moreover, the case represents a graphic example of how Canadian history and international legal standards can breathe life into the *Charter* by fleshing out the fundamental freedoms which are necessarily generally expressed in our entrenched bill of rights. The result is a judgment which closes the door on prior interpretations of freedom of association which severely narrowed the application of s.2(d)

[1] 2007 SCC 27

in a labour context. These formalistic and positivist interpretations of s.2(d) gave little scope to freedom of association by failing to appreciate the purpose for which this collective right became entrenched as a fundamental freedom in our *Charter of Rights and Freedoms.*[2]

The evolution of s.2(d) jurisprudence over the last 25 years has given trade unions a varied and disparate experience. This is not surprising in that the labour movement has had a rather "anomalous and ambivalent reaction to the *Canadian Charter of Rights and Freedoms*."[3] Prior to its enactment in 1982, Canadian trade unions showed a singular indifference to the *Charter*. At that time, the economy (stagflation - depressed economy, high unemployment, inflation) was the preoccupation of trade unionists. Moreover, the Canadian Labour Congress was not cooperating with the Trudeau government which had introduced wage and price controls a few years earlier much to the surprise of most Canadians. The only input the labour movement had in the formulation of the *Charter* was the participation of some New Democratic Party members who expressed some of labour's concerns.[4]

After the enactment of the *Charter*, trade unions used the *Charter* as a shield to protect against government intrusions on the gains they had made through the collective bargaining and legislative processes. Unfortunately, unlike other groups, the labour movement did not use the *Charter* in a shrewd and coordinated way. Rather than applying

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[2] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11

[3] Paul J.J. Cavalluzzo, "Freedom of Association – Its Effect Upon Collective Bargaining and Trade Unions" (1998), 13 Queen's Law Journal 267-300

[4] See, for example, Svend Robinson's participation in the Joint Committee debates regarding the scope of protection offered by freedom of association: *Minutes of Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, Issue No. 43, 22 January 1981

the *Charter* in an incremental way, the labour movement's earliest cases sought to achieve *Charter* protection for fundamental aspects of the labour relations system. The earliest cases which reached the Supreme Court of Canada – the 1987 *Labour Trilogy* – raised the issue of whether s.2(d) protects the right to bargain collectively and the right to strike in the private and public sectors.[5] It was a surprising beginning to ask a court of law to constitutionalize the right to strike when some decades earlier these same courts considered strikes to be criminal conspiracies. This irony was not lost on students of Canadian history who appreciated how our courts had treated trade unions in their representation of Canadian workers. Not surprisingly, these early, ambitious claims made by Canadian unions were dismissed by courts in the formative years of the *Charter*.

At the same time that labour was losing its *Charter* battles in the courts, it discovered that its opponents would use the *Charter* to curb gains it had made over the years in the legislative arena. In particular, even though s.2(d) was given a sterile interpretation, employers and dissident employees asked the courts to give s.2(d) a broad interpretation in the negative context. That is, it was argued that s.2(d) protects a negative freedom of association, the right not to associate in a trade union. Fundamental aspects of collective bargaining laws were under attack. Exclusive representation, union security clauses, compelled union membership and the expenditure of union dues for non-collective bargaining purposes were placed under the *Charter* microscope.[6] Although the unions were eventually successful in fighting off these *Charter* attacks, they expended significant amounts of time, money and resources in defending legislative gains they had made over

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[5] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 ["*Alberta Reference*"]; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424; *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460.

[6] See, for example, *R .v. Advance Cutting & Coring Ltd.,* [2001] 3 S.C.R. 209; *Lavigne v. OPSEU,* [1991] 2 S.C.R. 211; *Arlington Crane Services Ltd. v. Ontario (Minister of Labour)* (1988), 56 D.L.R. (4th) 209 (Ont. H.C.J.); *Bhindi v. B.C. Projectionists Local 248 of International Alliance of Picture Machine Operators of the United States & Canada* (1986), 29 D.L.R. (4th) 47 (B.C. C.A.).

the last several decades. It is safe to say that by the turn of the century, Canadian trade unions were very restrained in their praise of the *Charter*.

By 2001 the s.2(d) jurisprudence seemed pretty well settled.[7] On a general level, it was held that s.2(d) protects the collective exercise of the other freedoms guaranteed by the *Charter* such as freedom of conscience and freedom of expression. In the labour relations context, s.2(d) was held to protect the freedom to work for the establishment of a union, to belong to a union, to maintain it and to participate in its lawful activities without penalty or reprisal. However, s.2(d) was found not to protect the legitimate objects or goals of the trade union such as collective bargaining. At that time, the view of the Supreme Court of Canada was that the right to bargain collectively was not a fundamental freedom. The Court viewed it to be a statutory right created by the legislature which has the required level of expertise to shape and develop the right to collective bargaining which involves a delicate, complex and dynamic balance of competing interests. Our courts do not have the requisite level of expertise to strike this balance. Analogies were drawn to administrative law in which the standard of review of labour relations tribunals is very restricted because of the court's lack of expertise in labour relations. Similar notions of judicial deference to the legislature were transferred into the *Charter* review of labour relations matters. This judicial deference reached the point where government lawyers were arguing that labour relations legislation was virtually immune from *Charter* scrutiny.

Finally, the judicial consensus was that freedom of association is an *individual* freedom even though it may advance *group* interests. This conclusion has great significance in labour relations because collective bargaining is a group or collective activity which promotes the individual interests of each employee by equalizing their bargaining power with their employer. In the *Alberta Reference* McIntyre, J. stated in this regard:

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[7] The jurisprudence was grounded in the analysis set out in the *Labour Trilogy* and summarized in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner),* [1990] 2 S.C.R. 367 ["*PIPSC v. Northwest Territories*"] and *Delisle v. Canada* [1999] 2 S.C.R. 989.

> "Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the *Charter* for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged by the fact of the association"[8]

It should be noted that in his dissent in the *Alberta Reference*, Chief Justice Dickson relied upon Canadian history and international law to determine that freedom of association has a collective dimension. In his view, s.2(d) protection was not limited to activities which can be performed by individuals acting alone.[9]

In regard to the right not to associate, the consensus of the court was that legislated forced association in a trade union was only a breach of s.2(d) if the legislative compulsion imposed 'ideological conformity". Although there was consensus in the general rule, there were serious disputes as to the application and meaning of 'ideological conformity" in various labour relations contexts.[10]

Many labour lawyers were somewhat ambivalent about the state of the s.2(d) jurisprudence by 2000.[11] In respect of the legal reasoning, the jurisprudence was viewed to be formalistic and overly positivist. It failed to appreciate the purpose and value of freedom of association. It did not recognize that collective rights are a peculiar phenomenon of our entrenched freedoms which qualitatively makes the Canadian approach to civil liberties distinctly different from the American approach. The case law also failed to place appropriate significance to the *Charter* entrenching an independent

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[8] *Alberta Reference, supra* note 5 at 398-399, per McIntyre J.

[9] *Alberta Reference, supra* note 5 at 348-371, per Dickson C.J.C.

[10] See *R. v. Advance Cutting & Coring Ltd, supra* note 6.

[11] Cavalluzzo, "Freedom of Association" (1998), *supra* note 3.

freedom of association in s. 2(d). In the American Bill of Rights, freedom of association is a derivative right of freedom of speech found in the First Amendment. The jurisprudence also failed to take into account Canadian history and international human rights law. Finally, the jurisprudence did not consider the democratizing effect of collective bargaining or the fundamental place that work plays in Canadian society today.[12]

On the other hand, labour lawyers respected the courts' deference to the legislative process in which the Canadian labour movement had made most of its gains over the years. Many trade unionists were concerned with a robust *Charter* review in the labour context because of their experience in the courts. In their view, the content of collective bargaining laws is a matter for the legislature and not the courts.

The ambivalence of many labour lawyers was gradually dissipated over time by the systematic legislative attacks on workers' rights in the latter part of the last century. In many provinces, there was a serious legislative retrenchment on gains that Canadian unions had made over the years. Some employees were excluded from the application of collective bargaining laws. Other employees had their right to strike removed by legislation which in its stead substituted arbitration which was arbitrary and unfair. Some legislatures combatted deficit problems on the back of workers and trade unions by overriding collective agreements and severely restricting future collective bargaining. All of these legislative measures were introduced with little or no consultation with workers and unions. These legislative measures were found to violate international laws and treaties to which Canada is a party by international tribunals. [13] Canadian legislatures paid no heed

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[12] Paul J.J. Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively" in J.M. Weiler and R.M. Elliot, eds, *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986)

[13] See, for example, the following cases decided by the ILO's Committee on Freedom of Association arising out of Ontario alone between 1995 to 2003: Report 308 (1997), Case No. 1900 [addressing agricultural workers' and others' denial of rights to bargain collectively and removal of successor rights protections for crown employees]; Report 310 (1998), Case No. 1943 [re

to these international rulings. These legislative assaults created the conditions under which unions reverted to the *Charter of Rights and Freedoms* to defend against these state attacks on their liberty, equality and security.

B. THE OPENING – DUNMORE

Ironically, Canadian trade unionists can thank the Common Sense Revolution for giving new life to freedom of association in the labour relations context. Yes, Mike Harris was the catalyst to more robust labour rights! One of the first acts of the Harris government in 1995 was to take away collective bargaining rights from agricultural workers

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government interference in compulsory interest arbitration]; Report 311 (1998), Case No. 1951 [re government interference in collective bargaining in the education sector and denial of rights to unionize, bargain collectively and strike for vice-principals and principals]; Report 320 (2000), Case No. 2025, Report 327 (2002), Case No. 2145 and Report 335 (2004), Case No. 2305 [all addressing interference with teachers' right to strike and bargain collectively through back-to-work legislation]; Report 327 (2002), Case No. 2119 [statutory interference with the scope of teachers' right to bargain collectively]. See also Report 330 (March 2003), Case No. 1900 and ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, 91st Session, Geneva (June 2003) Report III (Part IA) addressing Ontario's legislation denying agricultural workers the right to unionize and bargain collectively. The ILO decried the Ontario government's increasingly frequent and repeated incursions on the freedom of association and failure to heed the ILO decisions and called on the government to seek the ILO's technical assistance to ensure compliance with its international law obligations. In Case No. 2145 at para. 310, the ILO Committee on Freedom of Association wrote:

> "The Committee notes with increasing concern that the violations of freedom of association in the present case constitute an almost exact repetition of those at issue in a very recent case, a mere two years after it. Furthermore, as already pointed out by the Committee ... these involve a long series of legislative reforms in Ontario, where the Committee has pointed in each case to incompatibilities with freedom of association principles. ... The Committee stresses the seriousness of the situation and points out that repeated recourse to statutory restrictions on freedom of association and collective bargaining can only, in the long term, have a detrimental and destabilizing effect on labour relations, as it deprives workers of a fundamental right and means of defending and promoting their economic and social interests. The Committee suggest once again the Government to have recourse to the technical assistance of the Office."

who are one of the most vulnerable groups of workers in Ontario.[14] The previous government had enacted the *Agricultural Labour Relations Act*.[15] This law gave Ontario farmworkers collective bargaining rights for the first time in their history. It was labour legislation which attempted to fairly balance the interests of farmers and farmworkers. For example, it protected the family farm whose importance is diminishing in this era of agribusiness. It also prohibited farmworkers from striking because of the perishable nature of farm products. However, it provided farmworkers with fair interest arbitration to resolve their bargaining impasses.

In the final analysis, it was a fair legislative compromise which had considerable input from farmers and farmworkers because of the government's extensive consultation process.[16]

Upon achieving power, the Harris government repealed this legislation without any consultation whatever. The government also amended the *Labour Relations Act* to, once again, expressly exclude farmworkers from its application. This legislative exclusion brought a *Charter* challenge from the United Food and Commercial Workers Union Canada

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[14] The authors act as counsel to the farmworkers and UFCW Canada.

[15] S.O. 1994, c. 6.

[16] The *Agricultural Labour Relations Act* ("*ALRA*") was the product of a broad 2-year consultation process which produced a tripartite consensus that unionization and collective bargaining could operate in the agricultural sector. The Ontario government established a tripartite Task Force on Agricultural Labour Relations composed of representatives of farm employers, organized labour and farm workers, and government. The Task Force prepared extensive background reports, conducted consultations and issued two unanimous reports in which the Task Force reached consensus on all the critical areas of discussion. The Task Force provided recommendations for how collective bargaining could operate in the agricultural sector and these recommendations were developed into the *ALRA*. The *ALRA* was endorsed by the Ontario Agricultural Organization's Labour Issues Coordinating Committee and was unanimously recommended by a ministerial advisory committee which included UFCW Canada as well as agricultural owner organizations: see *Task Force on Agricultural Labour Relations Report* (June 1992);*Task Force on Agricultural Labour Relations Report* (November 1992).

("UFCW Canada") which represents farmworkers across Canada: *Dunmore v. Ontario (Attorney General).*[17] The attack raised s.2(d) freedom of association and s.15 equality claims. In regard to the freedom of association claim, the Ontario courts were bound by the sterile jurisprudence referred to above. In the Ontario Superior Court, Sharpe, J. ruled that nothing in the legislation under attack prevented agricultural workers from forming or joining trade unions. Their problems in organizing were the product of market and other economic forces and not government action. He refused their attempt "to impose upon the province a positive duty to enhance the right of freedom of association." The equality claim based on underinclusiveness was dismissed on the basis that occupational classification or employment status is not a recognized analogous ground protected by s.15 of the *Charter*. This narrow interpretation of s.15 gave workers little room for equality protection unless they could found their claim on a ground other than occupational status. On the farmworkers' appeal to the Ontario Court of Appeal, government counsel was not even called upon to respond to their arguments.

The matter reached the Supreme Court of Canada in 2001. This is not the place to extensively review *Dunmore* as it has received considerable attention elsewhere.[18] In this paper, we only refer to the key conclusions in *Dunmore* which opened the door for a more robust freedom of association in the labour context. In the next section, we will review *B.C. Health Services and Support Facilities* which gives freedom of association new life.

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[17] [2001] 3 S.C.R. 1016.

[18] For example see B. Jamie Cameron, "The 'Second Labour Trilogy': A Comment on R. v. Advance Cutting, Dunmore v. Ontario, and RWDSU v. Pepsi-Cola", (2002), 16 S.C.L.R. (2d) 67; Patricia Hughes, "Dunmore v. Ontario (Attorney General): Waiting for the Other Shoe", (2003) 10 C.L.E.L.J. 27; Steven M. Barrett, "Dunmore v. Ontario (Attorney General): Freedom of Association at a Crossroads", (2003) 10 C.L.E.L.J. 83.

In *Dunmore*, Bastarache, J. revived the dissent of Chief Justice Dickson in the *Alberta Reference* in which he interpreted freedom of association in the context of Canadian labour history and international human rights law. *Dunmore* made three significant holdings which has had an important effect of the application of freedom of association in labour law.

First, it rejected the notion that s.2(d) is solely an individual right. Bastarache, J. agreed with Dickson, C.J. that s.2(d) has a collective aspect. That is, in certain situations s.2(d) will protect collective or group activities which have no counterpart or analogue in individual activity. Collective bargaining or striking are examples of such collective or group activity. This recognition went far beyond the sterile and formalistic interpretation the court had given s.2(d) up to that time.

Secondly, legislative underinclusion can be the basis of a s.2(d) claim as well as a s.15 claim. In particular, there may be a positive duty on the government to legislate in order to ensure fundamental freedoms are secured by vulnerable groups. This is particularly so where legislative inaction leads to the denial of a fundamental freedom to vulnerable groups like agricultural workers. In short, the state has a positive obligation to ensure that fundamental freedoms are meaningful. Of course, the importance of this conclusion is that in certain circumstances the *Charter* will apply to the relations between employers and employees in the private sector.

Finally, *Dunmore* gave short shrift to the extensive scope of deference given to the legislature by past cases to labour legislation. As stated above, labour relations had reached a stage whereby the courts would defer to the legislative policy unless it had negative consequences upon the very narrow and restricted freedom it had elaborated upon. Deference to labour relations matters had almost morphed into immunity from *Charter* review. With *Dunmore*, the Court put governments on notice that it was ready to be scrupulous in scrutinizing labour laws affecting fundamental freedoms.

In *Dunmore,* the Court set the ball on the constitutional tee. In *B.C. Health Services and Support Facilities,* the Court "drove the ball a mile." Now we know that s.2(d) protects much more than the "right to golf."[19]

C. *B.C. HEALTH SERVICES AND SUPPORT FACILITIES*

1. Brief Overview of the Appeal

This appeal arose out of a challenge by a coalition of British Columbia health sector unions to provincial legislation (Bill 29) which voided health sector collective agreement provisions that prohibited contracting out and that provided protections for layoff and bumping.[20] Bill 29 also prohibited future collective bargaining in respect of those issues. The unions argued that Bill 29 violated both the freedom of association under s. 2(d) of the *Charter* and the right to equality under s. 15 of the *Charter*.

The Supreme Court in a 6-1 majority decision written jointly by Chief Justice McLachlin and Justice LeBel ruled that the right to bargain collectively is protected as an exercise of freedom of association under s. 2(d) of the *Charter*. The Court ruled that collective bargaining is consistent with and supports the values of the *Charter*: "Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*." Very significantly for unions, the Court held that recognizing that collective bargaining is protected under s. 2(d) of the *Charter* imposes corresponding

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[19] See McIntyre, J. in *Alberta Reference, supra* note 5 at 407-408. See H.W.A. Arthurs, "The Right to Golf:' Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*." (1988), 13 Queen's Law Journal 17.

[20] The appeal was supported by other labour organizations which intervened at the Supreme Court such as the Canadian Labour Congress, the Confederation of National Unions, the United Food and Commercial Workers' Union Canada and the British Columbia Teachers' Federation.

duties on employers to bargain in good faith. The Court ruled that the duty to bargain in good faith – including the obligation to meet, to commit time to the process, and to engage in meaningful dialogue that is aimed at arriving at an acceptable agreement – "lies at the heart of collective bargaining". This process of collective bargaining must be a "meaningful process of consultation and discussion" and "cannot be reduced to a mere right to make representations".

The majority of the Court concluded that the provisions in Bill 29 dealing with contracting out, layoffs and bumping violated the right to freedom of association and that these violations were not justifiable under s. 1 of the *Charter* because they did not minimally impair *Charter* rights. The majority found that the legislation did not violate s. 15 equality rights. The Court suspended its declaration of invalidity for 12 months to allow the government time to address the repercussions of the decision.

Justice Deschamps, in a partial dissent, agreed with the majority's analysis finding that the right to bargain collectively is protected under s. 2(d) but would have applied a different test for finding a breach of s. 2(d) and would have found, with one exception, that the infringements of s. 2(d) were saved under s. 1.

2. The New Basis for Protecting Collective Bargaining Under s. 2(d)

The Supreme Court ruled that s. 2(d) protection for collective bargaining rests on four propositions:

i. The reasons evoked by the Supreme Court in past cases for excluding collective bargaining from the protection of s. 2(d) "do not withstand principled scrutiny and must be rejected" [para. 22]. The Supreme Court's earlier analysis had not been conducted contextually with appropriate analysis of the nature of collective bargaining. It had focussed too narrowly

on the question of individual activities and the objects sought to be achieved through bargaining. It failed to give appropriate recognition to the fundamental importance of collective bargaining and had taken an overly broad view of judicial deference by effectively declaring "a judicial 'no go' zone for an entire right" on the ground that it may involve the courts in reviewing decisions reflecting legislative policy [para. 22-30] The Court's rejection of the arguments previously used to exclude collective bargaining from protection under the *Charter* lead to a reassessment of whether it was properly protected under s. 2(d).

ii. Excluding collective bargaining from s. 2(d) protection is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. While the majority of the Court had previously held that the rights to strike and bargain collectively are "modern rights" created by legislation, this belies the fact that "the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute." [para. 25] The Court recognizes that "association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*" [para. 40, 41]. After reviewing the evolution of labour rights in Canada from the 1700s, the Court concluded that "the protection enshrined in s. 2(d) of the Charter may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining." [para. 68]

iii. International conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. In reaching this conclusion, the Court

examined the international instruments which Canada has ratified[21] and the ILO's interpretation of those instruments. The Court concluded that, as stated by Dickson C.J.C. in his dissent in the *Alberta Reference* in 1987, s.2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection as is granted under international human rights instruments that Canada has ratified. [para. 70, 79]

iv. *Charter* values support protecting a process of collective bargaining under s. 2(d) of the Charter. The Court ruled that

> "the protection of collective bargaining under s. 2(d) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*". [para. 86]

3. What Scope of Protection is Granted to Collective Bargaining under Section 2(d)?

In granting protection to collective bargaining, the Court has made clear that s. 2(d) protects the *process* of collective bargaining but does not guarantee any particular outcomes that may be sought through bargaining. Moreover, in protecting the right to collective bargaining, the *Charter* protects the right to "a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method." [para. 91] However, it is clear that workers are entitled to the core elements that are enshrined in any typical Canadian labour law, particularly in respect of ensuring that

[21] *International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights; Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize;* and the *Declaration on Fundamental Principles and Rights at Work.*

union representatives are recognized and there is a duty to bargain in good faith. The Court's analysis indicates that the protections that have been enshrined in labour legislation and that have been recognized under ILO law will help inform what protections are appropriate.

The Court ruled that s. 2(d) of the *Charter* applies both in respect of legislation that is passed by government and state action where the government is an employer. With respect to legislation, the Court confirmed that "legislation must conform to s. 2(d) of the *Charter* and is void under s. 52 of the *Constitution Act, 1982* if it does not (in the absence of justification under s. 1 of the *Charter*)". [para. 88].

The Court has defined the scope of the protected collective bargaining process broadly to take into account the history of collective bargaining in Canada and Canada's international human rights obligations. It also confirms that the protection of collective bargaining under the *Charter* imposes corresponding obligations on employers to bargain in good faith:

> ... s. 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining. ...
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> ... 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 in 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 issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve 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... [para. 87-89]

4. The Test to Find that the Right to Bargain Collectively is Breached

The Court notes that s. 2(d) does not protect all aspects of collective bargaining. Rather, it protects only against "substantial interference" with associational activity. The Court asks: "does the state action target or affect the associational activity, 'thereby discouraging the collective pursuit of common goals'?"

To establish a breach of s. 2(d), it is not necessary to show that there was an *intent* to interfere with collective bargaining. Instead, "it is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals."

The Court ruled that

> "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." [para. 90]

The Court stressed that "the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. ... the right to collective bargaining cannot be reduced to a mere right to make representations." [para. 114]

In order for legislation or government action to constitute *substantial interference* with freedom of association, "the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer".

Union-breaking, denying a union access to labour laws as in *Dunmore*, acts of bad faith or unilateral nullification of negotiated terms without any process of meaningful discussion and consultation are all examples that may significantly undermine the process of collective bargaining. But the Court also noted that "less dramatic interference with the collective process may also suffice" to establish a breach.

Ultimately, whether there is a breach must be assessed on a case-by case basis:

> "the inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted." [para. 92]

Determining whether the right to bargain collectively has been substantially interfered with involves two inquiries, both of which are necessary:

i. The first inquiry relates to "the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert." [para. 93] To find a breach of freedom of association, "the interference with

collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d).” [para. 129]

ii. The second inquiry relates to “the manner in which the measure impacts on the collective right to good faith negotiation and consultation” [para. 93]

On the first inquiry, “the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively. “ The more important the matter, the more likely that there will be substantial interference with s. 2(d). The Court stated that

> “Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.” [para. 96]

Where it is established that the government legislation or action affects a subject matter important to collective bargaining, and the capacity of union members to pursue common goals, the analysis moves to the second inquiry. At this stage, the question is whether the legislation or government action “respect[s] the fundamental precept of collective bargaining – the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(d), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.” [para. 97]

The Court held that “consideration of the duty to negotiate in good faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights.” In doing so, the Court drew on the principles

of good faith bargaining articulated by the ILO which the Court found have been consistently incorporated into federal and provincial labour legislation:

> "The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith." [para. 98]

The Court found that a basic element of the duty to bargain in good faith is the obligation to actually meet and commit time to the bargaining process. The parties also "have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract." [para. 101]

The duty to bargain in good faith does not impose an obligation to conclude a collective agreement or to accept any particular contract provisions. Generally, the s. 2(d) right is not concerned with the content of bargaining. However, when the content of bargaining shows hostility from one party toward the collective bargaining process, this will constitute a breach of the duty to bargain in good faith." [para. 104] If the employer engages in surface bargaining – if the nature of its proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship – the duty to bargain in good faith will be breached. [para. 104-105]

Finally, the Court ruled that in considering whether legislative provisions violate the collective right to good faith negotiations and consultation, one must have regard for the circumstances surrounding the adoption of the law. Situations of "exigency and urgency" may affect the content and modalities of the duty to bargain in good faith. Different situations may demand different processes and time lines. The Court ruled that

> "failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line."

Even where there is a breach of s. 2(d), there may be circumstances where this is justified under s. 1 of the Charter:

> "This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis."

5. Application to the Facts in the Appeal

On the facts in the Bill 29 appeal, the majority of the Court found that various provisions in Bill 29 violated the freedom of association. The legislative provisions which were found to be unconstitutional were those which

* voided provisions in collective agreements protecting against contracting out [s. 6(2)];
* voided provisions in collective agreements which had required the employer to consult with the union prior to contracting out [s. 6(4)];
* voided provisions in collective agreements which had provided protections in the context of layoff and bumping with the result that the employer was able to reorganize the delivery of health care services without reference to these protections [s. 4, 5, 9, 10]; and
* prohibited the parties from bargaining in respect of these issues in future rounds of collective bargaining.

The Court found that these provisions interfered with collective bargaining by disregarding past processes of collective bargaining and by preemptively undermining future processes of collective bargaining.

The Court found that the violations were not justifiable under s. 1 of the *Charter*. While the Court found that the government's objectives to cut costs and increase management power were not pressing and substantial, the Court found the legislation did have a pressing and substantial objective to the extent that it sought to improve the delivery of health care services in British Columbia. [para. 146-147].

The Court found, however, that the Act did not minimally impair *Charter* rights and that the government had adduced no evidence to support a conclusion that the impairment was minimal. Instead, the government had simply asserted that the legislation minimally impaired rights. The Court ruled that "in the absence of supportive evidence, we are unable to conclude that the requirement of minimal impairment is made out in this case." Moreover, it found that the provisions at issue bore little evidence of a search for minimal impairment: "insofar as it hammers home the policy of no consultation under any circumstances, it can scarcely be described as suggesting a search for a solution that preserves collective bargaining rights as much as possible, given the legislature's goal." [para. 151-154] Further "government presented no evidence about why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it."

The Court noted that while it was not ruling that legislatures have an obligation to consult, this is a factor that would be taken into account in the course of conducting the s. 1 analysis:

> "Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful

> to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. " [para. 157]
>
> . . .
>
> "This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices." [para. 160]

In the result, the Court ruled that the provisions of Bill 29 violated freedom of association under s. 2(d) of the *Charter* and were not justified under s. 1. The Court suspended the declaration of invalidity for 12 months to allow the government to address the repercussions of the decision.

6. Equality Rights Argument

The unions in their appeal had argued that the provisions of Bill 29 discriminated on the basis of sex because they targeted only sectors of the economy that were overwhelmingly female-dominated and because they targeted pay equity adjustments that the unions had secured after many years of collective bargaining.

The Court, in five brief paragraphs, dismissed the s. 15 argument. The Court concluded that the distinctions made by Bill 29 "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 Court found that the differential impact

and effects of the legislation "relate essentially to the type of work [the workers] do and not to the persons they are." [para. 165]

The Court's analysis on s. 15 equality rights is extremely brief. The question of whether occupational group or employment status is an appropriate analogous ground under s.15 will be left to another day. For example, some reasonable arguments can be made that either agricultural or domestic workers is an analogous ground since they are likely the most vulnerable workers in Canada.[22] Their treatment under Canadian law has been discriminatory in the extreme and has hampered their efforts to improve their economic security. Their political powerlessness and marginalization in Canadian society should be the basis of a powerful equality claim under s.15. It is not unreasonable to suggest that when a law's underinclusiveness exacerbates a discrete occupational group's vulnerability and marginalization, there is a breach of s.15.[23]

It is fair to say that vulnerable workers would be given much more protection under s.15 than s.2(d) in that the former provision would require the government to provide benefits for the group on the basis of discrimination. Although s.2(d) has been given a more robust interpretation now, the government will only be required to provide equal benefits where the vulnerable workers can demonstrate that the legislation interferes with their freedom of association.

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[22] See L'Heureux-Dubé J. in *Dunmore v. Ontario, supra* note17 who held in her concurring reasons at1110-1114 that agricultural workers constituted an analogous ground for the purposes of s. 15 analysis.

[23] See, for example, *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at para. 63.

7. Conclusion

Regardless of our comments on s.15, this decision is a significant contribution to our constitutional law. It is a wonderful recognition that a nation's history should be the lifeblood of constitutional interpretation as suggested by Justice Cardozo many years ago. It is also fundamentally responsive to Canada's international legal obligations. Finally, it focuses our attention to the fundamental values underlying the *Charter*. Any activity which promotes values such as equality, personal autonomy and dignity and democracy is worthy of constitutional protection. Rather than being an affront to a democratically elected legislature, this decision is a call to the legislature to promote and act on the values which are the underpinning of its very existence.

D. DEBUNKING COLLECTIVE BARGAINING MYTHS

Moving forward, it is important to recognize how in ruling that the rationale for the *Labour Trilogy*'s narrow interpretation of s. 2(d) does not "withstand principled scrutiny and should be rejected", *B.C. Health Services* has expressly debunked certain "myths" about the place and status of collective bargaining. Prior to *B.C. Health Services,* there were a number of assumptions about collective bargaining and related matters which gave rise to the sterile interpretation given to freedom of association in the labour relations context in the previous jurisprudence. These assumptions reached the level of "truths" in some of the cases. *B.C. Health Services* has gone a long way in destroying some of those myths. In this section we refer to three of these myths and expand upon the Court's reasoning in rejecting them. In the next section we look at the practical implications that the Court's analysis may have for future developments.

(i) *Myth #1: Collective bargaining rights are statutory rights.*

This was the strongest proposition which supported an interpretation of s. 2(d) which excluded the right to bargain collectively. There were variations of this proposition. Some argued that if the legislature conferred statutory rights, it could also restrict or eliminate those rights. Others argued that collective bargaining is a dynamic and fluid process which involves a very complex balancing of interests between labour and management. This process is beyond the expertise of a court and should be left to the legislature. If you left it to the courts, these proponents argued, all aspects of collective bargaining law could be open to judicial scrutiny through constitutional litigation.[24] This particularly concerned trade unions which did not have a good 'track record' in the courts and believe that the content of collective bargaining laws is a matter for the legislature.

Although this proposition is attractive on its face, it has limited merit upon close analysis. The main weakness is that it is just plain wrong in historical terms. In Canada, workers engaged in collective bargaining for decades before the enactment of modern collective bargaining legislation. As Bastarache, J. stated in *Dunmore*, the labour laws instantiated rights which already existed. Collective bargaining's importance as a fundamental freedom was expressly recognized by the 1968 Report of the Task Force on Labour Relations which remains the most authoritative statement of the principles underlying Canada Labour Relations Board policy:

> "Freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system. Together they constitute freedom of trade union activity: to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanction, including taking a case public in the event of an impasse. Collective bargaining legislation establishes rights and imposes duties derived from these

[24] See J..M. Weiler, "The Regulation of Strikes and Picketing Under the *Charter*", in *Litigating the Values of a Nation, supra* note 12; see also, McIntyre J. in *Alberta Reference, supra* note 5 at 416-419.

> fundamental freedoms, just as legislation in other fields protects and controls corporate action."

At most, collective bargaining legislation regulated rights which had existed for years. These laws represented an historic compromise between labour and management in which labour surrendered many of its rights for the purposes of industrial peace and harmony. Hence, when a legislature substantially interferes with these pre-existing rights, its actions must be carefully scrutinized as it is not eliminating or restricting rights it has conferred upon workers.

In regard to the policy argument that the courts lack the expertise to adjudicate collective bargaining disputes, courts responded in an absolutist manner. in practice, judicial deference became judicial paralysis. In *Charter* litigation, many governments argued that most aspects of collective bargaining laws were beyond the purview of *Charter* scrutiny based on the jurisprudence as it evolved after the "collective bargaining trilogy" in 1987. The deference to legislative policy was extreme. As stated by the majority judgment of the Supreme Court in *B.C. Health Services*:

> "... It may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws. But to declare a judicial 'no go' zone for an entire right on the ground that it may involve the courts ins policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values."

(ii) ***Myth #2: The fundamental freedom of one Canadian should not entail the imposition of a duty on another Canadian.***

This proposition suggests that freedom of association of employees should not be construed as imposing a duty on an employer to bargain. Quite often an analogy to freedom of expression is used: the freedom of speech of one citizen does not impose a duty to listen on another citizen.

This proposition, as well, does not bear scrutiny. Analogies to freedom of expression are inapt in Canada as freedom of association is an independent right and not a derivative of expression as it is in the American Bill of Rights. Moreover, in every context the recognition of constitutional rights – and non-constitutional rights – imposes duties on others in society. Recognizing rights in itself involves recognizing correlative duties. This is inherent in the nature of rights which regulate the relations between members in a society. For example, under human rights statutes, the recognition of the right to equality imposes on employers a commensurate duty to accommodate employees to the point of undue hardship. Finally, in the employment context, the recognition and protection of employees' fundamental freedoms does not force a relationship of mutual obligations on employers. Rather, each employer has voluntarily created that relationship of mutual obligation by creating an employment relationship with its employees. This relationship involves the creation, renewal of and adherence to terms and conditions of employment. Protecting the right to bargain collectively under s. 2(d) ensures that when laws adversely affect the making, renewal and enforcement of this employment contract, the interests of individual employees are protected if they elect to act in association with each other.

(iii) *Myth #3: Collective bargaining protects economic interests which are not protected by the Charter.*

At the time the *Charter* was adopted in 1982, there was a great deal of debate concerning the inclusion of a right to property. Property rights were protected by the *Canadian Bill of Rights,* 1960 in s.1(b). Moreover, the *American Bill of Rights* protects property rights such as in the fifth and fourteenth amendments. However, the consensus reached in 1982 was that there would be no right of property protected by the *Charter.* As a result, many argued that the *Charter* was not intended to protect economic interests.

This analysis was applied to collective bargaining which protects the interests of Canadians in their working lives. In 1987 one of the authors dealt with this analysis in the following way:

> "Whether the pursuit of economic interests is of fundamental interest is more debatable in that the *Charter* does not expressly guarantee economic rights. However, it is clear that the guaranteed freedoms will frequently be used to advance economic interests. Moreover, there is in Canada a consensus that the advancement of one's economic well being is an important and legitimate goal for any citizen. Even if not all economic interests should be protected by the *Charter,* surely some economic interests deserve protection especially when the economic interest advances and enhances the economic well being and security of the person. It follows that the group assertion of such interests should be protected by freedom of association."[25]

Since that time, Canadian law has evolved in a way which clearly recognizes the significance of work in one's life. Indeed, the Supreme Court of Canada has repeatedly recognized that work is "one of the most fundamental aspects of a person's life" and an essential component of a person's sense of identity, self worth and well being.[26] In *B.C. Health Services* the Court held that collective bargaining "enhances the human dignity, liberty and autonomy of workers by giving them an opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work ...".[27] Whether or not the pursuit of economic interests is the primary objective of collective bargaining, it is protected by the *Charter* because of the fundamental personal and democratic values it promotes. Although s.2(d) does not protect substantive outcomes, it does protect the process by which Canadian workers are given

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[25] Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively", *supra* note 12 at 204.

[26] *Alberta Reference, supra* note 5 at 368-369 per Dickson, C.J.C.; *Wallace v. United Grain Growers* [1997] 3 SCR 701 at para. 91-94; *McKinley v. B.C. Tel.* [2001] 2 SCR 161 at para. 53-54.

[27] *B.C. Health Services,* para.82

the opportunity for meaningful participation in the quality of their work lives.[28] One can consider fewer freedoms which are more fundamental to the lives of Canadian workers.

E. THE IMPACT OF *B.C. HEALTH SERVICES*

As with any significant constitutional judgment of the Supreme Court of Canada, there are extreme and opposing views as to the impact of *B.C. Health Services*. On the one hand, are the "doomsayers" of both management and union stripe. The management doomsayers opine that the courts will now become the regulators of collective bargaining policy. Indeed, they argue that the decision suggests that the courts will venture into other areas of economic policy. They express concern that governments will be hamstrung in their efforts to control government expenditures and deficits. Indeed, one commentator has said that *B.C. Health Services* will hamper the B.C. Government in controlling health care costs and expenditures. As a result, it is suggested that these uncontrolled costs will lead to a call for more privatization of the health care system because the state cannot afford to provide medical services in an effective manner. In short, they say, the last laugh is on the union victors in the *B.C. Health Services* case. Finally, the management doomsayers argue that workers will now use the courts to advance their common interest. All of these claims are made in a context in which they claim that the courts are not expert and equipped to balance the competing interests of workers and management.

The union doomsayers approach the analysis from a different perspective and interest. In their view, *B.C. Health Services* will give a huge assist to dissident employees and renegade employers. They argue that many gains unions have made in the legislative arena will now be open to attack. Fundamental cornerstones of collective bargaining laws, such as exclusive representation or union security clauses, will be challenged by anti-

[28] As the Supreme Court noted in *B.C. Health Services* at para. 66, collective bargaining is "the most significant collective activity through which freedom of association is expressed in the labour context."

union, dissident employees who will argue for a strengthened freedom not to associate so as to avoid their obligation to contribute to the costs of achieving the fruits of the collective bargain. On the other hand, renegade employers will challenge provisions of the law which promote collective bargaining by equalizing the power between workers and management. In the union doomsayers' eyes, *B.C. Health Services* may be a pyrrhic victory for the unions who had the audacity to challenge a government which "tore up" its collective agreements.

On the other extreme to the doomsayers, we have the naive idealists who believe that *B.C. Health Services* will stem the tide of the dismal unionization rates in Canada. In their view, the deunionization of Canada is part of the impact of neo-conservative policies over the last twenty five years. Unquestionably deunionization along with deregulation, privatization and lower taxes have been the consistent mantra of the neo-conservatives. It is suggested that *B.C. Health Services* will have a salutary effect in a number of ways. First, it will encourage workers to appreciate the benefits of collective bargaining and unionization because it is a *Charter* protected fundamental freedom. The educative value of the decision should help unions in their organizing campaigns. Secondly, the case should be a warning to governments, particularly of the neo-conservative stripe, that budgets cannot be cut or taxes lowered on the backs of workers. Collective agreements are legally binding and trade unions are partners in the public service employment relationship. Government workers must be treated with respect and dignity. Finally, it is argued that employers will be restrained as a result of this case. This is particularly so in respect of government qua employer which too readily reneged on its contractual commitments to its own employees in order to reduce government expenditures. In regard to private sector employees, it is argued that *B.C. Health Services* will have a general protective effect over all labour relations regimes by underscoring the fundamental nature of collective bargaining in Canada. This case should be a warning to legislators not to restrict collective bargaining rights in the future.

As usual, there is likely some legitimacy to the views of each extreme position. In our view, the case will have a far more moderate effect than has been predicted. However, there are clear benefits to those who believe that the promotion of collective bargaining is a valuable legislative policy.

In regard to the predictions of the management doomsayers, we suggest that the legislature will continue to take the lead in developing collective bargaining policy. The limits of adjudication and the costs of *Charter* litigation will be a significant deterrent to using the courts to advance the interests of workers. However, we do believe that *B.C. Health Services* will have a positive effect in discouraging governments from too readily adopting restraint measures which involve overriding collective agreements. Most Canadians agree with the old adage that "a deal is a deal". Governments should be just as restrained in overriding collective agreements as they are in respecting security obligations they have incurred in borrowing in financial markets. A legally binding contract is just that regardless of who the other party to the contract is.

In regard to the union doomsayers, we do not see *B.C. Health Services* as being a panacea for dissident employees. The case will not be the basis for a newly strengthened right <u>not</u> to associate. The judgment affirms the fundamental nature of <u>collective</u> bargaining and the <u>collective</u> dimension of freedom of association not individual rights. Moreover, the costs of *Charter* litigation should also be a disincentive for employees promoting a negative freedom of association or renegade employers trying to avoid trade unions. The courts will only be used for defending against egregious government actions which interfere in the collective bargaining process. The cornerstones of the labour relations system will remain intact after *B.C. Health Services*.

Finally, any idealistic notions that the case will spawn increased union density rates is naive at best. The union density rate in Canada is far too complicated to be materially affected by constitutional litigation. There are many reasons for the declining union rate

which are far beyond the reach of the *Charter of Rights.* Globalization, free trade, privatization, a declining manufacturing base are but a few of the reasons for declining unionization. The *B.C. Health Services* case will have little effect on this decline. On the other hand, it might stem the tide in some ways. As indicated above, the case is a warning to governments that the collective rights of their workers cannot be dealt with in a unilateral, cavalier fashion. The association of employees must be treated as a partner with respect to the legal rights they have negotiated. Moreover, the Supreme Court's message should have an educative effect which should enhance collective bargaining in the future. Labour is not just another commodity which can be discarded unfairly by arbitrary government fiat.

Collective bargaining is an historic Canadian vehicle which has been of fundamental value to the working lives of our citizens by bringing democracy and the rule of law to the workplace. This powerful message may have a positive effect on encouraging workers to unionize and discouraging governments from unfairly restricting labour rights. However, there are far more powerful forces at play which will ultimately determine the future of trade unions in Canada.

On a more concrete level, there are some areas where one may expect the case to have impact.

Exclusions from the Right to Bargain Collectively

The most obvious area where *B.C. Health Services* will have an impact is in the context where particular groups of employees are excluded from statutory protections and denied the right to bargain collectively. The most immediate context where this will be addressed is in relation to agricultural workers' continued exclusion from the right to bargain collectively in Ontario.[29] In 2004, agricultural workers and UFCW Canada

[29] Agricultural workers are also denied the right to bargain collectively in Alberta.

launched a second constitutional challenge arguing that the law implemented following *Dunmore* continues to deny their rights to unionize and bargain collectively.[30] While their application was dismissed by the Ontario Superior Court of Justice in January 2006 based on the narrow legal analysis of the 1987 *Labour Trilogy*,[31] their challenge is currently proceeding on appeal before the Ontario Court of Appeal.

Part-time workers in Ontario's community colleges have also, by statute, been denied the right to bargain collectively under the *Colleges Collective Bargaining Act*. On 30 August 2007, Ontario Minister of Training, Colleges and Universities Chris Bentley announced that the government intends to introduce legislative amendments that would extend collective bargaining rights to part-time college workers. The government appointed Kevin Whitaker, Chair of the Ontario Labour Relations Board, the College Relations commission and the Education Relations Commissions, to conduct a broad-based review of the *Colleges Collective Bargaining Act* and to file a written report of his findings and recommendations by the end of February 2008.

R.C.M.P. officers are also renewing the challenge to their exclusion from collective bargaining under the *Public Service Labour Relations Act*. R.C.M.P. officers had previously challenged their exclusion from statutory protection for collective bargaining in *Delisle v. Canada.*[32] The Supreme Court in 1999 relied on the analysis of the 1987 *Labour Trilogy* to find that their exclusion did not violate s. 2(d).

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[30] The authors are counsel for the farm workers in this challenge.

[31] *Fraser v. Ontario (Attorney General)* (2006), 79 O.R. (3d) 219 (S.C.J.). Currently on appeal at the Ontario Court of Appeal, Court File No. 44886.

[32] [1999] 2 S.C.R. 989.

The decision will also give strength to different groups of public sector workers who may not have statutory rights to bargain collectively – for example, lawyers and doctors – but who do in practice negotiate with the government regarding terms of work.

The Right to Strike

It is also likely that future challenges will also re-examine whether the right to strike is constitutionally protected. To the extent that the Supreme Court's analysis in *Dunmore* and *B.C. Health Services* have adopted Chief Justice Dickson's dissent from the *Alberta Reference*, this squarely raises the question of whether his conclusion that the right to strike is constitutionally protected will now stand.[33] Such challenges could also address the extent to which interest arbitration which is imposed in place of the right to strike effectively protects the right to freedom of association.[34]

Even in the absence of *Charter* challenges, the ruling in *B.C. Health Services* should give governments pause before resorting to back-to-work legislation to end strikes. Over the past decades, governments have been increasingly quick to resort to back to work legislation. As indicated above, the ILO has repeatedly found this legislation to be inconsistent with Canada's obligations under international law.[35] At a minimum, *B.C. Health Services* will require strict scrutiny of any such legislation to ensure that it minimally impairs rights and guarantees a genuine process of good faith bargaining and resolution

[33] While much of the Court's decision in *B.C. Health Services* emphasizes that s. 2(d) protects a process of collective bargaining, the Court has also framed the collective dimension of freedom of association more generally as protecting "the right of employees to associate in a process of collective action to achieve workplace goals". What implications this may have for other forms of workers' collective action remain to be seen.

[34] Unions have successfully challenged such provisions where the particular model of interest arbitration imposed did not adequately protect and provide for adjudicative independence: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539.

[35] See note 13, *supra*.

of bargaining disputes. As indicated in *B.C. Health Services*, while it is possible that a breach of s. 2(d) may be justified under s. 1 of the *Charter* this will likely be exceptional:

> "[Section 1] may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis." [para. 108]

Scope of Bargaining

There is a wide range of legislation which limits the scope of bargaining for particular groups of workers. Sector-specific legislation may either prescribe certain substantive terms and conditions of work or expressly exclude certain substantive matters from the scope of collective bargaining. To the extent that such statutes may remove fundamentally important matters from the scope of bargaining, a question arises as to whether they undermine the process of bargaining itself. For example, labour board complaints and court applications have previously been commenced in the education sector alleging that regulations introduced immediately prior to bargaining or during the course of bargaining or government action during bargaining amounted to unfair labour practices that interfered with collective bargaining.[36] Such conduct in future would also raise questions as to whether the legislation was in breach of constitutional rights.

Union Certification

Statutory schemes which impose specific pre-conditions to union certification may also be subject to review under s. 2(d). For example, in *P.I.P.S.C. v. Northwest Territories*, the legislation at issue required that before a union could seek certification under the

[36] See, for example, *Ontario English Catholic Teachers Association v. Attorney General of Ontario and Ministry of Education for Ontario*, Ont. S.C.J. File No. 00-CV-189872; *Brant Haldimand-Norfolk Catholic District School Board* , [2001] O.L.R.D. No. 1159 (OLRB). There is no decision on the merits in either case. The first case was discontinued as the regulations at issue were repealed; in the second case, the OLRB declined to rule on the merits as a collective agreement was subsequently ratified.

application labour legislation, it must be incorporated by statute in the Northwest Territories.[37] Judicial review of such restrictive methods of certification may be decided differently in light of *Dunmore* and *B.C. Health Services*.

Restraint Legislation

Legislation implementing income policies such as wage and price controls or imposing restraints such as in the *Social Contract Act* or the wide range of other provincial restraint laws passed over the past two decades would also be vulnerable to scrutiny following *B.C. Health Services*. It will no longer possible for government to simply override collective agreements as a first line of cost cutting. How such legislation is designed and whether it can withstand scrutiny would have to be determined on a case by case basis.

Restructuring

Finally, legislation affecting economic restructuring in particular sectors – such as has been seen in the health sector and through the amalgamation of municipalities and cities – will also need to be designed with a closer eye to protecting workers' freedom of association. Such legislation has been challenged in the past but has failed based on the 1987 *Labour Trilogy*. This area then is also ripe for reconsideration.

In all of these circumstances, the analysis in *B.C. Health Services* suggests that government will need to actively consider, address and ultimately respect workers' fundamental collective rights in the course of designing legislation. *B.C. Health Services* provides greater leverage for requiring genuine and good faith consultation with unions on legislation affecting workers rights.

[37] *PIPSC v. Northwest Territories, supra* note 7.