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Constitutional Changes
B.C. Health Services and *Fraser Decision*
Freedom of Association

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Introduction

In my presentation today I will review the development of freedom of association in the labour context from before the *Charter of Rights* through the labour trilogy in 1987 to the *Fraser* case in 2011.

I will critically review the *Fraser* decision and look to the jurisprudence after *Fraser* to see what kind of impact the decision has had.

I will finally review the outstanding *Charter* challenges, particularly those related to the critical question of whether s.2(d) protects the right to strike.

Freedom of Association before the *Charter*

Of all the fundamental freedoms now protected by s.2 of the *Charter* (religion, conscience, expression, opinion, belief, press, assembly and association), freedom of association was the least visible before the *Charter* was enacted in 1982.

Outside of labour relations and collective bargaining, freedom of association had little visibility on the Canadian legal landscape. The constitutional and civil liberties texts made little reference to it. Prior to the *Charter*, the Supreme Court of Canada

decided only two freedom of association cases and, very indirectly, at that. Both of these cases were in the labour context. One dealt with a labour board refusing to certify a trade union because one of its officers was a communist. In a very courageous decision in the midst of the McCarthy era, Justice Rand ruled that the Board's decision was beyond its jurisdiction and an insult to the union members' intelligence. The other case dealt with provincial legislation which regulated the expenditure of union dues for political purposes. The question was whether the provincial legislature had the jurisdiction to regulate political rights as it attempted to do here. The law was upheld.

The interesting aspect of these two cases is that the Supreme Court of Canada was acting without an entrenched bill of rights. It acted on the basis that provincial governments did not have the jurisdiction to regulate fundamental freedoms.

However, the important point for us is that before the *Charter*, freedom of association was only fundamental in the labour relations context. Of course, association was important for religious and political groups and racial minorities. However, in these situations, the essential fundamental freedom is the freedom around which the group is formed or organized... i.e. freedom of religion, freedom of expression and equality rights. It is clear that before 1982 labour laws gave life to freedom of association in Canada.

For example, in 1968, the Woods Task Force, the most authoritative statement on Canadian labour law and policy said:

> "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."

In the labour trilogy in 1987, which I will discuss later, Chief Justice Dickson said that freedom of association is the cornerstone of modern labour relations.

Clearly, before the *Charter,* freedom of association was fundamental to how workers combined in order to advance their collective goals in the workplace.

The *Charter* 1982

In 1982, Canada adopted an entrenched *Charter of Rights and Freedoms* which in s.2(d) expressly protected the freedom to associate. This is unlike the American Bill of Rights which has no such express protection. Associational rights in the U.S. are derived from the First Amendment protection of freedom of speech.

One is led to the question of why the drafters of the *Charter* made association a fundamental freedom in light of the legal landscape at the time of the *Charter.* Presumably, the answer is because freedom of association, including collective bargaining, were fundamental to the working lives of Canadians. As was stated in 2007 by the Supreme Court of Canada:

> "historically collective bargaining emerges as the most significant activity through which freedom of association is expressed in the labour context."

In this light, one would think that in the making of the *Charter* these labour rights would be clearly nailed down.

Unfortunately, they were not because of the politics at the time of the *Charter*.

Prior to its enactment, trade unions demonstrated a singularly indifferent attitude to the proposed entrenchment of our civil liberties in the *Canadian Charter of Rights and Freedoms*. No formal representations were made to the Joint Senate – House of Commons Committee established to hold hearings in regard to the enactment of the *Charter.* The *Charter* arose at a time when the Canadian Labour Congress was not co-operating with the Trudeau government. In its view, unemployment and

manpower concerns were far more relevant to their members. As a result, the final draft of the *Charter* had no input from labour other than the participation of some New Democratic Party members who expressed some of labour's concerns.

In the formative years of the *Charter*, the labour movement experienced a roller coaster-like ride in relation to the possible effect of the *Charter* in advancing their political, social and economic goals. Let me read to you what I wrote 25 years ago, in 1987, at the time of the labour trilogy:

> After the enactment of the *Charter* in 1982, many labour groups invoked it to curb government restrictions on their affairs and activities. Unfortunately, these *Charter* attacks were not made in a co-ordinated fashion nor was any thought given to the long term effects if such attacks were ever successful. Wage restraint legislation, "no-strike" legislation and "back to work" laws, amongst others, were attacked as being contrary to the *Charter*. [Anomalous positions were proffered such as unions arguing that income policies violated their members' freedom of contract or "due process" rights. Students of Canadian or American history would not miss the irony inherent in these positions.]

> At the same time, labour discovered that its opponents would use the *Charter* against trade unions by attempting to curtail their powers and to emasculate the underpinnings of the collective bargaining system. These attacks were all done under the banner of individual rights at the expense of group decisions made in a democratic manner. Many feared that labour would feel the brunt of an individualist-oriented document affirming rights which are expressed in very general language and which would be interpreted by our courts which have historically viewed labour unions with suspicion.
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> Although it is still early to tell, the effect of the *Charter* on trade unions lies somewhere between the initial and naive hopes of some unionists and the apocalyptic fears of others. Recent indications of the Supreme Court of Canada suggest a measured and restrained approach in respect of the *Charter* scrutiny of trade unions and collective bargaining.

Twenty-five years later we are in a better position to read where the Supreme Court of Canada is going with s.2(d) of the *Charter*. However, after the *Fraser* case in 2011 there is a clear tension on the court as to how generous an interpretation should be given to freedom of association in the labour context. There remains a dispute as to

the nature and scope of freedom of association. When we discuss *Fraser*, you will see that there are still some judges who take a very libertarian or individualist view of freedom of association. Fortunately, it appears that they are in the minority. However, in order to understand where we are today, it is important to review how we got there.

Our historical review of the application of the *Charter* will start with the labour trilogy in 1987.

Labour Law Trilogy 1987

- issue - are the rights to bargain collectively and strike protected by s.2(d).

- legislation - essential service law (Alberta)
  - federal wage restraint law in the early 1980's
  - Saskatchewan back to work law in the Dairy industry

- McIntyre - Dickson. C.J. Divide

- the key decision of the 3 cases is the *Alberta Reference* in which there was a critical debate between McIntyre and CJ Dickson as to the nature of freedom of association in Canada.

- "whole enchilada" - poor strategy because these were crucial issues to be raising n the formative years of the *Charter*

- *McIntyre* - very narrow view of s.2(d)

  - freedom of association is an individual right and not a collective right

  - freedom to join, form and maintain an association is protected

  - freedom to engage collectively in those activities which are constitutionally protected - religious and political groups

  - freedom to pursue with others whatever action an individual can lawfully pursue as an individual

  - by conceiving of freedom of association as an individual right, Justice McIntyre removed from the ambit of the protection of s.2(d) key associational activities of trade unions including most aspects of collective bargaining and the right to strike.

  - in short, the essential activities of an association were not protected.

- he advanced two policy rationales for this narrow view

(1) institutional concern

- courts lack the institutional expertise and experience to deal with serious questions of labour policy which attempt to strike an appropriate balance between the interests of labour and management in very dynamic and fluid circumstances.

(2) political concern

- labour laws strike a delicate balancing of the interests of labour and management – this balance should be made and fine-tuned by the democratically elected legislature which is accountable to the electorate and not by unelected judges

McIntyre J, therefore, advocated judicial restraint in the *Charter* review of labour laws. Unfortunately, this led to a "judicial no-go zone" where labour laws became virtually immune from *Charter* review for 20 years.

It also led to a legal scenario in which s.2(d) was held not to protect the right to bargain collectively or strike for a quarter of a century after the enactment of the *Charter*.

I might note as an aside that at the same time that the court took this very narrow view of freedom of association when unions were challenging legislative restrictions, the courts developed an expansive view of freedom of association when unions were being attacked. The courts developed the so-called negative freedom of association or the right not to associate when an individual claimed that he or she should not be compelled to belong to a union or support causes with which he or she disagreed. However, these attacks were usually fended off under s.1 of the *Charter*, *i.e.*, although a s.2(d) was violated, the law was justified under s.1 of the *Charter* in that it was found to be a justifiable limit on freedom of association.

Lavigne is an example of this negative right.

Dickson, CJ: A Generous and Purposive View of Freedom of Association

In probably one of the most important dissents in Canadian legal history, CJ Dickson ruled that on a proper reading of s.2(d), freedom of association protected much more than individual rights.

He provided a contextual analysis of freedom of association, one which was grounded in Canadian values and traditions.

He questioned the propriety of relying on American constitutional doctrine upon which McIntyre J relied.

He ruled that if freedom of association did not protect the essential activities of an association of workers, then the freedom would be legalistic, ungenerous and vapid.

CJ Dickson's analysis went on to consider the unequal distribution of power within society.

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

Significantly, he ruled that as a result, freedom of association went beyond the individual and has a collective dimension as well. In his view, confining the scope of

the freedom to activities that could be carried out by the individual alone was unprincipled and unduly restrictive. He recognized that certain activities were qualitatively collective in nature insofar as they could not be performed by individuals acting alone.

In his view, collective bargaining and the collective withdrawal of labour by workers were two activities which had no individual analogue and which deserved constitutional protection. Drawing on international jurisprudence, which uniformly treats collective bargaining and striking as fundamental freedoms, CJ Dickson recognized the close relationship between freedom of association and activities carried out by trade unions. He also recognized that the activities of unions have a human rights dimension which went beyond economic interests. In short, he concluded that trade unions and collective bargaining enhance *Charter* values such as equality, democracy, liberty, dignity and the rule of law.

in conclusion, he ruled that s.2(d) protects the right to bargain collectively and the right to strike based on his contextual analysis of Canadian history, values and traditions and international legal norms which applied to Canada.

Unfortunately from labour's perspective, his analysis did not win the day.

Justice McIntyre's American-like analysis of solely focusing on the individual formed the basis of the constitutional law underlying s.2(d) for 20 years.

In my view, it was the wrong approach in light of what the drafters of the *Charter of Rights* had in mind in 1982 when they protected an express right to freedom of association. As I said before, in 1982 freedom of association was alive and well in the labour law context. Elsewhere on the legal landscape it was not a real factor.

A "Collective" Breakthrough in 2001

As you know, the *Fraser* case dealt with the plight of farm workers who were expressly excluded from Ontario's collective bargaining laws. Unfortunately, *Fraser* was not the first time Ontario farm workers were in the Supreme Court of Canada fighting for the same rights that most other workers in the province have.

Farm workers were excluded from Ontario's first collective bargaining law in 1943 which was and still is based on the Wagner model from the U.S. The *Wagner Act* was Franklin D. Roosevelt's labour bill of rights passed in 1935 as part of his New Deal. One of the unfortunate aspects of the *Wagner Act* was that farm workers and domestics were excluded from its application. This exclusion was part of an unholy concession which Roosevelt made to the Southern Dixiecrats for their support. The

exclusion of farm workers and domestics was a coded way to exclude blacks and keep southern politicians happy. Unfortunately this exclusion was picked up in the Ontario law and remains to this day. Quite apart from this irrational and discriminatory exclusion imported from the U.S., when it comes to lobbying the government, the farmers' lobby in Ontario easily overpowers the farm workers which is one of Ontario's most vulnerable group of workers.

For 50 years after the introduction of Ontario's first collective bargaining law, farm workers fought for collective bargaining rights. Every province, other than Alberta and Ontario, give farm workers collective bargaining rights. Finally, in 1994 the NDP government of Bob Rae passed the *Agricultural Labour Relations Act* which conferred collective bargaining rights on farm workers. Unfortunately for them, a Common Sense Revolution occurred in Ontario in the next year. One of the first things that Mike Harris did was to repeal the *Agricultural Labour Relations Act* and extinguish the short-lived collective bargaining rights of farm workers. This repeal was done without regard to all of the studies and reports relied upon by the previous government in deciding that collective bargaining was appropriate in the agricultural workplace.

The repeal of this law and the revival of this exclusion led to a case called *Dunmore* in 2001. *Dunmore* is important because it was the first step in the Supreme Court of

Canada's rehabilitation of the important dissent of CJ Dickson from the *Alberta Reference*. *Dunmore* recognized that s.2(d) has a collective dimension and goes beyond protecting only individual rights. The court agreed with CJ Dickson that there are certain collective activities such as making collective representations to an employer which have no analogue in individual activity but should be constitutionally protected. *Dunmore* is also important in that it ruled that sometimes government must act positively with legislation in order to ensure that vulnerable citizens can effectively exercise their fundamental freedoms. However, the court maintained the existing law and ruled that even though it has a collective dimension, s.2(d) does not protect collective bargaining.

As a result of its decision, the court remitted the matter back to the Conservative government in Ontario to come up with a law which was *Charter* compliant. The government enacted the *Agricultural Employees Protection Act* . . . which did not confer collective bargaining rights on farm workers. It only gave them the right to make collective representations. The only duty on the employer was to listen to these representations. There was no duty to bargain in good faith. It doesn't take a law degree to speculate how many collective agreements would be negotiated under this new and unique legal regime.

This law led to the *Fraser* case. Before *Fraser* reached the Supreme Court of Canada in 2011, there was an important turning point in the s.2(d) jurisprudence.

The Turning Point: *B.C. Health Services*

In 2007 the real breakthrough in instantiating a meaningful right of freedom of association in the labour context came in the *B.C. Health Services* case. In this case, the Supreme court of Canada revived CJ Dickson's important dissent in the *Alberta Reference*.

At issue in *B.C. Health Services* was the validity of provincial legislation which invalidated important provisions of collective agreements in the health services sector, and effectively precluded meaningful collective bargaining on a number of significant issues. The government did so unilaterally, without consultation with unions before enacting the impugned legislation. In finding certain provisions of the impugned statute to be in violation of s. 2(d), the Court recognized a limited constitutional right to collectively bargain.

In a stunning acknowledgement, the Court declared that "the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter*'s

protection of freedom of association do not withstand principled scrutiny and should be rejected".

The Court renounced the "decontextualized" approach to defining freedom of association which dominated Justice McIntyre's judgment in the Alberta Reference and its jurisprudential progeny. This decontextualized approach not only focused narrowly on the individual, but also led to the contention that the content of freedom of association must be identical across all types of organizations.

Such an approach ignored the importance of collective bargaining both historically and currently to the freedom of association of trade unions. Upon reviewing the history of collective bargaining in Canada, the Court noted that "historically, [collective bargaining] emerges as the most significant collective activity through which freedom of association is expressed in the labour context". The Court drew support from international law, which recognizes collective bargaining as an integral component of freedom of association.

The Court further anchored its more expansive interpretation of freedom of association in *Charter* values more broadly. In the same manner that Chief Justice Dickson had done 20 years before, the Court reviewed the ways in which collective bargaining enhanced human dignity and the autonomy of workers, and permitted

workers to achieve a form of democracy and rule of law in the workplace. The Court concluded as follows:

> 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*.

In short, pursuant to a contextual analysis of the s. 2(d) guarantee, the Court was able to establish the fundamental nature of collective bargaining and its relationship to freedom of association as protected under the *Charter*.

In finding that collective bargaining falls within the scope of s. 2(d), the Court broke with the tradition established by Justice McIntyre of judicial restraint in the context of labour relations and freedom of association. The Court noted that this policy:

> ... fails to recognize the fact that worker organizations historically had the right to bargain collectively outside statutory regimes and takes an overbroad view of judicial deference. 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 in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values.

In the end, the Court provided for a limited procedural right to bargain collectively under s. 2(d). It guarantees neither a particular substantive outcome nor access to a particular model of labour relations or bargaining method. Rather, it protects 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. Where a government measure substantially interferes with the collective bargaining process - insofar as it affects a matter important to the bargaining process, and it does so in a way that undermines the duty of good faith negotiation - the government will have infringed s. 2(d) of the *Charter*.

Attempted Revival of the Debate - The *Fraser* Case

The gains made in *B.C. Health Services*, however, were not free from the spectre of the libertarian reasoning espoused by the majority in the labour trilogy. In 2011, the Court released *Ontario v. Fraser* which cold potentially raise new ambiguity into the meaning of freedom of association in the labour relations context. In an extraordinarily divisive decision which evoked the polarized judgments of the U.S Supreme Court, the majority of the Court was put on the defensive by an attack on

B.C. Health Services led by Justice Rothstein. This attack on the expansive conception of freedom of association was brought by Justice Rothstein on his own motion to overrule *B.C. Health Services* and, at the time of the hearing of the appeal, a mere two years after *B.C. Health Services* was released. In this surprising feat of judicial activism, Justice Rothstein attempted to revive the old Dickson/McIntyre debate in the *Alberta Reference*.

Writing on behalf of himself and Justice Charron, Justice Rothstein disagreed strenuously with the majority and past Supreme Court jurisprudence that collective bargaining was constitutionally protected under s. 2(d) of the *Charter*. In his attempt to overturn *B.C. Health Services*, he resurrected several arguments which had been previously laid to rest, including that section 2(d) protected individual interests, not collective interests, was a freedom not a right, and did not privilege some associations over others.

Justice Rothstein further revived Justice McIntyre's doctrine of judicial restraint. In his view, courts in the past have afforded the legislature significant deference in the application of s. 2(d) of the *Charter* to the field of labour relations, and should continue to do so. He argued that neither Canadian labour history, international law, nor *Charter* values supported the constitutionalization of collective bargaining rights. Finally, Justice Rothstein suggested that the approach set out in *B.C. Health*

Services was unworkable insofar as it constitutionalized a part of the Wagner or North American model of labour relations and drew an untenable distinction between the substance and process of collective bargaining.

The majority judgment, authored by Chief Justice McLachlin and Justice LeBel - the same co-authors of *B.C. Health Services* - responded to each of Justice Rothstein's attacks. In responding to these attacks, they clearly stated that they were upholding *BC Health Services*.

Lost in the divisive debate over the proper conceptualization of freedom of association was the farm workers' continued struggle to form an association and bargain collectively. As I said earlier, in response to *Dunmore*, the provincial government enacted the *Agricultural Employees Protection Act, 2002* ("*AEPA*"), which provided very limited, if any, protections to the collective bargaining process. Indeed, the Minister introducing the legislation at the time of its enactment stated clearly that it was not intended to "extend collective bargaining to agricultural workers". Through a combination of a narrow conceptualization of freedom of association and an extraordinary exercise of statutory interpretation, the majority of the Court found that the *AEPA*, *properly interpreted*, was not unconstitutional.

The majority phrased the question as "whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals". Applying this standard, the Court determined that it was premature to conclude that the impugned legislation offered insufficient protections for s. 2(d) rights. It did so despite clear evidence that the agricultural workers have thus far been unable to meaningfully exercise their collective bargaining rights under the impugned legislation. Moreover, as of today, not one agricultural business in Ontario has become subject to any good faith collective bargaining, let alone a collective agreement, under the *AEPA* - a startling outcome for purported "collective bargaining" legislation.

In the end what we are left with is a re-emergence of the Dickson/McIntyre divide and, in response, a possible retreat from the generous, contextual analysis of freedom of association put forward by Chief Justice Dickson in the Alberta Reference and adopted by the Court in *B.C. Health Services*. As it stands, s. 2(d) in the labour relations context currently guarantees a meaningful process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith. Whether Justice McIntyre's narrow conception of freedom of association will gain currency with future members of the Court is difficult to predict. However, as it stands today, we should rely upon the majority's clear statement in *Fraser* that it was upholding the

decision in *B.C. Health Services* which held that s.2(d) protects a right to a process of collective bargaining.

Jurisprudence - Post Fraser

Since *Fraser,* there have been a number of cases across Canada in which government lawyers have argued that *Fraser* has watered down *B.C. Health Services.* Fortunately, from my perspective the courts in these cases have rejected these arguments. There are 3 cases which dealt with the federal *Expenditure Restraint Act* ... Federal Court, Ontario Supreme Court and B.C. Supreme Court. All of these cases took the *Fraser* majority at its word i.e. that is that it was upholding *B.C. Health Services.* As well, in a very recent case, the Sask. Q.B. Court rejected these government arguments and ruled that *B.C. Health Services* is the law so that s.2(d) protects collective rights, such as collective bargaining in the labour context. In fact this court went on to say that "in *Fraser,* the S.C.C. did not resile from its position in *B.C. Health Services*".

Finally, I would like to deal with the critical question that remains:

"Does s.2(d) protect the right to strike?"

Does s.2(d) Protect the right to Strike

In my view, the answer is **YES.** In fact, I believe that the right to strike case is a much stronger argument than whether s.2(d) protects the right to bargain collectively.

It is a question that is ripe for determination in light of the Harper government's cavalier attitude to the right to strike. In the last year, it has taken away or threatened to remove the right to strike on 5 separate occasions.

June 2011

CAW - Introduced law on 1st day of strike at Air Canada.
(ticket agents)

CUPW - the Restoring Mail Delivery for *Canadian Act* **lockout** and not strike - sole shareholder - **lower wages**

September 2011

CUPE - Flight Attendants

March 2012

The Protecting Air Service Act

- pilots of Air Canada (ACPA)
- machinists of Air Canada (IAM)

There are 3 constitutional challenges outstanding

In these challenges the unions will be relying on C.J. Dickson dissent in the *Alberta Reference* in which he decided that s.2(d) protects the right to strike because the right to bargain collectively is meaningless without the right to strike to resolve bargaining impasses.

Indeed, a reading of Rothstein, J. in *Fraser* shows that he agrees that if s.2(d) protects the right to bargain collectively it must also include the right to strike in order to make collective bargaining meaningful. The right to strike does not have some of the conceptual problems of the right to bargain collectively.

(i) no duty imposed on another person

(ii) predates the Wagner model by about 3000 years

(iii) an adverse ruling would legalize slavery.

Finally, international law recognizes that for association includes the right to of employees to collectively withdraw their services. The fighting ground will be whether the law is justified under s.1.

(i) is there a threat tp public health and safety;

(ii) if so, is there an adequate alternative dispute settlement mechanism substituted in the place of the right to strike. e.g. final, independent and effective arbitration.

Saskatchewan Federal Labour Law case (Feb 6/12)