Chapter 2

Freedom of Association: How Fundamental is the Freedom? — Section 2(d)

Paul J.J. Cavalluzzo and Adrienne Telford*

1. Introduction

The recent *Fraser v. Ontario (Attorney General)*[1] case demonstrates a lingering debate in the Supreme Court of Canada on the nature of freedom of association. It harkens back to the vigorous debate between Justice McIntyre and Chief Justice Dickson in the *Reference re: Public Service Employee Relations Act*,[2] the court's first attempt to instantiate the abstract right to freedom of association under s. 2(*d*) of the Charter. This debate, in the early stages of the Charter, was won by Justice McIntyre who rendered a narrow interpretation of freedom of association by relying upon American constitutional doctrine with no reference to the material differences in the Canadian context. In particular, he relied upon American legal literature which focused upon the individual nature of freedom of association. In the U.S., freedom of association is conceived of as a narrow individual right in part because it is derived from the individual rights found in the First Amendment to the Bill of Rights. Unlike the Charter, the American Bill of Rights does not explicitly protect freedom of association. Justice McIntyre also relied upon two policy reasons to support his conclusion that the right to strike was not protected by s. 2(*d*) which related to the institutional limits of courts in reviewing labour laws.

In a strong dissent, Chief Justice Dickson recognized the different legal and political culture in Canada which was recognized by our

* Both of Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

1 (2011), 331 D.L.R. (4th) 64 (S.C.C.) ("*Fraser*").

2 (1987), 38 D.L.R. (4th) 161 (S.C.C.) ("*Alberta Reference*").

Charter in providing for an independent freedom of association. In Chief Justice Dickson's view, freedom of association has a collective aspect in that some collective action which is deserving of constitutional protection will find no analogue in individual action. In a modern society, the true purpose of freedom of association is to protect the collective pursuit of common objectives. The focus on the collective aspect is to ensure that Canadians can join together with their fellow citizens in order to effectively pursue their common goals. The association provides the individual with the capacity to meaningfully strive to achieve the aspirations which he/she could not achieve on their own. Individual aspirations usually cannot be achieved by the individual alone in contemporary Canadian society. The act of joining in association advances the Charter goals of equality, democracy, dignity and respect for the autonomy of the person by making these goals realizable. The nature of freedom of association goes beyond the individual. It is at least, in part, a collective right similar to group rights protected by the Canadian Constitution.

Nevertheless, in the Charter's formative years, the court gave a narrow interpretation of s. 2(*d*) in claims brought by trade unions seeking protection from state interference with the collective bargaining rights of its members. In contrast, it is interesting to note that the court gave s. 2(*d*) a robust interpretation in implying a negative freedom of association or a right not to associate in claims brought by individuals against laws promoting trade unionism. This inconsistency in approach which Justice Wilson described as "one-sided justice" in *Lavigne v. Ontario Public Service Employees Union*[3] was due to the court's individual rights focus to s. 2(*d*) in the early years.

Over time, the Supreme Court began to incrementally move away from the McIntyre or American approach. In 2001, the court adopted a contextual approach to freedom of association in two cases, *R. v. Advance Cutting & Coring Ltd.*[4] and *Dunmore v. Ontario (Attorney General)*.[5] Initially in *Advance Cutting*, some of the justices recognized the collective dimension of freedom of association. Later in the year in *Dunmore*, Justice Bastarache for the majority ruled that there are some collective activities for which there is no analogue in individual action which ought to be protected by s. 2(*d*), such as the making of collective representations to one's employer. However, the recognition of a collective dimension to s. 2(*d*) in *Dunmore* was not grounded in

[3] (1991), 81 D.L.R. (4th) 545 (S.C.C.) ("*Lavigne*").
[4] (2001), 205 D.L.R. (4th) 385 (S.C.C.) ("*Advance Cutting*").
[5] (2001), 207 D.L.R. (4th) 193 (S.C.C.) ("*Dunmore*").

Canadian values and traditions. Rather, it was grounded in the terse definition given to s. 2(*d*) by most justices that an individual has the freedom to do in association what he or she may do lawfully alone. By 2001, the court recognized that there are some associational activities which have no analogue in individual conduct. Unfortunately, this legalistic and parsimonious concession did not give the collective right firm grounding.

Nevertheless, both cases represented a departure from Justice McIntyre's approach in the *Alberta Reference* which solely focused upon freedom of association as an individual right. In 2007, the departure from this approach became clear in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*,[6] in which McIntyre J.'s focus on the individual was explicitly and soundly rejected. Chief Justice Dickson's strong dissent in the *Alberta Reference* was resurrected and became the law. For the first time since the enactment of the Charter, the court recognized a procedural right to collective bargaining as coming within the scope of the s. 2(*d*) guarantee.

However, in 2011, in *Fraser*,[7] a minority of the court, led by Justice Rothstein, attempted to revert back to the individual or American approach to freedom of association. The vigour and adversarial nature of the debate between the judgments in *Fraser* suggested a decision similar to ones we often see in the Supreme Court of the United States. The fundamental premise underlying Justice Rothstein's attack on *Health Services* is that freedom of association is an individual right which does not protect collective bargaining as practised in Canada. This radical assault on the court's evolutionary process to recognize a collective dimension to s. 2(*d*) does not consider the contextual Canadian factors which call for a different approach from the American doctrine. With the court's makeup likely to change significantly in the near future, it is difficult to predict whether the court will continue to recognize that freedom of association has important collective dimensions which are worthy of constitutional protection in Canada in light of our unique cultural, historical, social and political tradition.

What is needed in the future is a theoretical framework in order to unequivocally mandate a truly Canadian approach to freedom of association which recognizes our values, traditions and culture. At this stage of our Charter development, we should not be relying upon exclusively liberal or libertarian notions of individual liberty to inform

6 (2007), 283 D.L.R. (4th) 40 (S.C.C.) ("*Health Services*").
7 *Supra*, footnote 1.

the interpretation of s. 2(*d*). In Canada, communitarian and egalitarian values have always lived comfortably with individual freedoms. The *Canadian Charter of Rights and Freedoms* is a testament to this constitutional harmony in that both individual rights and group rights are protected. Indeed, without the constitutional protection of such group rights as language, denominational schools, Aboriginal and women's rights, there would be no *Canadian Charter of Rights and Freedoms*.[8] Significantly, at the insistence of Prime Minister Trudeau, these group rights cannot be overridden by Parliament or a legislature under s. 33 of the Charter, the notwithstanding clause, as is the case with the fundamental freedoms found in s. 2, the legal rights found in ss. 7 to 14 and the equality rights found in s. 15.[9] Needless to say, the Canadian Charter is an entrenched bill of rights quite different from the American in that it protects far more than traditional individual rights. The Canadian focus was primarily on protecting rights of minority groups in the face of the greater power of the majority. The implications of this focus are twofold. First, in Canada group or collective rights are recognized as sufficiently fundamental to be constitutionally entrenched. Second, the implication of protecting these minority group rights is that frequently positive government action is required in order to secure these rights. Restrictive notions that the Charter is only concerned with "freedoms" in the sense of negative government action (*i.e.*, freedom from or a prohibition of undue government interference with our Charter rights), have no place in the Canadian context. The blending of individual and collective rights in the Charter was the quintessential Canadian compromise reached in 1982 when the Charter was adopted. This contextual constitutional background should ultimately inform the interpretation of s. 2(*d*).

In this chapter we survey the jurisprudential development of freedom of association in Canada. We first review the limited jurisprudence prior to the entrenchment of the Charter, and note that notwithstanding the sparsity of judicial treatment there was a vibrant history of freedom of association in the labour relations context from which our modern collective bargaining regimes were derived. We then review freedom of association in the Charter era, tracing its evolution from the narrow conception in the *Alberta Reference* through to the more purposive and

[8] P.C. Weiler, "The Evolution of the Charter: A View from the Outside", in J.M. Weiler and R.M. Elliot, *Litigating the Values of the Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986).

[9] R. Graham, *The Last Act: Pierre Trudeau, the Gang of Eight, and the Fight for Canada* (Toronto: Allen Lane Canada, 2011), excerpted in the Globe and Mail, November 5, 2011.

generous conception in *Dunmore* and *Health Services*, and finally the recent controversial decision in *Fraser*. Along the way we highlight the vigorous debates which have gripped the court and which have characterized the jurisprudence on freedom of association. These debates include the tension between individual and collective interests, negative and positive conceptions of the right, and contextual and decontextualized (or neutral) approaches to interpreting the scope of protection under s. 2(*d*) of the Charter. Finally, we propose a way forward which continues the evolutionary jurisprudential trajectory toward instantiating a full and meaningful right to freedom of association.

2. Freedom of Association before the Charter

Prior to the enactment of the Charter in 1982, freedom of association was of limited significance in our legal system outside of labour relations and collective bargaining. In his constitutional text, Professor Bora Laskin classified freedom of association as a political liberty along with the "freedom of assembly, of utterance, of communication and of conscience and religion".[10] Much of the very limited discussion on freedom of association in Professor Laskin's text related to whether, as a political liberty, freedom of association was beyond the purview of provincial legislatures to interfere with the liberty to associate. This debate was framed by the "implicit bill of rights" doctrine developed by the Supreme Court of Canada in the 1950s in response to restrictive provincial laws which interfered with civil liberties.[11] There was no discussion as to the content, nature or scope of freedom of association.

Adopted in 1960, the *Canadian Bill of Rights* expressly protected freedom of association under s. 1(*e*). However, unlike s. 2(*d*) of the Charter, s. 1(*e*) of the Bill of Rights protected both "freedom of assembly and association". There are no Supreme Court of Canada cases under the association part of the clause. The other leading texts on civil liberties at the time also had limited discussion on the nature and purpose of freedom of association.[12] In his text, *Constitutional Law of Canada*,[13] initially published in 1977, Professor Peter Hogg did not even mention freedom of

[10] B. Laskin, *Canadian Constitutional Law*, 3rd ed. (Toronto: Carswell, 1966), at p. 974.

[11] Under this "implicit bill of rights" doctrine, the Supreme Court ruled that the subject-matter of fundamental freedoms was a matter beyond provincial jurisdiction. Hence, before the *Canadian Charter of Rights and Freedoms*, and, indeed, before the *Canadian Bill of Rights*, S.C. 1960, c. 44, the court was protecting civil liberties on a "division of powers" analysis.

[12] See D.A. Schmeiser, *Civil Liberties in Canada* (London: O.U.P., 1964), at pp. 221-2; W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed. (Toronto: McClelland and Stewart, 1975), at pp. 201-209.

[13] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), at p. 410.7.

association as one of the political liberties, which he described as consisting of "freedom of speech, religion and assembly".

Prior to the Charter, there were two cases decided by the Supreme Court of Canada which dealt, in part, with freedom of association. Both cases arose in the labour relations context and dealt with issues which were more concerned with expression than association. In *R. v. Smith & Rhuland Ltd.*,[14] the Nova Scotia Labour Relations Board had dismissed an application for certification at a shipyard "on public policy grounds" because the secretary-treasurer and organizer of the union was a communist. This decision in the context of the "Red Scare" of the McCarthy era reached the Supreme Court of Canada. In a split 4-3 decision, the court rejected the Board's refusal of certification on this political ground. In the plurality decision, Justice Rand found that the Labour Relations Board of Nova Scotia was not empowered to dismiss an application for certification on the basis that it viewed a union officer's political beliefs to be dangerous. Rand J. observed that the union officer could run for political office regardless of his communist beliefs, and thus it was difficult to see how he could be excluded from union office. He also suggested that the Board's decision was an insult to the intelligence and loyalty of the workers who elected and relied upon this union officer:[15]

> The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals?
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> . . . . .
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> I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization.

No doubt, these were courageous and wise words in the middle of the McCarthy era. As an aside, it is interesting to see our fundamental freedoms being protected by the court without a constitutionally entrenched bill of rights. Indeed, in the 1950s our courts were arguably more protective of civil liberties than their American counterparts by relying upon the implicit bill of rights.[16]

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14 [1953] 3 D.L.R. 690 (S.C.C.).

15 *Supra*, at pp. 694-5.

16 See P. Cavalluzzo, "Judicial Review and the Bill of Rights: *Drybones* and its Aftermath" (1971), Osgoode Hall L.J. 511, at pp. 526-8. By comparison, in 1947 the U.S. Congress passed the *Taft-Hartley Act*, 61 Stat. 136, amending the *National Labour Relations Act*, 29 U.S.C. §151 *et seq.*, to require that all union officers sign non-communist affidavits or face the penalty of losing their position.

In the second case, *Oil, Chemical and Atomic Workers International Union, Local 16-601 v. Imperial Oil Ltd.*,[17] the legislature of British Columbia regulated the expenditure of checked-off union dues for political purposes. A union constitutionally challenged the provincial legislation on the basis that it went beyond provincial jurisdiction. The dissenting judgments, in particular that of Justice Abbot, ruled that expenditures in support of political activities by voluntary associations were not matters of "property and civil rights" assigned to the provinces by s. 92(14) of the *Constitution Act, 1867*. The dissenting justices decided that the real subject-matter of the law was political rights protected by the implicit bill of rights and was therefore beyond the purview of the provinces. The majority, however, ruled in favour of the province.

Although the fundamental nature of freedom of association appears to be equivocal on much of the Canadian legal landscape prior to the enactment of the Charter, the freedom was fundamental in labour relations and collective bargaining prior to 1982. In Canada, freedom of association was given life by modern collective bargaining laws which provided employees with the right to organize, bargain collectively and strike without reprisal from the employer. In consideration for these rights, employees gave up the right to strike at certain times, for example, during the life of a collective agreement. The legislatures regulated the right to strike in order to promote industrial harmony and peace. Significantly, although there was a profound connection between freedom of association and the modern statutory regime, the Canadian statutes did not create the right to organize, bargain collectively and strike. Rather, these statutory rights were themselves derived from the fundamental freedom of association and became a significant part of the Canadian polity.

The relationship between freedom of association and labour law was recognized in 1968 by the Woods Task Force Report,[18] which remains the most authoritative statement of principles underlying Canadian labour law and 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 sanctions, including taking a case public in the event of an impasse. Collective bargaining

[17] (1961), 41 D.L.R. (2d) 1 (S.C.C.).

[18] H.D. Woods (chair), *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa, Privy Council Office, 1968).

> legislation establishes rights and imposes duties *derived from these fundamental freedoms*, just as legislation in other fields protects and controls corporate action. [Emphasis added]

After the enactment of the Charter, the Supreme Court recognized early on how significant freedom of association was to the creation and evolution of the modern statutory regimes. In *Alberta Reference*, Chief Justice Dickson noted that:[19]

> Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe and exploitative working conditions.

In *Dunmore*,[20] Justice Bastarache stated that the *Labour Relations Act* of Ontario was designed to safeguard the exercise of this fundamental freedom. In regard to the freedom to organize which he said lies at the core of the Charter's protection of freedom of association, he stated that the "[*Labour Relations Act*] does not simply enhance, but instantiates, the freedom to organize".[21] Finally, in *Health Services*, the court accepted the fundamental interrelationship between freedom of association and modern collective bargaining laws:[22]

> . . . the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute. Legislatures throughout Canada have historically viewed collective bargaining rights as sufficiently important to immunize them from potential interference. The statutes they passed did not create the right to bargain collectively. Rather, they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature.

In short, freedom of association was vibrant in the area of labour law prior to the enactment of the Charter. Freedom of association is the cornerstone of modern labour laws. This was also reflected in international law prior to 1982 which was binding on Canada and which guaranteed freedom of association in the workplace. Freedom of association was far more important in labour relations than in any other area of human activity in Canada in 1982. This was the context in which freedom of association was constitutionally entrenched when the Charter was enacted. In our view, this should be part of the contextual background to the interpretation of s. 2(*d*) of the Charter today.

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19 *Supra*, footnote 2, at p. 173.
20 *Supra*, footnote 5, at paras. 23 and 36.
21 *Supra*, at para. 36.
22 *Health Services*, *supra*, footnote 6, at para. 25.

3. Alberta Reference: The McIntyre and Dickson Divide

The *Alberta Reference* was the court's first attempt to grapple with the question of how to concretize the abstract right to freedom of association under s. 2(*d*) of the Charter. The court examined the nature of freedom of association in the context of a reference concerning the constitutional validity of provincial public sector labour relations legislation. This constitutional reference raised, among other things, the question of whether s. 2(*d*) of the Charter protected the right of workers to bargain and withdraw their services collectively. What emerged was a deep and, as it turned out, longstanding division in the court on the proper interpretation of freedom of association.

On the one hand was a narrow view of the right, which was adopted by the majority of justices and epitomized by Justice McIntyre's concurring judgment in the *Alberta Reference*. On the other hand was a more expansive and contextual conception of freedom of association grounded in Charter values, which was advanced by Chief Justice Dickson in dissent. While both Justice McIntyre and Chief Justice Dickson started from the premise that "freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes",[23] they quickly parted ways on the scope of protection afforded by s. 2(*d*) of the Charter.

(1) McIntyre: A Thin and Impoverished Vision of Freedom of Association[24]

At the outset of his reasons, Justice McIntyre expressed that at the core of freedom of association "rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others".[25] He thus staked out the parameters for a narrow interpretation of freedom of association based on liberal commitments, which place primacy on the individual. In doing so, Justice McIntyre relied on the Western liberal conception of rights, which emphasizes individual liberty and autonomy. Buttressed by American constitutional doctrine, Justice McIntyre asserted that freedom of association is an explicitly individual right:[26]

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[23] *Alberta Reference*, *supra*, footnote 2, at p. 173 *per* Dickson C.J.C. See McIntyre J.'s reasons at pp. 221 and 227-8.

[24] A reference to Justice La Forest's statement in regards to the equality rights provision under s. 15 of the Charter in *Eldridge v. British Columbia (Attorney General)* (1997), 151 D.L.R. (4th) 577 (S.C.C.), at para. 73.

[25] *Alberta Reference*, *supra*, footnote 2, at p. 218.

[26] *Supra*, at pp. 219-20.

> In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise . . . The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.

In short, in Justice McIntyre's view, freedom of association protected individual, not collective, interests. The group or association was merely a means — or "device" — to an end: enhancing the individual's liberty, autonomy and capacity for self-realization. On the basis of this proposition, and again relying on American constitutional doctrine, Justice McIntyre defined narrowly the scope of s. 2(*d*) protection to include the following three elements:

1. The freedom to join with others in lawful, common pursuits and to establish and maintain organizations and associations;
2. The freedom to engage collectively in those activities which are constitutionally protected for each individual; and
3. The freedom to pursue with others whatever action an individual can lawfully pursue as an individual.

By conceiving freedom of association as an individual right, Justice McIntyre effectively removed from the ambit of s. 2(*d*) protection key associational activities of organized labour, including most aspects of collective bargaining[27] and striking. These activities were largely a group concern and, according to Justice McIntyre:[28]

> . . . 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 merely by the fact of association.

To illustrate the dangers of extending constitutional protection to the essential activities of an association, Justice McIntyre relied upon the example of a gun club.[29] According to this example, if the essential

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[27] In *PSAC v. Canada* (1987), 38 D.L.R. (4th) 249 (S.C.C.), one of the judgments released by the court at the same time as the *Alberta Reference*, Justice McIntyre noted that his concurring judgment in the *Alberta Reference* did not "preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association" (para. 54). However, he went on to find that the impugned legislation in that case, which effectively precluded collective bargaining on compensatory and non-compensatory components of collective agreements for many public sector workers, did not violate freedom of association.

[28] *Alberta Reference*, *supra*, footnote 2, at p. 220.

activities of an association are protected under s. 2(*d*), then the right to bear arms would achieve constitutional status since the principal activity of a gun club is the ownership and use of guns. The example is premised, of course, on the assumption that any contextual analysis by the court of the value of the associational activity in question, and whether it is deserving of constitutional protection, is impermissible.

Thus, a related concern underlying Justice McIntyre's position, which was perhaps most clearly articulated in the majority judgment of Justice Le Dain, was the assumption that the content of the s. 2(*d*) Charter right must be uniform for individuals of all types of associations. The court was concerned about privileging one form of association over another by extending constitutional protection to the essential activities of a trade union. As stated by Justice Le Dain:[30]

> In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter* it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

This concern for uniformity or neutrality across different types of associations led the majority of the court to exclude from s. 2(*d*) protection essential associational activities of members of a trade union: collective bargaining and the collective withdrawal of services.

Justice McIntyre also advanced two policy rationales in support of excluding these associational activities from s. 2(*d*) protection. These policy rationales underscored the impropriety of courts intervening in the delicate balance of labour relations. In particular, Justice McIntyre emphasized that the courts lack institutional expertise to deal competently with the polycentric issues which arise in the labour relations context. He also highlighted the political as opposed to legal nature of judicial decision making in determining whether to intervene in the balance struck by the government between the interests of labour and management. Accordingly, Justice McIntyre advocated for judicial restraint in interpreting the scope of s. 2(*d*) rights, adopting wholesale the principle of curial deference which was developed in the administrative law context. In doing so, he ignored significant differences

[29] *Supra*, at p. 225.
[30] *Supra*, at p. 239. In this regard, see the reasons of Justice McIntyre at pp. 226-7.

in the constitutional and administrative law contexts, including the supremacy of the Charter and the role of the courts in upholding the constitution. Moreover, Justice McIntyre's judicial restraint in interpreting the scope of s. 2(*d*) contradicted clear Charter jurisprudence identifying s. 1 of the Charter as the appropriate stage in the analysis for considering deference to the legislature.

(2) Dickson: A Generous and Purposive View of Freedom of Association

In contrast, while Chief Justice Dickson began with the individual in his analysis of freedom of association, he did not end there. Writing on behalf of himself and Justice Wilson, Chief Justice Dickson provided a contextual analysis of freedom of association, one which was grounded in Canadian values and traditions.

Significantly, Chief Justice Dickson questioned the propriety of relying on American constitutional doctrine in interpreting freedom of association under the Canadian Charter. He distinguished the American constitutional context from the Canadian on the basis of two material differences:[31]

> First, freedom of association is not explicitly protected in the United States Constitution, as it is in the *Charter*. Instead, it has been implied by the judiciary as a necessary derivative of the First Amendment's protection of freedom of speech, "the right of the people to peaceably assemble," and freedom to petition . . . The general principle, as developed in the First Amendment jurisprudence of the Supreme Court, is that of freedom "to engage in association for the advancement of beliefs and ideas" . . . The limited associational purposes protected in the United States are therefore faithful to the derivation of freedom of association from the particular rights and freedoms delineated in the First Amendment.
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> A second important difference between the United States Constitution and the *Charter* is the absence, in the former, of a provision such as s. 1. The balancing of the protection of rights and freedoms with the larger interests of the community, therefore, must be done in the context of defining the right or freedom itself. Whereas a Canadian court could endorse constitutional protection for strike activity, for example, under s. 2(*d*) of the *Charter* and yet still uphold certain limits on the freedom to strike under s. 1, this approach is not open to courts in the United States. Accordingly, one would expect a more limited approach to the delineation of the freedom itself. It is with these two caveats in mind that we turn to an appraisal of the United States position. [Citations omitted]

In Chief Justice Dickson's view, the derivative status of freedom of association and the internal balancing at the rights definition stage under American constitutional law rendered suspect reliance on the doctrine in Charter jurisprudence. Accordingly, Dickson C.J.C. rejected the United

[31] *Supra*, at pp. 181-2.

States Bill of Rights's narrow delineation of freedom of association wherein the right entailed little more than a freedom to belong to or form an association, or engage in those associational activities which related specifically to one of the enumerated fundamental freedoms.[32] Such an approach was unduly restrictive and was not supported by the language of s. 2, which provided an explicit and independent guarantee of freedom of association.[33]

Moreover, in Chief Justice Dickson's opinion:[34]

> If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

In his view, having regard to the purposive approach to constitutional interpretation mandated by the Charter, "while it is unquestionable that s. 2(*d*), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed".[35]

In this regard, Dickson C.J.C. expounded on the values and interests underpinning the s. 2(*d*) guarantee:[36]

> The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.
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> As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live.

Yet, Chief Justice Dickson's contextual analysis went even further. He advanced a reading of freedom of association which took into account the unequal distribution of power within society:[37]

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers

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[32] The enumerated constitutional freedoms under the United States Bill of Rights are the freedom of religion, speech, press, and the right to peaceably assemble and to petition government: *supra*, at pp. 195-6.

[33] *Supra*, at p. 196.

[34] *Supra*, at p. 195.

[35] *Supra*.

[36] *Supra*, at pp. 196-7.

[37] *Supra*, at p. 197.

> have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

While Dickson C.J.C. acknowledged the individual's interest to act in concert with others, he recognized that the interests protected by freedom of association went beyond the individual and had a collective dimension as well. In his view, confining the scope of the freedom to activities that could be carried out by the individual was unprincipled and unduly restrictive. He recognized that certain activities were collective in nature, insofar as they could not be performed by individuals acting alone:[38]

> There will [be] occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights.

Collective bargaining and the collective withdrawal of labour by workers were two activities which had no individual analogue, and which deserved, in the Chief Justice's view, constitutional protection. Drawing on international authorities and jurisprudence, which uniformly treat collective bargaining and striking as fundamental freedoms, Chief Justice Dickson recognized the close relationship between freedom of association and the activities carried out by trade unions. He also recognized that the activities of trade unions have a human rights and civil liberties dimension which went beyond their economic aspect. Indeed, Chief Justice Dickson noted that the primary value of the activities of trade unions is their potential for liberating workers from the exploitive power of their employer so as to permit them to express their personhood more fully at work and in society at large:[39]

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.

Chief Justice Dickson thus drew a link between the essential activities of a trade union and the realization of fundamental goals of the Charter, including enhancing human dignity, equality and democracy, as well as protecting individuals from the "vulnerability of isolation" and assuring them "the potential of effective participation in society".[40] This

[38] *Supra*, at p. 198.
[39] *Supra*, at p. 199. See also p. 173.
[40] *Supra*, at p. 173.

significant connection served as a foundation for extending s. 2(*d*) protection to essential trade union activities, such as collective bargaining and the collective withdrawal of labour.

In short, a distinguishing feature of Chief Justice Dickson's dissent was that he employed a contextual analysis, one which acknowledged the collective dimension of freedom of association and its importance in overcoming inequalities within society, as well as the significant role played by unions in advancing in the workplace the Charter values of dignity, equality and democracy. Accordingly, Chief Justice Dickson was able to advance a more generous conception of the s. 2(*d*) guarantee, one which extended Charter protection beyond the formation and maintenance of a union to the pursuit of the essential activities of that union.

However, despite the Chief Justice's powerful dissent, the narrow, decontextualized and ungenerous view of freedom of association carried the day. In *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*,[41] Justice Sopinka, writing for himself, summarized the three principles set out by Justice McIntyre in the *Alberta Reference* and added a fourth: that s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association. These four propositions were then adopted by the majorities in subsequent Supreme Court jurisprudence on freedom of association.[42]

4. The Negative Freedom of Association

The negative freedom of association or the right not to associate has created as much controversy in Supreme Court jurisprudence as the positive aspect of freedom of association. Like the positive freedom, the activity giving rise to the great bulk of the applicable jurisprudence is labour relations or collective bargaining. This is ironic in light of the admonition of Le Dain J. in the *Alberta Reference* in which he cautioned against the constitutional protection of collective bargaining because s. 2(*d*) was not limited to trade unions or associations of workers and that any interpretation of s. 2(*d*) must be broad in scope in order to be applicable to any association seeking its protection. As you will see in the conclusion of this chapter, Justice Rothstein gave a similar admonition in *Fraser* in his concurring judgment. In spite of these judicial caveats, after

41 (1990), 72 D.L.R. (4th) 1 (S.C.C.) ("*PIPSC*").

42 These four propositions were endorsed by majorities of the court in *Canadian Egg Marketing Agency v. Richardson* (1998), 166 D.L.R. (4th) 1 (S.C.C.), and *Delisle v. Canada (Deputy Attorney General)* (1999), 176 D.L.R. (4th) 513 (S.C.C.).

30 years of the Charter, labour relations has been and continues to be the main focus of s. 2(*d*) jurisprudence.[43] This is not surprising in light of the development of freedom of association before 1982.

(1) A Right Not to Associate?

A right not to associate in Canada is not self-evident. On its face, s. 2(*d*) does not provide for such a right. Other constitutional documents expressly provide for a negative freedom of association. For example, art. 20(2) of the *United Nations Universal Declaration of Human Rights* provides: "No one may be compelled to belong to an association".[44]

Needless to say, if there is a right against compelled association in Canada, it will have to be implied by the courts.

In the early years of the Charter, the courts were very wary of implying these rights in the area of labour relations. As we review elsewhere in this chapter, until 2007 the courts were not prepared to imply the right to collective bargaining in s. 2(*d*). The reason for this was twofold. First, until recently the courts viewed s. 2(*d*) to be an individual right even though it protects the right of individuals to combine together in order to pursue common objectives. Although the purpose and effect of such combinations are social or communitarian in nature, our courts were of the view that such combinations are intended to further *individual* aspirations. As such, the right is individual in nature. Collective bargaining is by its very nature not an individual activity and therefore not worthy of constitutional protection. The second reason for denying such constitutional protection is an institutional one. Judicial intervention in a dynamic and fluid area such as labour relations could have a disruptive effect. Courts are not competent to engage in the difficult balancing of interests between management and labour which is required

[43] Freedom of association issues have arisen in other areas of regulated conduct. These cases have raised association issues in the positive sense and have all been unsuccessful in claiming a violation of s. 2(*d*). The cases raised s. 2(*d*) challenges to the following various laws and regulations:
(i) the Alberta Law Society rules which prohibited lawyers from associating with anyone who was not a practitioner or resident in Alberta: *Black v. Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (S.C.C.);
(ii) Section 195.1 of the *Criminal Code* which prohibits communications for the purpose of prostitution, *R. v. Skinner*, [1990] 1 S.C.R. 1235;
(iii) certain aspects of Quebec legislation on the conduct of referendum: *Libman v. Quebec (Attorney General)* (1997), 151 D.L.R. (4th) 385 (S.C.C.);
(iv) the federal egg marketing scheme which allegedly prevented a group of egg producers in the Northwest Territories from associating with others in the marketing of eggs by preventing them from marketing their eggs inter-provincially or exporting them: *Canadian Egg Marketing Agency v. Richardson*, *supra*.

[44] G.A. Res. 217A (III), U.N. Doc. A/180, at 71 (1948).

in the resolution of labour disputes. As Justice McIntyre stated in the *Alberta Reference* in relation to the right to strike:[45]

> It has been said that the courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed in the Charter, this may on occasion be true. But where no specific right is found in the Charter and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. That is the function of the freely elected Legislatures and Parliament.

As stated elsewhere in this chapter, this interpretive approach of Justice McIntyre prevailed until 2001 despite the strong dissent of Chief Justice Dickson in the *Alberta Reference*. The focus of the analysis remained on the individual to the exclusion of group activity.

While this individual-focused or American approach prevailed, the issue of the negative freedom of association arose in the field of labour relations. At a time when labour relations was a judicial "no go" zone in the context of Charter challenges brought by trade unions to labour laws, many observers thought that the courts would take a similar "hands off" approach when the Charter was used *against* trade unions to challenge these same labour laws which protected them. Needless to say, Canadian trade unions were surprised to learn that this was not the case and that the same institutional and policy reasons for not intervening did not apply when they were defending labour laws against dissident employees or employers.

The Supreme Court of Canada initially faced the question of the negative freedom of association in *Lavigne*,[46] a case concerning a community college teacher in Ontario who challenged the right of the Ontario Public Service Employees Union to spend his union dues on political and social causes to which he was opposed. The union had entered into a collective agreement which contained a Rand formula check-off clause. That is, Lavigne did not have to be a member of the union but he had to pay dues in order to finance the benefit of the collective bargain which he received. In his position before the court, Lavigne argued that he did not wish to be a "free rider" as he conceded that the compelled payment of union dues under a Rand formula, while still a breach of freedom of association, was nevertheless a reasonable limit under s. 1 so long as the dues are used for collective bargaining purposes. However, the use of these dues for other purposes such as political and social causes was not justified under s. 1. This is the

[45] *Alberta Reference*, *supra*, footnote 2, at p. 237.
[46] *Lavigne*, *supra*, footnote 3.

American approach under the free speech clause of the First Amendment to the Bill of Rights.

In a deeply divided bench, the Supreme Court split on the question of whether s. 2(*d*) implicitly protects a right not to associate. Three justices ruled that s. 2(*d*) does not protect a negative freedom. Three justices were prepared to imply a negative freedom, while one justice felt that it was not necessary to decide the issue although she was inclined to find forced association in certain situations to be of questionable constitutionality.

The answer to the question of whether s. 2(*d*) protects the right not to associate depended on the justice's view of the scope of freedom of association. The justices who believed that s. 2(*d*) has an important collective dimension were prone to favour an interpretation which would not imply a negative freedom into s. 2(*d*). However, it should be noted that at the same time they would not leave the claimant without a constitutional remedy if he or she was coerced in any way by the state into association with political or social causes which they opposed. They were of the view that the more appropriate remedy should be found under s. 2(*b*) which protects freedom of expression or under s. 7 which protects liberty interests. On the other hand, the justices who viewed s. 2(*d*) to be solely an individual freedom had no trouble intruding in a labour relations regime which required the individual to pay dues which in turn could be spent on various political activities, something these justices felt amounted to ideological coercion or conformity.

Justice Wilson wrote the judgment for those justices who were not prepared to imply a negative freedom (L'Heureux-Dubé and Cory JJ. concurring). She relied heavily upon the dissent of Dickson C.J.C. (with whom she concurred) in the *Alberta Reference* in regard to the scope of freedom of association. In particular, she referred to the following portions of the dissent:[47]

> "Freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the *Charter*, a *sine qua non* of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations. Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.
>
> . . . . .
>
> "The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the

[47] *Supra*, at pp. 572-3.

> individual from state-enforced isolation in the pursuit of his or her needs . . . As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society . . .
>
> "Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those whom their interests interact and, perhaps, conflict."

Justice Wilson stated that even though Dickson C.J.C. was in dissent, his view that s. 2(*d*) was intended to protect the right of individuals to form collectivities was endorsed by all of the court. In short, the unanimous view of the court in the *Alberta Reference* was that the purpose of s. 2(*d*) is to advance the collective action of individuals in pursuit of their common goals.

In her view, any other interpretation would lead to a court having to balance and resolve the conflicting claims of persons asserting their positive and negative freedoms. This would place the court in an untenable position and trivialize the Charter guarantee. It follows that in her opinion, s. 2(*d*) includes only the positive freedom to associate. She concluded that Lavigne's s. 2(*d*) freedom was not violated in that he had not been prevented from forming or joining associations of his choosing.

Finally, Justice Wilson rejected Lavigne's heavy reliance on American jurisprudence which supported the result he was seeking. In her view, the Charter is quite different from the American Bill of Rights in that it explicitly recognizes a freedom to associate. As mentioned, in the United States, freedom of association has been recognized as a derivative of freedom of speech. In the American cases relied on by Lavigne, the essential complaint was that the compelled expression of political views amounts to a violation of freedom of speech. The real harm in the American cases is not the fact of compelled association itself but the enforced support of views, opinions or actions which one opposes. By contrast, under the Charter there is no necessary connection between association and speech in order to engage s. 2(*d*). Importantly, in Justice Wilson's view, the special features of the Canadian cultural, historical, social and political tradition call for a unique Canadian approach to resolving these issues.

As a footnote Justice Wilson added that even if s. 2(*d*) included a right not to associate, it was not violated in this case in that if a negative right exists, it surely can be no broader in scope than the positive right to associate previously defined by the court. In this regard she stated:[48]

[48] *Supra*, at p. 583.

> Beginning with the *Alberta Reference* and culminating most recently in the decision in *P.I.P.S.*, *supra*, this court has repeatedly stated that s. 2(*d*) does not protect the objects of an association. Unions have accordingly been denied constitutional protection for activities which are central, indeed fundamental, to their effective functioning within our system of collective bargaining. Mr. Lavigne submits however, that while the objects of an association are irrelevant to the claims of collectivities of working people, they may legitimately be taken into account when assessing the claim of an individual who objects to being associated with the objects of such a collectivity. I do not believe it is open to the court to engage in one-sided justice of this kind.

In her view, the prevailing jurisprudence removed the objects of the association as a relevant consideration in a s. 2(*d*) claim:[49]

> Since s. 2(*d*) protects both *individuals and collectivities*, if the objects of an association cannot be invoked to advance the constitutional claims of unions, then neither, it seems to me, can they be invoked in order to undermine them. Even though the appellant has framed his claim in terms of his compelled association with the Union *simpliciter* (*i.e.*, in terms of his having been forced to pay dues), it is clear that his only real objection is to certain forms of union expenditure. Mr. Lavigne's claim is thus inextricably connected to the objects of the association, a factor which this Court has consistently stated has no place in s. 2(*d*), and not merely to the existence of the association. [Emphasis added]

This view that s. 2(*d*)'s protection went beyond the individual was revived 10 years later in the *Dunmore* case.

The contrary position was the judgment of Justice La Forest (Sopinka and Gonthier JJ. concurring). He gave a broad definition to the right not to associate. Although agreeing that s. 2(*d*) protects the right of individuals to join together to achieve their common goals he held that it is an individual right. Its purpose is to enhance the self-realization of individuals through a combination of individuals acting towards the same objective. Such self-realization may only be achieved through the co-operation of, and association with, others.

The result of this individual focus is that s. 2(*d*) protects the individual and not the group or its objects and/or activities. However, although the essence of the freedom is the protection of the individual, Justice La Forest recognized a community interest embodied in freedom of association. He expressed this interest as the interest of society at large "in the contributions in political, economic, social and cultural matters which can be made only if people are free to work in concert".[50] He also saw a community interest in sustaining democracy, an essential element of which is associational activity. The arbitrary and draconian treatment

[49] *Supra*.
[50] *Supra*, at p. 623.

of trade unions by totalitarian regimes is a testament to this community interest.

In reaching the conclusion that freedom from compelled association should be recognized under s. 2(*d*), he relied upon the following considerations:[51]

> Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' conviction and free choice. Instead, it can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. One need only think of the history of social stagnation in Eastern Europe and the role played in its development and preservation by officially established "free" trade unions, peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic. Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals.

However, Justice La Forest emphasized that a negative freedom is not a right to isolation. Certain associations must be accepted because they are an integral part of membership in a democratic community which is the contextual environment of the Charter. He doubted whether s. 2(*d*) entitles us to be free from all legal obligations flowing from citizenship, the family and the workplace. Hence, some degree of involuntary association is constitutionally acceptable. Significantly he concluded that state compulsion may require an assessment of the nature of the underlying associational activity the state has chosen to regulate. In our view, this has significance in that the nature of the associational activity should also be assessed in a positive claim. We will return to this analysis in the framework we suggest for the future.

In applying these principles to the case, La Forest J. concluded that financial payments to an organization may constitute association under s. 2(*d*). Therefore, the question is whether the compelled payment of union dues under the Rand formula violates the negative freedom under s. 2(*d*).

In assessing the scope of the negative freedom, Justice La Forest assessed the important role that collective bargaining has historically played in improving the conditions of workers in Canada. In his view, it is not unreasonable for the legislature to require workers who receive the benefit of collective bargaining to contribute towards its costs. Compelled association is also tempered in the case of Canadian trade unions which are established, maintained and operated in accordance

[51] *Supra*, at p. 624.

with democratic principles. Relying on Dickson C.J.C. in *R. v. Big M Drug Mart Ltd.*,[52] La Forest J. stated that although the freedom should be interpreted generously, it is important not to overshoot its actual purpose by placing the freedom in its proper linguistic, philosophic and historical contexts. In applying this contextual approach he concluded that where there is a state-compelled combining of efforts and where the state is acting in regard to individuals whose association is already compelled by the facts of life, such as a shared workplace, freedom of association will not be violated unless there is a danger to a liberty interest such as ideological coercion or conformity. This approach will only apply so long as the association pursues the objectives which justify its creation.

In applying this analysis to Lavigne's claim, he concluded that there would be no violation of s. 2(*d*) if his complaint related to the expenditure of union dues for collective bargaining or collective agreement purposes. Where, however, the union goes beyond these purposes the individual's associational rights are engaged. In short, the individual's freedom of association will be violated when he or she is compelled to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit.

Although finding that Lavigne's freedom not to associate was violated because the union expended dues for causes beyond collective bargaining, La Forest J. found that the compelled dues were justified under s. 1 of the Charter. In regard to whether there is a legitimate objective for the state compulsion of the payment of dues, he found two such objectives:[53]

1. The first is to ensure that unions have both resources and the mandate necessary to enable them to play a role in shaping the political, economic and social contexts within which particular collective agreements and labour relations disputes will be negotiated or resolved.
2. The second government objective is to contribute to workplace democracy by having the union itself decide, by majority vote, which causes or organizations it will support in the interest of favourably influencing the political, social and economic environment in which labour relations occur.

Finally, La Forest J. found that the means adopted are proportional in that respecting autonomy in union decision-making has the effect of promoting democratic unionism. The American approach would have a

[52] (1985), 18 D.L.R. (4th) 321 (S.C.C.).
[53] *Lavigne*, *supra*, footnote 3, at p. 636.

negative effect on union resources which in turn would have an adverse effect on the ability of trade unions to participate in and influence their political, economic and social environment.

Justice McLachlin (as she then was) found that there was no need to rule on the issue of the negative freedom although she was inclined to rule in favour of its protection. However, she held that there was no violation of s. 2(*d*) since the payments made by Lavigne did not bring him into association with ideas and values to which he does not voluntarily subscribe. In short, there was no forced ideological conformity.

(2) Advance Cutting: Seeds of a Contextual Analysis

As stated above, similar to its positive counterpart, the negative freedom of association has evolved in the context of labour relations. The other Supreme Court of Canada decision on the negative freedom concerned construction labour relations in Quebec. To this day, the construction industry in Quebec has faced many problems including violence, corruption and lengthy labour disputes. As a result, the legislature of Quebec has periodically responded to these problems by enacting labour laws which are unique in Canada. Since 1968, Quebec construction labour laws were premised on the idea of representative associations for collective bargaining. In *Advance Cutting*, the Supreme Court reviewed the 1990s reiteration of the Quebec construction labour law. Unlike *Lavigne*, this case dealt with a union shop arrangement under which the worker not only had to pay dues but also had to be a union member.

Under the legislation,[54] only five unions could represent employees in the construction industry. Apart from restricting the number of representative unions, the law was also different from the typical North America model because of the centralized character of the collective bargaining system and the separation of the negotiation of the working conditions from their implementation. The five unions are involved in the negotiations and a Commission created by the *Construction Act* oversees the implementation. Under the law, the Commission draws up a list of construction workers qualified to participate in a mandatory vote during which each worker must opt for one of the five unions as their bargaining representative. To be qualified to vote, a worker must meet a number of eligibility requirements. On the basis of the vote, the Commission

[54] *Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry*, R.S.Q. 1977, c. R-20 (the "*Construction Act*").

determines the representativeness of each union. The degree of representativeness determines the extent of the influence of each union in the bargaining process. Only a union or group of unions with a representativeness of 50% or greater of all certified construction workers may negotiate collective agreements. If a union's representativeness is less than 15%, it is even deprived of the right to attend collective bargaining sessions.

A number of contractors, real estate promoters and construction workers were charged with either hiring employees who did not have the required competency certificates to work on a construction project or with working in the industry without the proper competency certificates, as the case may be. In their defence, they asserted that workers could not obtain the proper certificates without becoming members of one of the five unions which they claimed breached their right not to associate contrary to s. 2(*d*) of the Charter.

In yet another close 5-4 decision, the court upheld the constitutionality of the law. However, there was no real debate as to whether s. 2(*d*) protects the negative freedom. Eight of the nine justices agreed that it did. The only debate was as to the requirements of proof in order to establish a breach of the negative freedom. Nevertheless, there appeared to be an emerging, albeit equivocal, consensus of the collective dimension to s. 2(*d*).

The majority judgment was written by Justice LeBel and the dissenting opinion by Justice Bastarache. Sole opinions by Justice Iacobucci and Justice L'Heureux-Dubé supported the majority opinion that the law was constitutional. Apart from Justice L'Heureux-Dubé, who decided that there is no negative freedom protected by s. 2(*d*), and Justice Iacobucci, all of the other seven judges agreed that the test for infringement of the negative freedom is whether the state compulsion results in ideological conformity, which was the test formulated by McLachlin J. (as she then was) in *Lavigne*. However, there was a vigorous debate as to the requirements of that test. Justice LeBel concluded that the test for an infringement of the negative freedom is whether there is evidence of ideological coercion or conformity imposed by the state-enforced association. In order for ideological coercion or conformity to exist, there must be evidence of an imposition of union values or opinions on the member, evidence of a limitation of the member's freedom of expression or evidence that the union participates in causes and activities which the member opposes. Justice LeBel was not prepared to assume

that by joining a union a member's political choice is in any way coerced:[55]

> The evidence does not even indicate whether unions are engaged in causes and activities that the appellants disapprove of. It is not a subject where judicial knowledge could and should replace proper evidentiary records unless the fact of joining a union would be, of itself, evidence of a particular ideological bent. One would have to presume that, because Quebec unions, as well as many other groups, take positions on social, economic and political issues, they impose an ideological coercion on their members, or in some way impair the liberty interests protected by the *Charter*. The well-known fact of trade union participation in public life in Canada does not demonstrate that every union worker joining a union under a union security arrangement should be considered *prima facie* a victim of a breach of the *Charter*. After all, in *Lavigne*, our Court has accepted that the participation of labour unions in public life is an important aspect of their social role. The application of the negative right not to associate may not rest on a generalized suspicion of the nature of unions and their management or internal life. Nor should the right to association be viewed primarily as an empty shell devoid of any positive or substantive meaning. Ironically, if another view prevails, what would be left in the *Charter*, at least in the field of labour relations, would be essentially a negative freedom not to associate. It would be used to deprive, inasmuch as possible, associations of workers of their effectiveness in the workplace and of their influence in society.

Justice Bastarache vigorously disagreed with this position. In his view, the fact of required membership in a Canadian union is enough to establish ideological conformity. In an unrealistic and inflated view of the influence or suasion that Canadian trade unions have over the political behaviour of their members, he stated:[56]

> The recognition of the union movement as a fundamental institution is implicit here precisely because it is a participant in the political and social debate at the core of Canadian democracy. To suggest that the unions in the present case are not associated with any ideological cause is to ignore the history of the union movement itself. Although it has been accepted that freedom of association protects an activity by an association that is permitted by an individual, this does not mean that there is no distinctive function for an association, or that association analogues to individual rights need be ignored. The collective character of the right to associate is undeniable because collective activity is not equivalent to the addition of individual activities. It is important, however, that belonging to important social institutions be free; this is how democracy will be enhanced.

As a result of this view, Justice Bastarache held that the *Construction Act* contravened s. 2(*d*). He also found that it was not justified under s. 1 of the Charter.

In regard to s. 1 it should also be noted that although not required in light of his ruling that s. 2(*d*) was not violated, Justice LeBel proceeded

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[55] *Advance Cutting*, *supra*, footnote 4, at para. 232.
[56] *Supra*, at para. 17.

to conduct an extensive s. 1 analysis and found the legislation to be justified in any event. Justice Iacobucci agreed with this s. 1 analysis although he parted with Justice LeBel as to whether the legislation infringed the negative freedom.

In conclusion, regardless of the vigorous debate on the application of the test for infringement, it would appear that *Advance Cutting* clearly resolved the debate as to whether s. 2(*d*) protects the right not to associate. There are other important implications of the case for the evolution of s. 2(*d*). First, *Advance Cutting* recognizes the collective dimension of s. 2(*d*) which is separate and distinct from the individual interest. Second, all justices recognize that collective activity is important to advance other Charter values such as democracy, equality and autonomy of individuals. Third, international law has an important role to play in informing the interpretation of the nature and scope of freedom of association. Fourth, *Advance Cutting* also advances the court's appreciation of the fundamental role which trade unions play in the Canadian democratic polity. Finally, the case demonstrates the problems of the application of judicial deference in the interpretation of the scope of Charter protection. *Advance Cutting* shows how the same legislation gives rise to such differing views as to whether the court should defer to the policy choices made by the democratically elected legislature in the field of labour relations. One could argue that the deference given is dependent on the judge's individual view of the wisdom of the legislation. A more principled approach is required in order for the court to maintain the legitimacy of these important constitutional decisions. In any event, *Advance Cutting* is the beginning of the court's eventual rejection of a judicial "no go" zone approach in the area of labour relations. It is also the beginning of a consensus that there is an important collective dimension to s. 2(*d*).

5. A "Collective" Breakthrough

Returning to the positive aspect of freedom of association and the Dickson/McIntyre divide, the court began in *Dunmore* to move away from the narrow conception of freedom of association advanced by Justice McIntyre and the majority of justices in the *Alberta Reference*, toward the *contextual*, Charter values based conception of the s. 2(*d*) guarantee set out by Chief Justice Dickson.

(1) Dunmore: Collective Activities with No Individual Analogue

As previously mentioned, the seeds of a contextual approach to defining the scope of freedom of association were sowed in *Advance Cutting*. It was not until *Dunmore*, however, that a more expansive approach to freedom of association would finally take root. In *Dunmore*, the court considered the constitutionality of excluding farm workers from Ontario's statutory labour relations regime. Employing a contextual analysis, the court found that farm workers faced significant barriers that made them substantially incapable of exercising their right to form associations without being under the aegis of a statutory labour relations regime. The court found that there was a positive obligation on government to permit farm workers to join together to make collective representations in an effective manner to their employer. Accordingly, government measures that substantially interfered with the ability of farm workers to associate for the purpose of promoting work-related interests were found to violate the guarantee of freedom of association under s. 2(*d*) of the Charter.

The decision was significant in two respects. First, it overcame a tenuous distinction drawn between rights and freedoms under the Charter. According to this doctrine, the fundamental freedoms under s. 2 of the Charter guarantee freedom from state interference with a protected activity, but do not go so far as to impose a positive obligation on government to facilitate that activity. However, in *Dunmore*, the court found that in certain limited circumstances s. 2(*d*) of the Charter may require the state to take affirmative action to facilitate a meaningful freedom of association. In this instance it required the government to extend protective legislation to vulnerable farm workers in order to enable the exercise of their associational freedom.[57]

Second, the court in *Dunmore* broadened the scope of s. 2(*d*) protection to include associational activities with no individual analogue. Emphasizing the need for a contextual approach to defining the content of freedom of association, the court acknowledged that the four principles of freedom of association previously adopted in *PIPSC*[58] did not extend s. 2(*d*) protection far enough.[59] Excluded from protection were collective activities which had no individual analogue and that were not grounded in a separate Charter right. The court noted that these collective activities may nevertheless be deserving of protection.

[57] *Dunmore*, *supra*, footnote 5, at para. 20.
[58] *Supra*, footnote 41.
[59] *Dunmore*, *supra*, footnote 5, at para. 14.

Interestingly, Justice Bastarache did not address head on the argument espoused by Justice McIntyre in the *Alberta Reference* that collectivities cannot have greater constitutional rights than individuals. The debate on the individual nature of constitutional rights reemerges in later jurisprudence, this time with Justice Rothstein espousing the individualist ideology.[60]

Returning to the purpose of s. 2(*d*), the court concluded in *Dunmore* that "s. 2(*d*) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?"[61] From this proposition, Justice Bastarache was able to extend the scope of s. 2(*d*) protection to encompass certain activities for which there was no individual analogue but which were clearly associational in nature. Drawing on Chief Justice Dickson's dissent in the *Alberta Reference*, Justice Bastarache elaborated on the collective dimension of certain activities:[62]

> . . . the collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distill their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union. To limit s. 2(*d*) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives.
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> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak . . . Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities — making collective representations to an employer, adopting a majority political platform, federating with other unions — may be central to freedom of association even though they are inconceivable on the individual level.

Thus, by employing a contextual and purposive analysis, the court acknowledged that certain collective activities which were inconceivable

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60 See *Health Services*, *supra*, footnote 6.
61 *Dunmore*, *supra*, footnote 5, at para. 16.
62 *Supra*, at paras. 16-17.

on the individual level may nevertheless be protected under s. 2(*d*) where the state has targeted the activity because of its concerted or associational nature.[63] One such activity, suggests Justice Bastarache in *obiter*, is the making of collective representations to one's employer. Thus, in *Dunmore*, the court provided the thin edge of the wedge for extending in future cases constitutional protection to trade union activities such as the right to collectively bargain.

While *Dunmore* represented an advancement in the interpretation of s. 2(*d*), it was nevertheless limited and incremental in nature. Specifically, the majority judgment was anchored in a legalistic concession that some associational activities have no analogue in individual conduct. The court continued to distinguish between the associational aspect of an activity and the activity itself.[64] Thus, s. 2(*d*) protection hinged on whether the government precluded an activity because of its associational nature.[65] A contextual inquiry into the nature of the collective activity and whether the activity itself was worthy of protection on the basis that it was integral to the advancement of Charter values and goals, was a footnote to, rather than the focus of, the analysis. We note that this is in stark contrast to the approach taken by the court in interpreting the scope of the freedom "not to associate", where, in determining whether there is undue state compulsion to associate, the court permitted itself to examine the nature of the associational activity mandated or interfered with by the state.

(2) Health Services: A Turning Point

The real breakthrough in instantiating a meaningful right to freedom of association came in *Health Services*. In this groundbreaking decision, the court affirmed its commitment to a contextual and purposive approach to interpreting freedom of association under s. 2(*d*) of the Charter.

At issue in *Health Services* was the validity of provincial legislation which invalidated significant 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

63 *Supra*, at para. 18.

64 *Supra*.

65 This is established "by direct evidence or inference . . . that the legislature has targeted associational conduct because of its concerted or associational nature": *Dunmore*, *supra*, at para. 18. This approach differs significantly from the court's jurisprudence on freedom of expression. In the latter context a government measure which interferes with expression in either *purpose* or *effect* may constitute an infringement under s. 2(*b*). A claimant need not establish that the government has *targeted* expression because of its expressive nature, or even its particular content for that matter.

impugned legislation. In finding certain provisions of the impugned legislation 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''.[66]

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".[67] The court also 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:[68]

> 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 and purposive analysis of the s. 2(*d*) guarantee, the court established 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

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66 *Health Services*, *supra*, footnote 6, at para. 22.
67 *Supra*, at para. 66.
68 *Supra*, at para. 86.

judicial restraint in the context of labour relations and freedom of association. The court noted that this policy of judicial deference:[69]

> . . . 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.[70] Rather, it protects the ability of workers to engage in associational activities, and their capacity to act in common to achieve 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.

6. Attempted Revival of the Debate

The gains made in *Health Services*, however, were not free from the spectre of the liberal reasoning espoused by Justice McIntyre in the *Alberta Reference*. In 2011, the court released *Fraser v. Ontario (Attorney General)*,[71] which raises new ambiguity in the meaning of freedom of association in the labour relations context. In an extraordinarily divisive decision which evoked the polarized judgments of the United States Supreme Court, the majority of the court was put on the defensive by an attack on *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 the court and, at the time of the hearing of the appeal, a mere two years after *Health Services* was released.[72] In this surprising feat of judicial activism, Justice Rothstein revived the old Dickson/McIntyre debate in the *Alberta Reference*.

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69 *Supra*, at para. 26.
70 *Supra*, at para. 91.
71 *Supra*, footnote 1.
72 It should be emphasized that this move to overrule *Health Services* was made without any of the parties or intervenors before the court asking it to do so.

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 *Health Services*, he resurrected several arguments which had been previously laid to rest, including that s. 2(*d*) protects individual interests, not collective interests, is a freedom not a right, and does 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 *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 *Health Services* — responded to each of Justice Rothstein's attacks.

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. In response to *Dunmore*, the provincial government enacted the *Agricultural Employees Protection Act, 2002*,[73] which provided 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".[74] 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.

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[73] S.O. 2002, c. 16 (the "AEPA").

[74] *Fraser*, *supra*, footnote 1, at paras. 105-106 (*per* McLachlin C.J.C. and LeBel J.) and para. 332 (*per* Abella J.), citing Helen Johns, then Ontario Minister of Agriculture and Food: "I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does not extend collective bargaining to agricultural workers". See Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 46A, October 22, 2002, at p. 2339.

The majority framed the question as "whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals".[75] Applying this standard, the court determined that it was premature to conclude that the impugned legislation offered insufficient protections for s. 2(*d*) rights.[76] 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, at the time of publication of this text, not one agricultural business in Ontario has become subject to a collective agreement under the *AEPA* — a startling outcome for purported "collective bargaining" legislation.

In the end what we are left with is the 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 *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.

7. Conclusion: A Firm Grounding for the Future

In *Fraser*, Justice Rothstein attempted to revert to a purely libertarian view of our fundamental freedoms under which the state takes a neutral position in regard to the exercise of our freedoms and the court gives a value-free assessment to the activity under review. Under this theory, freedom of association is an individual freedom which defines a zone of liberty around the individual into which the state cannot interfere. This

[75] *Fraser*, *supra*, at para. 46. In our view the court's use of the term "impossible" should be read in the context of its statement at the outset of its decision that "[l]aws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute a limit on the s. 2(*d*) right of free association". This formulation is consistent with the court's judgment in *Health Services* which the majority expressly reaffirmed in *Fraser*. Indeed, it is also consistent with the interpretation of the s. 2(*d*) test adopted by the Federal Court in a post-*Fraser* case involving a challenge to federal compensation restraint legislation. The Federal Court formulated the s. 2(*d*) test set out in *Fraser* as one of "effective impossibility". See *Meredith v. Canada (Attorney General)* (2011), 204 A.C.W.S. (3d) 279 (F.C.), at para. 79. (According to the court: "If legislation makes it possible for employees to make collective representations that are ineffective or not meaningful, or if representations are possible but government action demonstrates a lack of good faith, a breach of s. 2(*d*) of the *Charter* will still have occurred" (at para. 77)).

[76] *Fraser*, *supra*, at para. 109.

negative conception of liberty makes for little, if any, allowance for positive obligations on government to promote the freedom. Moreover, the freedom does not entail the imposition of a correlative duty on other citizens to accommodate the exercise of the freedom. Under this libertarian view, the court need not be engaged in adjudicating the relative value of the manner in which individuals exercise freedom of association and thereby privilege some associations by giving them preferred constitutional protection. As stated by Justice Rothstein:[77]

> The protection of fundamental freedoms should not involve the Court in adjudicating the relative values of the way in which individuals exercise those freedoms. Just as this court has not adjudicated on the relative value of a religion or its tenets under s. 2(*a*) or assessed the relative value or content of a given exercise of freedom of expression under s. 2(*b*), so too should this Court not privilege some associations over others under s. 2(*d*): *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50, 241 D.L.R. (4th) 1.

In short, Justice Rothstein concluded that the correct approach is to recognize that a guarantee protecting a fundamental freedom to associate must be interpreted in a content-neutral fashion as between associations.

(1) A Critique of the Libertarian Approach to our Fundamental Freedoms

In our view, the court ought to lay to rest the libertarian conception of our fundamental freedoms. To begin with it is imperative that we move beyond the primacy of the individual in our constitutional rights doctrine. This individualist ideology is an artefact of a bygone era and is ill-suited to our current polity which, in addition to individual liberty and autonomy, values community and equality. As stated by Professor C.B. Macpherson nearly 30 years ago:[78]

> In the cause of individual rights they abstract the individual from history: they cut down the individual to the abstract pattern that was appropriate and most needed in the seventeenth and eighteenth centuries, when the big problem was to get the individual free from the many entrenched impediments to the flowering of the human personality. We must soon rethink the dimensions of our cherished individualism . . .
>
> . . . our thinking still retains the early liberal notion of the individual as a being prior to and rightfully independent of society or community. In the longer run we shall need a more realistic concept of what it is to be human. We shall need to recognize that the individual can be fully human only as a member of a community.

In fact, as outlined throughout this chapter, on closer examination the purely libertarian conception of government and value-free judicial

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77 *Supra*, at para. 209.

78 C.B. Macpherson, "Problems of Human Rights in the Late Twentieth Century", in *The Rise and Fall of Economic Justice and Other Essays* (Oxford: O.U.P., 1985), at pp. 23 and 33.

decision making has never existed, at least in any absolute form, in Canada, let alone in any other Western liberal democracy. Such a libertarian conception flies in the face of Canadian values, culture and traditions. It also fails to advert to our accepted Charter jurisprudence which long ago rejected ideal notions of the isolated individual and a purely neutral government.

The Charter itself is a clear indictment against this overly individualistic view of our polity. Group rights in Canada have a long and hallowed history. Confining the right to freedom of association to the individual on the basis that the group cannot exercise greater constitutional rights than the individual is artificially and unduly restrictive.[79] Group rights are not antagonistic to individual freedoms. Indeed, they are complementary in the sense that individual aspirations and self-fulfilment may not be achieved without the invocation of group or collective rights which are more than the sum of the rights of all of the members of the group or collectivity. The needs and goals of the group are not always identical to the needs and goals of any particular member. This is not a denial of the worth of the individual. It is recognition that we are social animals and do not live in isolation. It acknowledges that group rights are as equally indispensable to the flourishing of humans as individual rights.

Justice Rothstein's libertarian contention that the state and the courts ought to adopt a posture of neutrality in determining the scope of constitutional protection for associational activities is but one approach based on a particular philosophical leaning and is not in any way an approach mandated by the Charter. There is nothing fundamentally impermissible about interpreting s. 2(*d*) to extend constitutional protection to certain collectivities on the basis that they pursue goals and engage in activities which are fundamental to our democratic values, including the enhancement of human dignity. As one author has stated: "Section 2(*d*) could equally be construed as protecting associational activities that make for good social policy and constitutional sense".[80]

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[79] In this regard, the writings of Joseph Raz on the collective conception of rights are instructive. According to Raz, a collective right exists where it satisfies the following requirements: "First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of that group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty": J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), at p. 208.

[80] G. England, "Some Thoughts on Constitutionalizing the Right to Strike", in *Labour Law under the Charter: Proceedings of a Conference sponsored by Industrial Relations Centre, School*

A contextual and purposive analysis, as opposed to a posture of neutrality, permits a court to carve out a constitutional landscape which fosters associational activities which contribute to the public or common good by enhancing the values underpinning the Charter as a whole.[81]

Furthermore, distinguishing between the relative value of associational activities in order to determine the scope of constitutional protection is consistent with a contextual and purposive interpretation of freedom of association.[82] As recognized by Chief Justice Dickson in the *Alberta Reference*, and later echoed by the majority of the court in *Health Services*:[83]

> 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 the employer . . . [Association] 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.

Given the significant and historical connection between freedom of association and the struggle of disadvantaged groups within society, it makes eminent sense that the scope of s. 2(*d*) protection take into account the unequal distribution of power in society. In this regard, there are good public policy reasons for the state to promote the activities of labour.[84] As noted by the Supreme Court of Canada in *Health Services*, "one of the fundamental achievements of collective bargaining is to palliate the historic inequality between employers and employees".[85] Moreover, in addition to bringing equality, democracy and the rule of law to the workplace, the activities of trade unions promote many of the ideals

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of Industrial Relations and Faculty of Law (Kingston: Queen's Law Journal and Industrial Relations Centre, 1988), at p. 183.

81 See, for example, S. White, "Trade Unionism in a Liberal State", in A. Gutmann, ed., *Freedom of Association* (Princeton: Princeton U.P., 1998). Professor White argues that the state ought to take a promotive stance, as opposed to a neutral stance, when it comes to trade unionism since the latter promotes instrumental goods, such as access to employment and income, which are uniformly ascribed a positive value. Stuart notes that the principle of state neutrality is presumptively appropriate in the context of the state's relationship with expressive associations, such as religious groups or other groups whose primary purpose is to propagate a certain view of the "good life" or a particular ideology. With these types of associations it is appropriate for the liberal state to adopt a position of neutrality which neither promotes nor demotes one religious ideology or version of the good life over another.

82 For an insightful piece on the constitutional propriety of assessing the relative value of a given exercise of a fundamental freedom, see A. Bogg and K.D. Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012), Comp. Lab. L. & Pol'y J. (forthcoming) ("Bogg").

83 *Alberta Reference*, *supra*, footnote 2, at p. 197. See *Health Services*, *supra*, footnote 6, at paras. 81 and 84, for example.

84 Conversely, a contextual analysis of the Charter values of equality and human dignity would support a narrow scope of protection for the associational activities of a gun club or hate groups such as the Ku Klux Klan, for example.

85 *Health Services*, *supra*, footnote 6, at para. 84.

enshrined in the *Universal Declaration of Human Rights*, including the right to just and favourable conditions of work, the right to equal pay for work of equal value, the right to social security against the consequences of illness, old age, death and unemployment, the right to an income consistent with a life of human dignity, the right to rest and leisure, and the right to education.

This brings us to a related misconception relied upon by Justice Rothstein in his arguments against constitutional protection for the essential activities of trade unions: that the content of freedom of association must be uniform across different types of associations. Uniformity for uniformity's sake has never been lauded as a principle of constitutional interpretation. Quite the opposite, the Charter has ushered in an era of contextual analysis. Under s. 15 of the Charter, for example, what a claimant group requires in order to achieve substantive equality is contextual and in many respects determined by the particular characteristics, needs and interests of the group. The fact that s. 15 requires the state to extend a form of protection or a benefit to one group in society and not to another does not necessarily raise any constitutional red flags. Similarly, the scope of s. 2(*b*) protection is interpreted with reference to the values underpinning the free speech guarantee: namely, (1) democratic discourse; (2) truth finding; and (3) self-fulfillment.[86] Thus, the exact content of a Charter right depends in a significant respect on a contextual analysis of the claimant group and the nature of its claim.

It follows that the constitutional protections required to concretize a meaningful right to freedom of association will differ according to the type of association. A constitutional right to collective bargaining is of limited significance to members of a book club, whereas for members of a trade union the absence of such protection would render "as a practical matter their association . . . a barren and useless thing".[87] A contextual — as opposed to a neutral or value-free — analysis of the essential activities of an association is therefore required to instantiate a meaningful right to freedom of association.

Finally, freedom of association is far too fundamental to be riddled with positivist and antiquated notions and distinctions between freedoms and rights and positive and negative government actions. Contemporary

[86] See, for example, *Montreal (Ville) v. 2952-1366 Quebec Inc.* (2005), 258 D.L.R. (4th) 595 (S.C.C.), at para. 74. The court also considers the method and location of expression and, with respect to public or government-owned property, the historical and actual use of a particular public space for free expression.

[87] *S.E.I.U., Loc. 204 v. Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 at p. 248 (Ont. Div. Ct.), vard 13 D.L.R. (4th) 220 (C.A.), cited by Chief Justice Dickson in the *Alberta Reference*, *supra*, footnote 2, at pp. 178-9.

life in Canada — the matrix within which a constitutional right operates — is far too complex for these didactic concepts. Freedoms frequently take on "rights-like" qualities and periodically impose duties on others.[88] The meaningful exercise of religious freedom may at times require the provision of prayer rooms in our schools. The meaningful exercise of free speech similarly requires the provision of public space for peaceful protests.[89] It is not a radical idea in Canada to observe that positive government action is sometimes necessary in order to ensure the meaningful exercise of fundamental freedoms. Indeed, this was first alluded to by Chief Justice Dickson in the *Alberta Reference*:[90]

> Section 2 of the *Charter* protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. *This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms* (*e.g.*, regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). [Emphasis added]

Since the above statement by Chief Justice Dickson in 1987, the court has continued to move away from the tenuous distinction between negative and positive rights.[91]

(2) A Framework: Back to the Future

The framework we suggest for a freedom of association analysis is not revolutionary. It is based on the framework adopted by the Supreme Court of Canada in *Health Services*. This framework calls for a contextual approach which takes into account all of the relevant

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88 Indeed, freedoms are perhaps more accurately conceived of as a complex bundle of diverse rights, including claim rights, liberty rights and immunities. In this regard, see W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W.W. Cook (New Haven: Yale U.P., 1919). For a withering critique of Justice Rothstein's reliance on the distinction between positive and negative rights, see Bogg, *op. cit.*, footnote 82.

89 See, for example, *Canadian Federation of Students v. Greater Vancouver Transportation Authority* (2009), 309 D.L.R. (4th) 277 (S.C.C.), at para. 34. In the context of labour relations, given the inequality in bargaining power, a position of non-interference by the state (as opposed to positive assistance through protective statutory mechanisms such as federal and provincial labour codes) would likely result in the undermining of trade union organizing in Canada.

90 *Supra*, footnote 2, at p. 194.

91 *Alberta Reference*, *supra*. See also *Haig v. Canada (Chief Electoral Officer)* (1993), 105 D.L.R. (4th) 577 (S.C.C.), at pp. 606-607; and *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety and Security)* (2010), 319 D.L.R. (4th) 385 (S.C.C.), at para. 31.

considerations for determining whether a particular associational activity is worthy of constitutional protection under s. 2(*d*).

As stated elsewhere, *Health Services* is a natural progression from Chief Justice Dickson's eloquent dissent in the *Alberta Reference* through the judgments in *Advance Cutting* and *Dunmore*. As their backdrop, all of these cases reviewed collective bargaining laws. In adopting a framework for a s. 2(*d*) analysis in the labour relations context, the following principles adapted from *Health Services* are crucial:

(1) Section 2(*d*) has individual and collective dimensions. Although s. 2(*d*) protects the liberty to do collectively that which one is permitted to do as an individual, it also protects associational activity which has no analogies in individual conduct. However, not *all* collective activity is protected by s. 2(*d*). In determining whether constitutional protection should be afforded to any collective activity, three general considerations must be assessed:
   (i) First, the Canadian historical context should be reviewed in order to determine whether the activity has played a fundamental role in Canadian society. In regard to collective bargaining, the court reviewed Canadian labour history to conclude that it has long been recognized as a fundamental Canadian right which pre-dated the Charter. The court noted that collective bargaining has played a significant role in palliating the historic economic inequality between workers and employers. The court concluded that collective bargaining is the most significant collective activity through which freedom of association is expressed in the labour context.
   (ii) Second, international legal instruments should be reviewed as an important source of law to inform the interpretation of s. 2(*d*). In regard to collective bargaining, the court concluded that international legal standards are binding on Canada and protect collective bargaining as part of freedom of association.
   (iii) Third, the collective activity in question should be reviewed in order to determine whether it enhances Charter values. A contextual and purposive analysis of the s. 2(*d*) guarantee permits the fostering of associational activities which contribute to the public or common good by enhancing the values underpinning the Charter as a whole. In regard to collective bargaining, the court found that its protection within s. 2(*d*) is consistent with the Charter's underlying values. The court

found that human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are all complemented and indeed, promoted by the protection of collective bargaining in s. 2(*d*). Needless to say, although guns may bring pleasure to some, they do not promote Charter values.

(2) Finally, with respect to collective bargaining, while s. 2(*d*) is a right to a general process of collective bargaining and not to a particular model of labour relations or bargaining method, we would stress that labour laws should be used to inform the interpretation of s. 2(*d*). As we refer to above, long before the enactment of the Charter, labour law was the essential mechanism in Canada through which freedom of association was expressed. Such laws along with international human rights laws are useful sources for the courts to draw on in interpreting s. 2(*d*) so that the freedom is meaningful.

Unfortunately, in *Fraser*, the majority of the court responded to Justice Rothstein's unprecedented attack on *Health Services* in an overly defensive manner. *Health Services* was the logical step in the evolution of the s. 2(*d*) jurisprudence beginning with the vigorous debate in the *Alberta Reference* between Chief Justice Dickson and Justice McIntyre. Justice Rothstein's individualistic and decontextualized approach was an attempt to revive the McIntyre analysis which has been soundly rejected for good reason. Moreover, Rothstein J.'s concern that a court should not be engaged in adjudicating the relative value of the way in which individuals exercise the freedom is a rejection of an approach which has been followed by the Supreme Court under s. 2(*d*) of the Charter for two decades. The fundamental importance of collective bargaining and trade unions in Canadian democracy have been assessed, analyzed and recognized by the court in its s. 2(*d*) analyses in *Lavigne*, *Advance Cutting*, *Dunmore* and *Health Services*.

Hopefully, *Fraser* is a judicial anomaly. However, it does create some ambiguity in respect of the nature and scope of protection for collective bargaining under s. 2(*d*). In our view, at the next opportunity, the court should reaffirm the consensus it reached in *Health Services*, which provided a truly Canadian approach to the interpretation of s. 2(*d*). It seems that the contrary approach would lead to a "legalistic, ungenerous, indeed vapid" freedom of association which fails to fulfill the purpose for which the freedom was constitutionally entrenched.[92] Canadians are entitled to expect that the court will secure for them the full benefit of the

[92] *Alberta Reference*, *supra*, footnote 2, at p. 195, *per* Dickson C.J.C.

Charter's protection by giving it a generous rather than legalistic interpretation.[93] Canadian history, values and culture suggest that in the workplace, freedom of association expressed through the collective activity of collective bargaining is a fundamental right which secures for workers industrial democracy in the formulation of their working conditions and the rule of law in the enforcement of their collective bargain. A fundamental freedom, indeed!

[93] *R. v. Big M Drug Mart Ltd.*, *supra*, footnote 52, at p. 344.