

The Effect of *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia* on the Labour Trilogy, *PIPSC v. Northwest Territories (Commissioner)* & Its Potential Effect on the Alberta *Labour Relations Code*

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Abstract

In 1987 the Supreme Court of Canada released three decisions concurrently that collectively became known as “The Labour Trilogy”. Part II of this paper will refresh the reader’s mind regarding the legal principles which came out of the Alberta Reference, Dairy Workers and PSAC, and of the facts that gave rise to those decisions. The Labour Trilogy generally stood for the proposition that the Charter section 2(d) freedom of association did not include the right to strike.

In 1990 the Supreme Court of Canada released its reasons in Professional Institute. The case stood for the proposition that the Charter section 2(d) freedom of association did not include the right to collectively bargain. Part III of this paper will refresh the reader’s mind regarding the legal principles which came out of Professional Institute.

Fourteen years after the Labour Trilogy was decided, the Supreme Court signalled a shift in its interpretational views concerning the Charter section 2(d) freedom of association in the context of labour when it released its reasons in Dunmore. The Court favourably discussed international and democratic human rights principles, and left open the possibility of its future interpretation of the Charter section 2(d) freedom of association as mirroring Canada’s international commitments to honour International Labour Organization [“ILO”] principles including the right of workers to organize, bargain collectively, and strike. Part IV of this paper discusses Dunmore.

On June 8, 2007 the Supreme Court released its reasons in Health Services. The decision represents a sea change in the Court’s interpretation of the Charter section 2(d) freedom of association in the context of labour. Health Services expressly reverses Professional Institute and some, but not all, of the law represented by the Labour Trilogy. The Court has now interpreted the Charter section 2(d) freedom of association as including the procedural right to collective bargain; however the constitutional status of workers’ right to strike was explicitly not addressed in the decision, leaving its status less certain. Part V of this paper discusses Health Services and the present state of judicial interpretation regarding the Charter section 2(d) freedom of association in the context of workers’ procedural right to collectively bargain.

Part VI of this paper examines the right to strike in Canada as the law presently stands, and how it may evolve in future decisions of the Supreme Court. Part VII discusses possible effects that the decision in Health Services may have on Alberta’s Labour Relations Code. Part VIII concludes with a summary of the principle points addressed in the paper.

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I. Introduction

In 1987 the Supreme Court of Canada released three decisions concurrently that collectively became known as “The Labour Trilogy”.¹ Part II of this paper will refresh the reader’s mind regarding the legal principles which came out of the *Alberta Reference*, *Dairy Workers* and *PSAC*, and of the facts that gave rise to those decisions. The Labour Trilogy generally stood for the proposition that the *Charter*² s. 2(d) freedom of association³ did not include the right to strike.

In 1990 the Supreme Court of Canada released its reasons in *Professional Institute*.⁴ The case stood for the proposition that the *Charter* s. 2(d) freedom of association did not include the right to collectively bargain. Part III of this paper will refresh the reader’s mind regarding the legal principles which came out of *Professional Institute*.

Fourteen years after the Labour Trilogy was decided, the Supreme Court signalled a shift in its interpretational views concerning the *Charter* s. 2(d) freedom of association in the context of labour when it released its reasons in *Dunmore*.⁵ The Court favourably discussed international and democratic human rights principles, and left open the possibility of its future interpretation of the *Charter* s. 2(d) freedom of association as mirroring Canada’s international commitments to honour International Labour Organization [“ILO”] principles including the right of workers to organize, bargain collectively, and strike. Part IV of this paper discusses *Dunmore*.

On June 8, 2007 the Supreme Court released its reasons in *Health Services*.⁶ The decision represents a sea change in the Court’s interpretation of the *Charter* s. 2(d) freedom of association in the context of labour. *Health Services* expressly reverses *Professional Institute* and some, but not all, of the law represented by the Labour Trilogy.

¹ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 [the “*Alberta Reference*”]; *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460 [“*Dairy Workers*”]; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424 [“*PSAC*”].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 2(d) [the “*Charter*”].

³ “2. Everyone has the following fundamental freedoms: ... (d) freedom of association.”

⁴ *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 [“*Professional Institute*”].

⁵ *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 [“*Dunmore*”].

⁶ *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 [“*Health Services*”].

The Court has now interpreted the *Charter* s. 2(d) freedom of association as including the *procedural* right to collective bargain; however the constitutional status of workers' right to strike was explicitly not addressed in the decision, leaving its status less certain. Part V of this paper discusses *Health Services* and the present state of judicial interpretation regarding the *Charter* s. 2(d) freedom of association in the context of workers' procedural right to collectively bargain.

Part VI of this paper examines the right to strike in Canada as the law presently stands, and how it may evolve in future decisions of the Supreme Court. Part VII discusses possible effects that the decision in *Health Services* may have on Alberta's *Labour Relations Code*.⁷ Part VIII concludes with a summary of the principle points addressed in the paper.

II. The Labour Trilogy: No Right to Strike

In 1987 the Supreme Court of Canada released three decisions concurrently that collectively became known as The Labour Trilogy. This part of the paper will refresh the reader's mind regarding the legal principles which came out of the *Alberta Reference*, *Dairy Workers* and *PSAC*, and of the facts that gave rise to those decisions. In all three decisions the Supreme Court was considering the constitutional validity of various statutes that were enacted federally or provincially which had the effect of limiting (or abolishing) organized workers' ability to bargain collectively over certain issues and/or to strike. The statutes were enacted to support the federally spearheaded, and provincially adopted, policy to combat double-digit inflation through wage controls⁸ (among other economic policies such as monetarism⁹). The Supreme Court was divided on its interpretation of the scope of the *Charter* s. 2(d) freedom of association in the context of labour, and its application to the legislation under review in each case.

⁷ *Labour Relations Code*, R.S.A. 2000, c. L-1.

⁸ Craig Heron, *The Canadian Labour Movement: A Short History*, 2nd ed. (Toronto: James Lorimer & Company Ltd., 1996) at 114.

⁹ Monetarism is 'the theory or policy of regulating the economy, especially with regard to inflation, by increasing or decreasing the amount and velocity of money in circulation': *The New Lexicon Webster's Encyclopaedic Dictionary of the English Language*, Canadian ed. "monetarism"; contra "Keynesianism" which "advocated interest rate changes, public works to ensure full employment, and income redistribution such that the purchasing power of consumers should grow proportionately with the development of the means of production": *The New Lexicon Webster's Encyclopaedic Dictionary of the English Language*, Canadian ed. "Keynes".

i. Reference Re Public Service Employee Relations Act (Alberta) [Alberta Reference]

In the *Alberta Reference* the Supreme Court considered whether three labour-related statutes¹⁰ enacted by the government of Alberta infringed the *Charter* s. 2(d) freedom of association. The statutes prohibited the use of strikes¹¹ by certain public employees and replaced them with compulsory arbitration as a mechanism for the resolution of collective bargaining disputes. The statutes also proscribed the arbitrability of certain items,¹² and prescribed the factors appropriate for consideration by an interest arbitration board.¹³

McIntyre J., writing for the majority of the Court,¹⁴ considered “whether the [*Charter*] gives constitutional protection to the right of a trade union to strike as an incident to collective bargaining.”¹⁵ For McIntyre J., the appeal turned on the meaning of freedom of association in the *Charter*, as the appellants contended that the right to strike is a necessary incident to the exercise by a trade union of the freedom of association.¹⁶ McIntyre J. recognized the value of freedom of association; in particular, that the exercise of freedom of association “serves the interest of the individual”, “promotes general social goals” and plays an indispensable role in the functioning of democracy because “[a]ssociations serve to educate their members in the operation of democratic institutions” and “make possible the effective expression of political views and thus influence the formation of governmental and social policy.”¹⁷ However, for McIntyre J., while the freedom of association

¹⁰ *Labour Relations Act*, R.S.A. 1980 (Supp.), c. L-1.1 [“*LRA 1980*”]; *Police Officers Collective Bargaining Act*, S.A. 1983, c. P-12.05 [“*POCBA*”]; *Public Service Employee Relations Act*, R.S.A. 1980, c. P-33 [“*PSERA*”].

¹¹ Employers covered by the statutes were prohibited from locking out their employees as well.

¹² “...none of the following matters may be referred to an arbitration board and provisions in respect of the following matters shall not be contained in the arbitral award of an arbitration board: (a) the organization of work, the assignment of duties and the determination of the number of employees of an employer; (b) the systems of job evaluation and the allocation of individual jobs and positions within the systems; (c) selection, appointment, promotion, training or transfer; (d) pensions”: *PSERA*, *supra* note 10, s. 48.

¹³ *PSERA*, *supra* note 10, s. 55; *LRA 1980*, *supra* note 10, s. 117.8; *POCBA*, *supra* note 10, s. 15.

¹⁴ Le Dain J., writing for himself, *La Forest and Beetz JJ.* agreed “with McIntyre J. that the constitutional guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike”: *Alberta Reference*, *supra* note 1 at para. 139.

¹⁵ *Ibid.* at para. 144.

¹⁶ *Ibid.* at para. 145.

¹⁷ *Ibid.* at para. 152.

advances many group interests and ... cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise. [It is an individual right] not concerned with the group as distinct from its members. 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.¹⁸

“Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association.”¹⁹

Turning to the scope of the *Charter* section 2(d) freedom of association, McIntyre J. considered six theories “ranging from the very restrictive to the virtually unlimited.”²⁰ He accepted that the “freedom of association is not a new right or freedom [and i]t existed in Canada long before the *Charter* [and it consisted of] the liberty of two or more persons to associate together provided that they did not infringe a specific rule of common law or statute by having either an unlawful object or by pursuing their object by unlawful means [and it] was recognized and applied in relation to trade unions.”²¹

McIntyre J. interpreted the

freedom of association in s. 2(d) of the *Charter* to mean that *Charter* protection will attach to the exercise in association of such rights as have *Charter* protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.²²

Applying his definition,

it is clear that it does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual. ...it is not correct to say that it is lawful for an individual employee to

¹⁸ *Ibid.* at para. 153.

¹⁹ *Ibid.* at para. 155.

²⁰ *Ibid.* at paras. 156-165.

²¹ *Ibid.* at para. 166.

²² *Ibid.* at para. 174.

cease work during the currency of his contract of employment. ... there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation. ... An employee who ceases work does not contemplate a return to work, while employees on strike always contemplate a return to work.²³ ...

Modern labour relations legislation has so radically altered the legal relationship between employees and employers in unionized industries that no analogy may be drawn between the lawful actions of individual employees in ceasing to work and the lawful actions of union members in engaging in a strike. ... interpreting freedom of association to mean that every individual is free to do with others that which he is lawfully entitled to do alone would not entail guaranteeing the right to strike. ... Restrictions on strikes are not aimed at and do not interfere with the collective or associational character of trade unions. ... the concept of freedom of association does not extend to the constitutional guarantee of a right to strike.²⁴

In addition to holding that the *Charter* s. 2(d) *prima facie* cannot support an implication of a right to strike, McIntyre J. professed a sound reason grounded in social policy against such an implication; *viz.*, “at this stage of our *Charter* development such a right [to strike] should not have constitutional status which would impair the process of future development [of labour law] in legislative hands.”²⁵ The majority, therefore, held that the three impugned Alberta statutes did not infringe the *Charter* because the right to strike was not within the scope of *Charter* s. 2(d) protection. While majority reasons, such as McIntyre J.’s in the *Alberta Reference*, constitute the law unless overturned, dissenting reasons are important in that, as we shall see in Parts IV and V below, they are sometimes relied on or adopted by a majority of subsequent Supreme Court panels and thus become law.

Dickson C.J., writing for himself and Wilson J. in dissent, interpreted the “‘freedom of association’ as guaranteed in s. 2(d) of the [*Charter*] in the labour relations context”²⁶ by asking “to what extent freedom of association, as guaranteed by s. 2(d) of the *Charter*, protects the freedom of workers to act in concert, and to bargain and withdraw their services collectively.”²⁷ To Dickson C.J.,

²³ *Ibid.* at para. 175.

²⁴ *Ibid.* at para. 176.

²⁵ *Ibid.* at para. 180.

²⁶ *Ibid.* at para. 1.

²⁷ *Ibid.* at para. 24.

[f]reedom 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.²⁸

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, or exploitative working conditions. ...²⁹

Dickson C.J. drew heavily on international human rights law, stating that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”³⁰ He considered United Nations Covenants³¹ and International Labour Organization Convention No. 87,³² which Canada has ratified. Dickson C.J. stated that “[t]he general principle to emerge from interpretations of Convention No. 87 by [various] decision-making bodies is that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits.”³³ In his view, there is a “close relationship in each of [those international human rights documents] between the concept of freedom of association and the organization and activities of labour unions [and] there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides

²⁸ *Ibid.* at para. 22.

²⁹ *Ibid.* at para. 23.

³⁰ *Ibid.* at para. 59.

³¹ *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); *International Covenant on Economic, Social and Cultural Rights, Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

³² *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 67 U.N.T.S. 18 (1948).

³³ *Alberta Reference*, *supra* note 1 at para. 68.

protection of their essential activities—that is of collective bargaining and the freedom to strike.”³⁴

Dickson C.J. was of the view that “[i]t is clear from *Big M Drug Mart Ltd.*,³⁵ that the meaning of a provision of the *Charter* is not to be determined solely on the basis of pre-existing rights or freedoms. In the present appeal, therefore, whether or not a right or freedom to strike existed prior to the *Charter*, by virtue of the common law or otherwise is not determinative of the meaning of s. 2(d) of the *Charter*.”³⁶ “The Constitution is supreme law. Its provisions are not to be circumscribed by what the Legislature has done in the past, but, rather, the activities of the legislature—past, present and future—must be consistent with the principles set down in the Constitution.”³⁷

Dickson C.J. rejected “a ‘constitutive’ definition of freedom of association whereby freedom of association entails simply the freedom to combine together but does not extend to the freedom to engage in the activities for which the association was formed”³⁸ “whereby freedom of association entails only a freedom to belong to or form an association [and] does not extend beyond protecting the individual’s status as a member of an association [or] his or her associational actions.”³⁹ Instead he adopted “a wider definition ... to the effect that freedom of association embodies both the freedom to join together and the freedom to pursue collective activities”⁴⁰, stating: “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.”⁴¹ Dickson C.J. noted that “[t]here is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different.”⁴² In his view “[w]ork is one of the most fundamental aspects in a person’s life, providing the

³⁴ *Ibid.* at para. 72.

³⁵ *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295.

³⁶ *Alberta Reference*, *supra* note 1 at para. 73.

³⁷ *Ibid.* at para. 75.

³⁸ *Ibid.* at para. 27.

³⁹ *Ibid.* at para. 79.

⁴⁰ *Ibid.* at para. 27.

⁴¹ *Ibid.* at para. 82.

⁴² *Ibid.* at para. 89.

individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”⁴³ “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.”⁴⁴

In summary, Dickson C.J. held that “collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature. Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*.”⁴⁵ Applying his interpretation to the impugned Alberta legislation, Dickson C.J. held that “[a]ll three enactments prohibit strikes and ... the legislation is aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike, and its *raison d'etre*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual”;⁴⁶ they “directly abridge the freedom of employees to strike and thereby infringe the guarantee of freedom of association in s. 2(d) of the *Charter*.”⁴⁷

Since Dickson C.J. found that the impugned Alberta legislation infringed the *Charter* s. 2(d) guarantee of freedom of association, it was necessary for him to analyse whether the enactments could be upheld under the *Charter* s. 1, which states:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁴⁸

⁴³ *Ibid.* at para. 91.

⁴⁴ *Ibid.* at para. 92.

⁴⁵ *Ibid.* at para. 98.

⁴⁶ *Ibid.* at para. 99.

⁴⁷ *Ibid.* at para. 101.

⁴⁸ *Charter*, *supra* note 2, s. 1.

Dickson C.J. cited and applied the *Charter* s. 1 analysis set out in *Oakes*.⁴⁹ The Alberta government argued that the impugned legislation had two objectives: 1) protection of essential services and 2) protection of government from political pressure through strike action.⁵⁰ In deciding whether the protection of essential services relate to a “pressing and substantial concern,”⁵¹ Dickson C.J. was of the view that “[t]he protection of services which are truly essential is in my view a legislative objective of sufficient importance for the purpose of s. 1 of the *Charter* [provided that] ‘essential services’ [is defined as] one the interruption of which would threaten serious harm to the general public or to a part of the population [or] a service ‘whose interruption would endanger the life, personal safety or health of the whole or part of the population’.”⁵² Dickson C.J. held that “[t]he essentiality of police officers and firefighters is ... obvious and self-evident”⁵³ but that “[p]rohibiting the right to strike across the board in hospital employment is too drastic a measure for achieving the object of protecting essential services.”⁵⁴ “To deny all the employees covered by this provision the freedom to strike is, in my view, too drastic a means for securing the purpose of protecting essential services. ... the limit on freedom of association of public servants imposed by the abrogation of the right to strike in the *Public Service Act* is not justified under s. 1 of the *Charter* on the basis of the essential services argument.”⁵⁵ In deciding whether the protection of government from political pressure through strike action relates to a pressing and substantial concern, Dickson C.J. held that “the fact of government employment is not a sufficient reason for the purpose of

⁴⁹ *R. v. Oakes*, [1986] 1 S.C.R. 103 [“*Oakes*”]; “Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law”: *Health Services*, *supra* note 6 at para. 138.

⁵⁰ *Alberta Reference*, *supra* note 1 at para. 105.

⁵¹ *Oakes*, *supra* note 49 at para. 69.

⁵² *Alberta Reference*, *supra* note 1 at para. 107; citing Committee of the Governing Body of the I.L.O., *Digest of Decisions and Principles of the Freedom of Association*, 3rd ed. (Geneva: International Labour Office, 1985).

⁵³ *Alberta Reference*, *supra* note 1 at para. 110.

⁵⁴ *Ibid.* at para. 111.

⁵⁵ *Ibid.* at para. 113.

s. 1 for limiting freedom of association through legislative prohibition of freedom to strike.”⁵⁶

Considering whether the legislative measures adopted by the Alberta government impaired the freedom of association of those affected as little as possible,⁵⁷ Dickson C.J. stated that “the purpose of the prohibitions of strike activity of police officers and firefighters [being] to prevent interruptions in essential services[, i]f prohibition of strikes is to be the least drastic means of achieving this purpose it must ... be accompanied by adequate guarantees for safeguarding workers’ interests.”⁵⁸ He was of the view that the *Acts* prescribing certain factors appropriate for consideration by an interest arbitration board did not compromise the fairness of the arbitration or disadvantage the employees concerned.⁵⁹ However, he stated that “an arbitration system must be fair and effective if it is to be adequate in restoring to employees the bargaining power they are denied through prohibition of strike activity”⁶⁰ and “the exclusion of [certain] subjects⁶¹ from the arbitration process compromises the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration.”⁶² Finally, in considering the absence of a non-discretionary right to refer collective bargaining disputes to interest arbitration, Dickson C.J. stated: “The discretionary power of a Minister or administrative board to determine whether or not a dispute goes to arbitration is, in my view, an unjustified compromise of the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties.”⁶³

Dickson C.J. ultimately would have held that the impugned Alberta legislation infringed the *Charter* s. 2(d) guarantee of freedom of association, and the sections that prohibited strikes were not saved by section 1 because they were over-inclusive and the

⁵⁶ *Ibid.* at para. 116.

⁵⁷ The “minimal impairment” test: *Oakes*, *supra* note 49 at para. 70.

⁵⁸ *Alberta Reference*, *supra* note 1 at para. 118.

⁵⁹ *Ibid.* at para. 122; such provisions merely required the arbitrator to consider as broad a comparative bases as possible.

⁶⁰ *Ibid.* at para. 124.

⁶¹ *PSEERA*, *supra* note 10, s. 48; see *supra* note 12.

⁶² *Alberta Reference*, *supra* note 1 at para. 124.

⁶³ *Ibid.* at para. 127.

Acts’ arbitration systems were not an adequate replacement for the employees’ freedom to strike.⁶⁴

ii. *Retail, Wholesale and Department Store Union v. Saskatchewan [Dairy Workers]*

In *Dairy Workers* the Supreme Court considered whether the harm caused to dairy farmers through a closure of the dairies was of sufficient importance to justify prohibiting strike action and lockouts. In March 1984 contract talks between the unions representing the employees of eleven of the only twelve fluid milk processing plants operating in Saskatchewan broke down. The unions issued strike notice with the intention of utilizing partial rotating strikes. In response, the employers issued lockout notice on 1 April 1984. On 9 April, the Saskatchewan legislature enacted the impugned legislation⁶⁵ which: “abrogates the freedom of workers to strike. It compels workers to ‘resume the duties of their employment’ (s. 3(a)); it extends the terms of the former collective bargaining agreement (s. 6); it forbids the employee from participating in a work stoppage during this period of extension (s. 7(c)); and it requires submission to final and binding arbitration if a new or amended collective bargaining agreement has not been concluded between the employer and the union within 15 days of the coming into force of the Act (s. 8).”⁶⁶ The Supreme Court considered whether the *DWMOA*, or any section of it, infringed or denied the *Charter* s. 2(d) freedom of association; and, if so, whether the *DWMOA*, or such section, was justified under the *Charter* s. 1.

McIntyre J., writing for the same majority of the Court⁶⁷ as he did in the *Alberta Reference* simply held that “the Canadian Charter of Rights and Freedoms does not give constitutional protection to a right to strike. [It is] unnecessary for me to consider s. 1 of the *Charter*.”⁶⁸ The Majority, therefore, upheld the impugned legislation.

For the reasons he gave in the *Alberta Reference*, Dickson C.J. held that the *DWMOA* “violates s. 2(d) of the *Charter* to the extent that it interferes with the freedom

⁶⁴ *Ibid.* at para. 128-137.

⁶⁵ *Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1 [“*DWMOA*”].

⁶⁶ *Ibid.* at para. 25.

⁶⁷ Le Dain J., writing for himself, La Forest and Beetz JJ. held “that the guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include a guarantee of the right to bargain collectively and the right to strike. [He] would ... answer the constitutional questions in the manner proposed by McIntyre J”: *Dairy Workers*, *supra* note 1 at para. 45.

⁶⁸ *Ibid.* at para 47.

of the employees to engage in strike activity that would have been lawful in the absence of the Act.”⁶⁹ Turning to the *Oakes* s. 1 analysis, Dickson C.J. identified two proffered objectives of the impugned legislation: “serious adverse consequences for the dairy industry, especially for dairy farmers [and] that milk is an important food product, an essential commodity, and continuity of supply to consumers must be preserved.”⁷⁰ Dickson C.J. found it unnecessary to consider the second proffered objective, but on the first he was “persuaded that the legislative objective of avoiding serious harm to dairy farmers, in light of the unique nature of the dairy industry, constituted a satisfactory justification for the abrogation of the freedom of dairy plant workers to strike.”⁷¹ Dickson C.J., therefore, would have held that the *Charter* s. 1 saved the legislation. The following of his comments are poignant:

In the Alberta Labour Reference, I accepted the “essential services” justification for the substitution of an adequate scheme of compulsory arbitration for the freedom to strike. The legislature is entitled to limit the freedom of employees to strike if the effect of a strike would be to deprive the public of essential services. ... legislatures are justified in abrogating the right to strike and substituting a fair arbitration scheme, in circumstances when a strike or lock-out would be especially injurious to the economic interests of third parties.⁷²

I do not mean to suggest that any economic harm to a third party will suffice to justify the abrogation of the right to strike. ... The objective advanced to justify legislation ... must relate to a “pressing and substantial concern” in order for the legislation to be saved under s. 1. ... the relevant question ... is whether the potential for economic harm to third parties during a work stoppage is so massive and immediate and so focussed in its intensity as to justify the limitation of a constitutionally guaranteed freedom in respect of those employees.⁷³

... implicit in the respondents' argument is the assumption that the right to strike is in no way related to the employer's ability to lock out employees.⁷⁴ ... Since, under the unchallenged general labour law of the Province, the employer is entitled to lock out its employees in circumstances when employees are entitled to strike, it follows that the deleterious effects of permitting a strike must be taken to include the effects which flow from permitting an employer lock-out.⁷⁵

⁶⁹ *Ibid.* at para 26.

⁷⁰ *Ibid.* at para 28.

⁷¹ *Ibid.* at para 41.

⁷² *Ibid.* at para 29.

⁷³ *Ibid.* at para 30.

⁷⁴ *Ibid.* at para 37.

⁷⁵ *Ibid.* at para 40.

Dickson C.J. seemed impressed by evidence of “the enormity of the waste that would have resulted from an interruption of milk pick-up and processing.”⁷⁶ He stated:

...the economic harm threatened by a total work stoppage in the dairy processing industry was so immediate, of such a high degree and of such an intense focus as to fall well within the ambit of discretion of the Saskatchewan legislature to substitute a fair and efficient arbitration scheme for the dairy processing employees’ freedom to strike. I might add that what perhaps exacerbates the economic harm to dairy farmers and distinguishes it from the routine economic harm experienced by any supplier to a producer in the throes of a work stoppage is the combination of three unusual features: (i) the producer in this case was the sole outlet for the suppliers’ only product; (ii) the product in question was highly perishable; and (iii) because of the biological imperatives of the cow, the supplier could not mitigate losses by ceasing production.⁷⁷

Dickson C.J. was “persuaded that the legislative objective of avoiding serious harm to dairy farmers, in light of the unique nature of the dairy industry, constituted a satisfactory justification for the abrogation of the freedom of dairy plant workers to strike.”⁷⁸ “The compulsory arbitration scheme ... meets the criteria of proportionality for such a scheme which I described in the Alberta Labour Reference. The Act applies only to the workers in the dairy industry; it provides for a neutral arbitrator; either party may ultimately compel the other to submit to arbitration without interference from the government; and the scope of arbitration has not been legislatively restricted. [The] Act embodies a reasonable limit on freedom of association.”⁷⁹

Wilson J., writing in dissent, agreed with Dickson C.J. that the impugned legislation infringed the *Charter* s. 2(d) freedom of association, but concluded that it could not be saved under s. 1. She pointed out that in the *Alberta Reference* Dickson C.J. adopted the definition of “essential service” as being “a service ‘whose interruption would endanger the life, personal safety or health of the whole or part of the population’”⁸⁰ and “the provision of milk ... is not an essential service within the definition adopted by the Chief Justice.”⁸¹ Wilson J. could not “conclude ... that the prevention of economic harm to a particular sector is *per se* a government objective of

⁷⁶ *Ibid.* at para 34.

⁷⁷ *Ibid.* at para 35.

⁷⁸ *Ibid.* at para 41.

⁷⁹ *Ibid.* at para 42.

⁸⁰ *Ibid.* at para 51.

⁸¹ *Ibid.* at para 57.

sufficient importance to justify the abrogation of the freedom guaranteed by s. 2(d).⁸² “In some cases, a partial strike ban will achieve the government objective of preventing harm that in the Chief Justice's words is ‘massive, immediate and focussed’ or in [Wilson J.’s] words ‘would be considerably greater than that which would flow in the ordinary course of things from a work stoppage of reasonable duration’ [but] the government has not established that it had to institute a total strike ban and compulsory arbitration.”⁸³

iii. *Public Service Alliance of Canada v. Canada [PSAC]*

In *PSAC* the Supreme Court considered whether mere postponement of collective bargaining is a reasonable limit, given the Government’s substantial interest in reducing inflation and the growth in government expenses. The impugned federal legislation⁸⁴ was “aimed at ensuring that government employees’ compensation plans accord with the government’s restraint policy.”⁸⁵ The *Act* extended existing collective agreements for 2 years with compensation increases limited to 6 and 5 percent respectively. “[B]y continuing in force the terms and conditions of compensation plans, [the *Act*] preclude[ed] collective bargaining on compensatory components of collective agreements. [It also] preclude[ed] collective bargaining on all issues, including non-compensatory matters, subject to [allowing] the parties to a collective agreement to amend non-compensatory terms and conditions by agreement only. It [did] not ... authorize employees to strike or to submit proposed amendments to binding arbitration.”⁸⁶

McIntyre J., writing for the same majority of the Court⁸⁷ as he did in the *Alberta Reference* stated “that s. 2(d) of the *Charter* does not include a constitutional guarantee of a right to strike. My finding in [the *Alberta Reference*] does not, however, preclude the possibility that other aspects of collective bargaining may receive *Charter* protection

⁸² *Ibid.* at para 53.

⁸³ *Ibid.* at para 68.

⁸⁴ *Public Sector Compensation Restraint Act*, S.C. 1980-81-82-83, c. 122.

⁸⁵ *PSAC*, *supra* note 1 at para. 6.

⁸⁶ *Ibid.* at para. 9.

⁸⁷ Le Dain J., writing for himself, *La Forest and Beetz JJ.* held “the guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include a guarantee of the right to bargain collectively and the right to strike. [He] would ... answer the constitutional questions in the manner proposed by McIntyre J.”: *Ibid.* at para. 52.

under the guarantee of freedom of association.”⁸⁸ However, he held that the impugned *Act*

does not interfere with collective bargaining so as to infringe the *Charter* guarantee of freedom of association. The *Act* does not restrict the role of the trade union as the exclusive agent of the employees. ... The effect of the *Act* is simply to deny the use of the economic weapons of strikes and lockouts for a two-year period. This may limit the bargaining power of the trade union, but it does not, in my view, violate freedom of association.⁸⁹

Dickson C.J. dissented in part, restating that “freedom of association in the labour relations context includes the freedom to participate in determining conditions of work through collective bargaining and the right to strike.”⁹⁰ He would have held that the “*Act*, by automatically extending the terms and conditions of collective agreements and arbitral awards and by fixing wage increases for a two-year period, infringes the freedom of public sector employees to engage in collective bargaining.”⁹¹ Under the *Act*, “[a] union has no effective bargaining power ... since it lacks the legal capacity to withdraw services collectively or even to remit a dispute to binding arbitration. ... freedom to strike is a necessary incident of collective bargaining.”⁹² The “*Act* impairs the freedom to bargain collectively ... and therefore limits freedom of association.”⁹³

On his *Charter* s. 1 analysis, Dickson C.J. found that “the objective of reducing inflation was, at the time of passage of the *Act*, an objective of sufficient importance for the purpose of s. 1 of the *Charter*.”⁹⁴ On the question of “whether it was reasonable and demonstrably justified for the legislators to try to achieve their objective of combating inflation by suspending virtually all collective bargaining for two years and mandating specific non-inflationary compensation increases for federal public employees”,⁹⁵ Dickson C.J. found that “the leadership role of government constitutes justification for Parliament’s legislative focus on the public sector”⁹⁶ and that the aspect of the legislation

⁸⁸ *Ibid.* at para. 54.

⁸⁹ *Ibid.* at para. 55.

⁹⁰ *Ibid.* at para. 23.

⁹¹ *Ibid.*

⁹² *Ibid.* at para. 24.

⁹³ *Ibid.* at para. 25.

⁹⁴ *Ibid.* at para. 29.

⁹⁵ *Ibid.* at para. 31.

⁹⁶ *Ibid.* at para. 40.

that controls “compensation” rather than wages alone was justifiable.⁹⁷ However, in considering “s. 6(1)(b) [which] removes the right to strike over non-compensatory issues as well as the right to submit such disputes to binding arbitration”,⁹⁸ Dickson C.J. found that “whether collective bargaining on non-compensatory issues was entirely denied or, alternatively, profoundly impaired” the government did not meet “the burden of justifying s. 6(1)(b) of the *Act* under s. 1 of the *Charter*” because it cast “its net so widely as to impair collective bargaining on non-compensatory issues in an *Act* designed to reduce inflationary expectations.”⁹⁹ Further, “[n]o justification [was] offered for the impairment of the constitutionally protected freedom to bargain collectively on such important matters as employee safety, management rights, grievance procedures, seniority and employee rights to engage (or duties to refrain from engaging) in political activity.”¹⁰⁰ Dickson C.J. would have severed s. 6(1)(b) and upheld the rest of the *Act* as justified under section 1.¹⁰¹

Wilson J. dissented. She agreed with Dickson C.J. that the impugned *Act* violated the *Charter* s. 2(d), but was of the view that it could not be saved under s. 1. In her view, “the imposition of the limitation on federal public service sector employees only” was not rationally connected to the object of controlling inflation.¹⁰² Also, with regard to the government’s “leadership function” she stated that “the government as employer has no greater power vis-à-vis its employees than a private sector employer.”¹⁰³ Wilson J. concluded that “the measures adopted were not ‘carefully designed to achieve the objective in question’ as required by *Oakes*. ...that they were ‘arbitrary’ and ‘unfair’ in that they were imposed upon a captive constituency, were not, on the government’s own admission, expected to have any direct effect on inflation, and could not possibly ... constitute an example of voluntary compliance for others to follow.”¹⁰⁴

⁹⁷ *Ibid.* at para. 43.

⁹⁸ *Ibid.* at para. 44.

⁹⁹ *Ibid.* at paras. 44-45.

¹⁰⁰ *Ibid.* at para. 45.

¹⁰¹ *Ibid.* at para. 48.

¹⁰² *Ibid.* at paras. 58-59.

¹⁰³ *Ibid.* at para. 61.

¹⁰⁴ *Ibid.* at para. 65.

iv. Summary

In summary, the law in Canada as it stood after the Labour Trilogy was clearly that the *Charter* s. 2(d) freedom of association in the context of labour did not guarantee the right of unionized workers to strike. But “there was still some doubt whether section 2(d) might include a right to bargain collectively, even if it did not include a right to strike. However, in the [*Professional Institute*] case, the majority of the [Supreme] Court clearly rejected the argument that the right to bargain collectively was included in section 2(d).”¹⁰⁵

III. *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner): No Right to Collectively Bargain*

This part of the paper will refresh the reader’s mind regarding the legal principles which came out of *Professional Institute*. The impugned legislation¹⁰⁶ under consideration in the case required that an employees’ association (trade union) be incorporated (the equivalent in other jurisdictions of certification) by an *Act* of the legislature of the Northwest Territories before such association would be empowered to bargain collectively with the government employer. Under the legislation, according to Cory J.,

the government is able to control every aspect of the collective bargaining process. Not only does the *Act* give the government an unfettered discretion to choose which association will be incorporated as a collective bargaining agent . . . , but it also makes the negotiation of a collective agreement a discretionary process on the part of the government. This *Act* . . . makes not only the choice of the employees’ association but also a change of that association by the employees subject to the approval of the government, which is the employer. Whether that approval is to be given is within the absolute discretion of the government employer.¹⁰⁷

The Supreme Court considered whether the *NWTPSA*, s. 42(1) infringed the *Charter* s. 2(d) freedom of association; and, if so, whether it was justified under the *Charter* s. 1.

¹⁰⁵ Robert J. Sharpe, Katherine E. Swinton & Kent Roach, *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law Inc., 2002) at 153.

¹⁰⁶ *Public Service Act*, R.S.N.W.T. 1974, c. P-13 [the “*NWTPSA*”].

¹⁰⁷ *Professional Institute*, *supra* note 4 at para. 9.

Sopinka J. wrote for himself; however, La Forest J.,¹⁰⁸ L’Heureux-Dubé J.,¹⁰⁹ and Dickson C.J.¹¹⁰ agreed with his reasons and the result. Thus Sopinka J. wrote for a majority of four of the seven Justices on the panel. Sopinka J. took four propositions from the Labour Trilogy:

first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, 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; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.¹¹¹

Those propositions lead him to the conclusion

that collective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented. ...the conclusion that collective bargaining does not fall within s. 2(d) accords with the results in the s. 2(d) trilogy of cases.¹¹²

Assessing the absence in s. 42(1)(b) of a process for union certification, Sopinka J. wrote that the *Alberta Reference* made it clear that

[i]t is simply no longer open to an association (union or otherwise) to argue that the legislative frustration of its objects is a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association—unless the association's activity is another *Charter*-protected right, or an activity that may lawfully be performed by an individual. ...it is plain that

¹⁰⁸ La Forest J. wrote “I am in general agreement with Sopinka J. and would dispose of the case and answer the constitutional questions in the manner proposed by him”: *ibid.* at para. 45.

¹⁰⁹ L’Heureux-Dubé J. wrote “I agree both with the reasons and result reached by [Sopinka J.]”: *ibid.* at para. 46.

¹¹⁰ Dickson C.J. wrote “not without considerable hesitation having regard to the views which I expressed in the labour law trilogy of cases on the scope of s. 2(d) of the Canadian Charter of Rights and Freedoms, I have concluded that, short of overruling the reasons of the majority of this Court in the trilogy, this appeal must be dismissed... I agree with Sopinka J. [as to how] the constitutional questions should be answered”: *ibid.* at para. 4.

¹¹¹ *Ibid.* at para. 73.

¹¹² *Ibid.* at para. 78.

the statutory monopoly created by s. 42(1)(b) has no effect on the existence of the Institute or the ability of any individual to be a member of the Institute.¹¹³

...since the activity of bargaining is not itself constitutionally protected, neither is a legislative choice of the bargainer. ... Given that a government has no common law obligation to bargain at all and can suspend a statutory obligation to bargain altogether ... it would be inconsistent ... to hold that associational rights are created when a government grants employees the right to bargain but reserves to itself the power to choose the form of the employees' representative; that is to say, if a government does not have to bargain with anyone, there can be no constitutional impediment to its choosing to bargain with someone.¹¹⁴

Assessing the requirement in s. 42(1)(b) that a union be “incorporated” for the purposes of collective bargaining, Sopinka J. considered “whether the word ‘incorporated’ ... denotes the creation of a public service union.”¹¹⁵ He found that

...s. 42(1)(b) does not prohibit the establishment of or membership in other unions, and it does not prevent any such union from seeking incorporation under the Act [and it] does not prescribe the prerequisites or the incidents of incorporation [and it] does not require that an employees' association incorporated under the *Act* be constituted in a particular way or that it submit the scope of its objects, terms of membership or rules of internal governance to legislative control. [Therefore] the requirement of incorporation in s. 42(1)(b) is the means by which the territorial government has chosen to recognize the union or unions with which it will bargain collectively, and upon which it will grant the power to compel the government to bargain in good faith toward a binding agreement. ...¹¹⁶

...a grant of collective bargaining rights must account for the associational rights of affected individuals; but, in view of the trilogy, this means nothing more than permitting rival associations to exist and vie for recognition.¹¹⁷

L'Heureux-Dubé J. added that “the objects, purposes or activities which the association may wish to accomplish or pursue are irrelevant for *Charter* purposes”¹¹⁸ and that “[w]hile one of the primary goals of employee associations is to attain the status of bargaining agent and to bargain collectively, the attaining of this status, its retention and the association's subsequent activity are by no means protected under the rubric of s.

¹¹³ *Ibid.* at para. 82.

¹¹⁴ *Ibid.* at para. 83.

¹¹⁵ *Ibid.* at para. 88.

¹¹⁶ *Ibid.* at para. 89.

¹¹⁷ *Ibid.* at para. 90.

¹¹⁸ *Ibid.* at para. 47.

2(d).”¹¹⁹ She felt “bound by the majority decisions in the trilogy.”¹²⁰ Dickson C.J. too was “[r]eluctantly ... unable to agree with Cory J.”¹²¹ and only agreed with Sopinka J. with “considerable hesitation”¹²² because “the reasons for judgment of the majority in the [Labour Trilogy] are dispositive of the issue raised in this appeal.”¹²³

Cory J. wrote in dissent for the three justices in the minority.¹²⁴ He noted that in the Labour Trilogy “the Court appears to have been evenly divided on the question of whether s. 2(d) could guarantee at least some aspects of the right to collectively bargain. It thus remains an open question as to whether all aspects of collective bargaining are precluded from s. 2(d) protection.”¹²⁵ Cory J. wrote: “If collective bargaining is to function properly, employees must have confidence in their representative. That confidence will be lost if the individual employee is unable to choose the association.”¹²⁶ Cory J. was of the view that once a government undertakes to enact a collective bargaining legislative scheme, that legislation becomes subject to constitutional scrutiny.¹²⁷ He observed that the impugned section “provides the means by which the government can, for all collective bargaining purposes, deny the very existence of an association selected by the employees to bargain on their behalf. Such an untrammelled governmental discretion must *prima facie* violate an individual's freedom of association.”¹²⁸ *A fortiori* Cory J. could not

accept the statement of [his] colleague that ‘s. 42(1)(b) has no effect on the existence of the Institute’ and that the union exists as long as the individuals can meet at a town hall and discuss their grievances. ... a union can only exist if it is allowed to bargain collectively. That is the *raison d’être* of a union. In order to carry out its function of bargaining it must be recognized pursuant to the provisions of the relevant labour legislation. However, such an association or union does not ‘exist’ under the Northwest Territories *Act* until it is incorporated as an ‘employees’ association’. The *Act* thus effectively prevents ‘unincorporated’ associations from coming into existence and, by frustrating the

¹¹⁹ *Ibid.* at para. 48.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at para. 3.

¹²² *Ibid.* at para. 4.

¹²³ *Ibid.* at para. 2.

¹²⁴ Cory J., Wilson J., and Gonthier J.

¹²⁵ *Professional Institute*, *supra* note 4 at para. 14.

¹²⁶ *Ibid.* at para. 18.

¹²⁷ *Ibid.* at para. 19.

¹²⁸ *Ibid.* at para. 20.

employees' choice, thereby infringes the individual employees' right to associate.¹²⁹

...it is the very formation or changing of the employees' association which is restricted by s. 42(1)(b). To say that the association exists independently of its being incorporated under the legislation would be to denude the right granted by s. 2(d) of the *Charter* of any significance. The fact that the people who form the association (the union) may still meet together without interference from the state has no meaning if this association cannot be recognized under the relevant labour legislation. Section 42(1)(b) so restricts the freedom to form and change an association that it infringes the individual's right to associate protected by s. 2(d) of the *Charter*. Once a government has enacted a statutory definition of a group, as a legal entity, then any individual should be able to attempt to get his or her group recognized as such an entity, or to change the existing group entitled to exercise the rights granted under that legislative scheme. Arbitrary or totally discretionary restrictions placed upon the employees' right to choose their association must *prima facie* violate the freedom of association.¹³⁰

In his *Charter* s. 1 analysis, Cory J. determined that “[t]he objective of the *Act* ... to provide the means of selecting a collective bargaining agent for the employees [was] of sufficient importance to warrant overriding a constitutionally protected right.”¹³¹ However, on the proportionality branch of the test, he noted that there are three important concepts which are inscribed in other Canadian labour relations *Acts*: the certification procedures are conducted by an independent third party; the independent third party considers the wishes of the employees in the potential bargaining unit; and, the process of certification is mandatory upon the fulfillment of the stated requirements.¹³² He noted that “most of the collective bargaining statutes of the other Canadian jurisdictions provide a fair and reasonable process whereby individual employees may try to form associations to represent them, and may try to change associations which they deem to be inappropriate or ineffective.”¹³³ Cory J. held that the impugned section failed to achieve a reasonable balance between the rights of the individual, the union and the employer.¹³⁴ The “denial of the employees’ right to select their own bargaining agent in the manner contemplated in other jurisdictions cannot be justified as a reasonable limit under s. 1. It

¹²⁹ *Ibid.* at para. 24.

¹³⁰ *Ibid.* at para. 26.

¹³¹ *Ibid.* at para. 31.

¹³² *Ibid.* at para. 36.

¹³³ *Ibid.* at para. 39.

¹³⁴ *Ibid.* at para. 39-40.

is out of proportion to the objective sought to be achieved and restricts the employees' freedom of association far more than is reasonably necessary."¹³⁵

In summary, the law in Canada as it stood after *Professional Institute*, combined with the Labour Trilogy, was clearly that the *Charter* s. 2(d) freedom of association in the context of labour guaranteed neither the right of unionized workers to bargain collectively, nor their right to strike. These propositions were followed by the Supreme Court in subsequent decisions until 2001 when the Court delivered its judgment in *Dunmore*,¹³⁶ signalling the possibility of its future expansion of the scope of *Charter* s. 2(d) freedom of association to comport with Canada's international human rights undertakings to which Dickson C.J. (dissenting) had referred in the *Alberta Reference*.¹³⁷

IV. *Dunmore v. Ontario*: The Supreme Court Signals

This part of the paper will refresh the reader's mind regarding the legal principles which came out of *Dunmore*. The impugned legislation¹³⁸ under consideration in the case totally excluded agricultural workers from Ontario's statutory labour relations scheme. Historically, they had always been excluded except for the period when they were covered by the short-lived statute¹³⁹ which the impugned legislation repealed.

Writing for seven of the nine justices¹⁴⁰ in the majority, Bastarache J. held that "the total exclusion of agricultural workers from the *LRA* violates s. 2(d) of the *Charter* and cannot be justified under s. 1."¹⁴¹ Bastarache J. framed the issue as being

whether, in order to make the freedom to organize meaningful, s. 2(d) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a

¹³⁵ *Ibid.* at para. 41.

¹³⁶ *Dunmore*, *supra* note 5.

¹³⁷ See *supra* notes 30-34 and accompanying text.

¹³⁸ *Labour Relations and Employment Statute Law Amendment Act*, 1995, S.O. 1995, c. 1 ["LRESLAA"] combined with s. 3(b) of the *Ontario Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A ["LRA"].

¹³⁹ *Agricultural Labour Relations Act*, 1994, S.O. 1994, c. 6 ["ALRA"].

¹⁴⁰ Bastarache J. wrote for himself, McLachlin C.J., Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.; I have not addressed the concurring reasons of L'Heureux-Dubé J. or the dissenting reasons of Major J. in this paper.

¹⁴¹ *Dunmore*, *supra* note 5 at para. 2.

protective regime substantially contributes to the violation of protected freedoms.¹⁴²

Or in other words “can excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, constitute a substantial interference with freedom of association?”¹⁴³

Bastarache J. wrote that “the purpose of 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?”¹⁴⁴ Bastarache J. rejected earlier *dicta*¹⁴⁵ purporting to limit s. 2(d) protection to the exercise in association of the constitutional rights and freedoms and lawful rights of *individuals*. He stated that

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. To limit s. 2(d) to activities that are performable by individuals would, in my view, render futile [the] fundamental initiatives [of joining a political party, participating in a class action or certifying a trade union]. At best, it would encourage s. 2(d) claimants to contrive individual analogs for inherently associational activities... The collective dimension of s. 2(d) is also consistent with developments in international human rights law, as indicated by [international] jurisprudence illustrat[ing] the range of activities that may be exercised by a collectivity of employees [and] the right to organize as a collective right.”¹⁴⁶

... 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. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d)... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.¹⁴⁷

¹⁴² *Ibid.* at para. 20.

¹⁴³ *Ibid.* at para. 23.

¹⁴⁴ *Ibid.* at para. 16.

¹⁴⁵ See *supra* note 111 and accompanying text.

¹⁴⁶ *Dunmore*, *supra* note 5 at para. 16.

¹⁴⁷ *Ibid.* at para. 17.

Commenting on state responsibility under *Charter* s. 2(d), Bastarache J. wrote that “without the necessary protection, the freedom to organize could amount ‘to no more than the freedom to suffer serious adverse legal and economic consequences’” and the “exclusion from a protective [legislative] regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. ... legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom.”¹⁴⁸ He pointed out that the notion that underinclusion in a protective labour legislative regime was not only implied in the Supreme Court’s *Charter* jurisprudence, but was also consistent with international human rights law.¹⁴⁹ Bastarache J. wrote that the ratio set out in *Dunmore* “does not, on its own, oblige the state to act where it has not already legislated in respect of a certain area [but o]nce the state has chosen to regulate a private relationship such as that between employer and employee, ... it is unduly formalistic to consign that relationship to a ‘private sphere’ that is impervious to *Charter* review.”¹⁵⁰ Bastarache J. summarized that

the freedom to organize [is] the freedom to collectively embody the interests of individual workers [and] the effective exercise of these freedoms may require ... the exercise of certain collective activities, such as making majority representations to one’s employer. These activities are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize.¹⁵¹

Bastarache J. concluded that by enacting protective labour legislation in 1943, the Ontario legislature reflected its

awareness of employer unfair labour practices and its concomitant recognition that legislation was necessary to enable workers’ freedom of association. The *Collective Bargaining Act, 1943* was enacted against a background of staunch resistance to the labour movement; in large part, it was intended to prevent discrimination against union members. In this context, the exclusion of an entire category of workers from the *LRA* can only be viewed as a foreseeable infringement of their *Charter* rights.¹⁵²

¹⁴⁸ *Ibid.* at para. 22.

¹⁴⁹ *Ibid.* at para. 27.

¹⁵⁰ *Ibid.* at para. 29.

¹⁵¹ *Ibid.* at para. 30.

¹⁵² *Ibid.* at para. 47.

the exclusion of agricultural workers from the *LRA* substantially interferes with their fundamental freedom to organize [and] the provision infringes the freedom to organize and thus violates s. 2(d) of the *Charter*.¹⁵³

The majority held that the impugned legislation was not saved by *Charter* s. 1, and by way of remedy it struck down the clause excluding agricultural workers from the Ontario *LRC*, but the Court suspended its judgment to give the legislature time to fashion legislation that comported to the Court's judgement. The majority concluded that "at minimum the statutory freedom to organize ... ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms."¹⁵⁴

In summary, the law in Canada as it stood after *Dunmore* was: first, that the *Charter* section 2(d) freedom of association in the context of labour guaranteed the freedom of workers to organize collectively to embody the interests of individual workers, and that the effective exercise of this freedom may require the exercise of certain collective union activities, such as making collective representations to an employer, adopting a majority political platform, or federating with other unions; second, in certain contexts, governments have positive obligations to include groups in protective labour legislative to enable them to exercise their freedom of association. However, the Court reaffirmed that it had repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d). The importance of *Dunmore* in the context of this paper is the Supreme Court's adoption of Dickson C.J.'s heavy reliance in the Labour Trilogy on Canada's international human rights commitments and international human rights jurisprudence as interpretive aids for the Court's *Charter* s. 2(d) analysis.

Further, "*Dunmore* clarified three developing aspects of the law: what constitutes interference with the 'associational aspect' of an activity; the need for a contextual

¹⁵³ *Ibid.* at para. 48.

¹⁵⁴ *Ibid.* at para. 67.

approach to freedom of association; and the recognition that s. 2(d) can impose positive obligations on government.”¹⁵⁵

Three years after *Dunmore* was released, Professor Ken Norman¹⁵⁶ argued that through *Dunmore* “the Supreme Court of Canada [was] beginning to show the way towards compliance with ILO freedom of association principles.”¹⁵⁷ He pointed out that “ILO committees have repeatedly declared that the principles of freedom of association entail the right to organize and its intrinsic corollary, the right to strike.”¹⁵⁸ He argued that “for fourteen years following the Labour Trilogy, ILO freedom of association principles were not seen as speaking to a basic human right and, consequently, had no place in *Charter* analysis”¹⁵⁹ but that

Dunmore is an undeniable shift in the discourse of all but one member of the Court concerning freedom of association in employment from the field of curial deference to legislative interest balancing—where it had been left by the majority in the Labour Trilogy—into the fields of international and democratic human rights talk. This new vocabulary opens the door to interpreting the *Charter* as matching Canada's international promises to comply with the ILO freedom of association principles including the right to organize and its “intrinsic corollary,” the right to strike.¹⁶⁰

This emerging internationalist discourse, on the part of the Supreme Court, opens the door to interpreting the *Charter* as matching Canada's, promises to implement the ILO freedom of association principles, which include the right to organize and its intrinsic corollary, the right to strike. It will be recalled that this is the very course initially called for by Dickson, C.J., with Wilson J. in support, in the Labour Trilogy.”¹⁶¹

Should the Court choose to continue this journey through the door opened in *Dunmore*, the *Charter*, at long last, would be put to work as part of the solution to the continuing challenges posed by the legacy of the Labour Conventions¹⁶² case,

¹⁵⁵ *Health Services*, *supra* note 6 at para. 31.

¹⁵⁶ Ken Norman, “ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep” (2004) 67 Sask. L. Rev. 591.

¹⁵⁷ *Ibid.* at 593-94.

¹⁵⁸ *Ibid.* at 595.

¹⁵⁹ *Ibid.* at 598.

¹⁶⁰ *Ibid.* at 599.

¹⁶¹ *Ibid.* at 602-03.

¹⁶² *A.-G. Canada v. A.-G. Ontario et al; Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*, [1937] 1 D.L.R. 673 (J.C.P.C.) [“Labour Conventions”]; this was a constitutional division of powers case wherein the Court held that Canada's federal Parliament did not have the constitutional power to enact labour laws regulating wages, working hours and rest days affecting provincial “property and civil rights” because the Provinces had the exclusive constitutional

of Canada adhering to what has become a clear international consensus as to the basic human rights principles underpinning Canada's ILO freedom of association promises.¹⁶³

In the last twenty-two years, there have been some sixty-five complaints from Canadian unions referred to the Committee on Freedom of Association. Recently, the Committee on Freedom of Association censured the Campbell government of British Columbia with regard to six statutes curtailing the right to free collective bargaining and the right to strike in the health and education sectors. ...the results are that in forty of fifty-four such complaints, the Committee found that freedom of association principles had been violated.¹⁶⁴

The Supreme Court did indeed choose to continue its journey through the door opened in *Dunmore* as evidenced by its 2007 judgment in *Health Services*, a case that arose out of the very facts for which the ILO Committee on Freedom of Association censured the British Columbia Campbell government in its 2003 Report No. 330.¹⁶⁵

V. *Health Services*: A Sea Change in the Supreme Court's interpretation of the Charter Section 2(d) Freedom of Association

This part of the paper discusses the legal principles which came out of *Health Services*. The impugned legislation¹⁶⁶ under consideration in the case was passed quickly with no meaningful consultations with affected unions before it became effective. The legislation affected both public and private health sector employers and their unionized employees. "It introduced changes to transfers and multi-worksites assignment rights (ss. 4 and 5), contracting out (s. 6), the status of employees under contracting-out arrangements (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9)."¹⁶⁷ It "gave health care employers greater flexibility to organize their relations with their employees ... in ways that would not have been permissible under existing collective agreements... It invalidated important provisions of collective agreements then in force, and effectively

power to legislate in that area. The federal government had enacted the *ultra vires* legislation in order to comply with its international undertakings under various International Labour Organization Conventions.

¹⁶³ Ken Norman, *supra* note 156 at 604.

¹⁶⁴ *Ibid.* at 605-06.

¹⁶⁵ International Labour Organization Committee on Freedom of Association, Report No. 330, Vol. LXXXVI, 2003, Series B, No. 1; see cases 2166, 2173, 2180 & 2196.

¹⁶⁶ *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ["HSSDIA"].

¹⁶⁷ *Health Services*, *supra* note 6 at para. 10.

precluded meaningful collective bargaining on a number of specific issues.”¹⁶⁸ “[S]ome of the changes ... had profound effects on the employees and their ability to negotiate workplace matters of great concern to them.”¹⁶⁹

The case required the Court “to balance the need for governments to deliver essential social services effectively with the need to recognize the *Charter* rights of employees affected by such legislation.”¹⁷⁰ The unanimous Court¹⁷¹ held that “the s. 2(d) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues,”¹⁷² and six of the seven justices held that the *HSSDIA* “ss. 6(2), 6(4) and 9 breach [the *Charter* s. 2(d)] and have not been shown to be justified under s. 1.”¹⁷³

The issue before the Court was the same general issue that a different panel had addressed in *Professional Institute*; viz. whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. In a reversal of its own jurisprudence on the point, foreshadowed in *Dunmore*, the Court held:

...s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*.¹⁷⁴

The Court arrived at the conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining for four reasons:

¹⁶⁸ *Ibid.* at para. 11.

¹⁶⁹ *Ibid.* at para. 12.

¹⁷⁰ *Ibid.* at para. 3.

¹⁷¹ McLachlin C.J. and LeBel J. wrote for Bastarache, Binnie, Fish and Abella JJ., while Deschamps J. (dissenting in part) wrote: “I am in general agreement with the Chief Justice and LeBel J. concerning the scope of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* in the collective bargaining context”: *Health Services*, *supra* note 6 at para. 170.

¹⁷² *Ibid.* at para. 2.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at para. 19.

First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.¹⁷⁵

The Court rejected the majority reasons in the *Alberta Reference* and *Professional Institute*:

...the majority judgments in the *Alberta Reference* and *PIPSC* adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. [They] ignored differences between organizations [and] overlook[ed] the importance of collective bargaining—both historically and currently—to the exercise of freedom of association in labour relations.¹⁷⁶

...the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.¹⁷⁷

Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter* [and a]ll of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*.¹⁷⁸

...the protection of collective bargaining under s. 2(d) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.¹⁷⁹

¹⁷⁵ *Ibid.* at para. 20.

¹⁷⁶ *Ibid.* at para. 30.

¹⁷⁷ *Ibid.* at para. 78.

¹⁷⁸ *Ibid.* at para. 81.

¹⁷⁹ *Ibid.* at para. 86.

The Court provided the following guidance with regard to what aspects of collective bargaining do (and do not) now fall within the protective ambit of the *Charter* s. 2(d) freedom of association in the labour context:

...the suggestion ... that s. 2(d) was not intended to protect the “objects” or goals of an association ... overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in concert with others as the “object” of that association. [The] underlying concern—that the *Charter* not be used to protect the substantive outcomes of any and all associations—is a valid one. However, “collective bargaining” as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:

Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.

("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 Food for Thought, at p. 8.)

In our view, it is entirely possible to protect the “procedure” known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.¹⁸⁰

...s. 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.¹⁸¹

...*Dunmore* ... stressed that s. 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves. ...[T]he protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to ... employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and

¹⁸⁰ *Ibid.* at para. 29 [emphasis added].

¹⁸¹ *Ibid.* at para. 87.

discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining...¹⁸²

Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against “substantial interference” with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether “excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association” (para. 23). Or to put it another way, does the state action target or affect the associational activity, “thereby discouraging the collective pursuit of common goals”? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.¹⁸³

...the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. ...the interference ... must be substantial—so substantial that it interferes not only with the attainment of the union members’ objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.¹⁸⁴

To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. ...denying the union access to the labour laws ... designed to support and give a voice to unions ... [a]cts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may ... significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.¹⁸⁵

¹⁸² *Ibid.* at para. 89.

¹⁸³ *Ibid.* at para. 90.

¹⁸⁴ *Ibid.* at para. 91.

¹⁸⁵ *Ibid.* at para. 92.

...the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion.¹⁸⁶

The Court provided the following tests:

...determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.¹⁸⁷

...the essential question [in the first inquiry] is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively.¹⁸⁸

[The] sorts of matters [that] are important to the ability of union members to pursue shared goals in concert [include] laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer [or] laws that unilaterally nullify significant negotiated terms in existing collective agreements.¹⁸⁹ [In other words,] failure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.¹⁹⁰

Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining—the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(d), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.¹⁹¹

The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified

¹⁸⁶ *Ibid.* at para. 114.

¹⁸⁷ *Ibid.* at para. 93.

¹⁸⁸ *Ibid.* at para. 95.

¹⁸⁹ *Ibid.* at para. 96.

¹⁹⁰ *Ibid.* at para. 11.

¹⁹¹ *Ibid.* at para. 97 [emphasis added].

delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.¹⁹²

According to the Court, the duty to bargain in good faith:

- is essentially procedural and does not dictate the content of any particular agreement achieved through collective bargaining;¹⁹³
- includes the obligation to actually meet and to commit time to the process;¹⁹⁴
- includes a duty to engage in meaningful dialogue, be willing to exchange and explain positions, and make a reasonable effort to arrive at an acceptable contract;¹⁹⁵
- is not boundless—i.e. the parties may break off negotiations or adopt a “take it or leave it” stance if they have reached a point in the negotiations where further discussions are no longer fruitful;¹⁹⁶
- does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions, nor does it preclude hard bargaining;¹⁹⁷
- does not inquire into the nature (content) of the parties proposals but if the content shows hostility toward the collective bargaining process there will be a breach;¹⁹⁸
- makes a distinction between hard bargaining, which is legal, and surface bargaining, which is a breach;¹⁹⁹
- will be breached if the nature of proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship;²⁰⁰
- applies regardless of the subject matter of collective bargaining; all conditions of employment attract an obligation to bargain in good faith unless the subject matter is otherwise contrary to the law and could not legally be included in a collective agreement.²⁰¹

The Court pointed out that “limitations of s. 2(d) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society.

This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services,

¹⁹² *Ibid.* at para. 98; citing principle H of the ILO principles concerning collective bargaining. .

¹⁹³ *Ibid.* at para. 99.

¹⁹⁴ *Ibid.* at para. 100.

¹⁹⁵ *Ibid.* at para. 101.

¹⁹⁶ *Ibid.* at para. 102.

¹⁹⁷ *Ibid.* at para. 103.

¹⁹⁸ *Ibid.* at para. 104.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* at para. 105.

²⁰¹ *Ibid.* at para. 106.

vital state administration, clear deadlocks and national crisis.”²⁰² As previously mentioned, the majority held that the *HSSDIA* “ss. 6(2), 6(4) and 9 breach [the *Charter* s. 2(d)] and have not been shown to be justified under s. 1.”²⁰³ Those provisions of the impugned legislation failed the minimal impairment branch of the *Oakes* test. The following remarks of the majority are of interest:

Section 6(2) ... gives the employers absolute power to contract out of collective agreements. There is no need or incentive to consult with the union or the employees before sending the work they normally perform to an outside contractor. To forbid any contracting out clause completely and unconditionally strikes us as not minimally impairing.²⁰⁴

Section 6(4) makes void a provision in a collective agreement to consult before contracting out. ...[T]he policy of no consultation under any circumstances ... can scarcely be described as suggesting a search for a solution that preserves collective bargaining rights as much as possible...²⁰⁵

Section 9 evinces a similar disregard for the duty to consult the union ... before making changes to the collective agreement’s layoff and bumping rules.²⁰⁶

...The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.²⁰⁷

Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach...²⁰⁸

...a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it.²⁰⁹

The evidence establishes that there was no meaningful consultation prior to passing the *Act* on the part of either the government or the HEABC (as employer).

²⁰² *Ibid.* at para. 108.

²⁰³ *Ibid.* at para. 2.

²⁰⁴ *Ibid.* at para. 153.

²⁰⁵ *Ibid.* at para. 154.

²⁰⁶ *Ibid.* at para. 155.

²⁰⁷ *Ibid.* at para. 156.

²⁰⁸ *Ibid.* at para. 157 [emphasis added].

²⁰⁹ *Ibid.* at para. 158.

...The government also failed to engage in meaningful bargaining or consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration).²¹⁰

Deschamps J. (dissenting in part), would have held “that ss. 4, 5, 6(2), 6(4) and 9 of the *Act* infringe s. 2(d) of the *Charter*, but ... only s. 6(4) of the *Act* is not demonstrably justified in a free and democratic society.”²¹¹

In summary, the law in Canada as it stands after *Health Services* is: first, that the *Charter* s. 2(d) freedom of association in the context of labour guarantees the freedom of workers to organize collectively to embody the interests of individual workers, and the effective exercise of this freedom may require the exercise of certain collective union activities, such as making collective representations to an employer, adopting a majority political platform, or federating with other unions; second, in certain contexts, governments have positive obligations to include groups in protective labour legislative to enable them to exercise their freedom of association; third, s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*.²¹²

However, the Court explicitly declined to reconsider whether the right to strike falls within the protected ambit of *Charter* s. 2(d), given the factual context of *Health Services*.²¹³

²¹⁰ *Ibid.* at para. 159.

²¹¹ *Ibid.* at para. 169; Deschamps J.’s reasons are not addressed in this paper.

²¹² *Ibid.* at para. 19.

²¹³ *Ibid.* at para. 12.

VI. The Right to Strike: Now and the Future

This part of the paper discusses the law in Canada on the right of organized workers to strike as a “necessary incident of collective bargaining”,²¹⁴ the status of which the decision in *Health Services* has made uncertain.

i. The Right to Strike at Common Law

Whether there is a right to strike at common law in Canada is debatable. While there have been several judicial decisions that explicitly or implicitly recognize a common law right to strike, the Supreme Court of Canada has never explicitly pronounced an answer. Examples of Canadian judicial decisions that recognize a common law right to strike follow. In *Haldimand-Norfolk*,²¹⁵ Goodman J.A. stated that: “The rights to strike or lock-out are basic and fundamental rights of the parties to collective bargaining in endeavouring to settle the terms of a collective agreement. They are rights that existed at common law.”²¹⁶ In *Grey-Owen*,²¹⁷ Wilson J.A. stated: “The rights of strike and lock-out, [counsel] submits, existed at common law and all the statute does is prescribe certain limitations on their exercise. I agree with [counsel] that the rights of strike and lock-out existed at common law but the Legislature undoubtedly has incorporated them into its statutory scheme of collective bargaining.”²¹⁸ In *Borough of Scarborough*,²¹⁹ Callaghan J. discussed the “common law right to strike or withdraw services from the municipality.”²²⁰ In *C.P.R.*,²²¹ McRuer C.J.O. stated that “[a]lthough the *Act* does not purport to create a statutory right to strike, as I have indicated it recognizes the common law right to strike and so doing, limits it.”²²² In *NAPE*,²²³ Goodridge, J stated: “It has

²¹⁴ *PSAC*, *supra* note 1 at para. 24 per Dickson C.J. dissenting in part.

²¹⁵ *Re Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association et al.; Re Perth District Health Unit and Ontario Nurses' Association et al.* (1981), 31 O.R. (2d) 730, 120 D.L.R. (3d) 101 (C.A.) [*“Haldimand-Norfolk”*]; rev'd on other grounds [1983] 2 S.C.R. 6.

²¹⁶ *Ibid.* at para. 49.

²¹⁷ *Re Grey-Owen Sound Health Unit and Ontario Nurses Association* (1979), 24 O.R. (2d) 510, 104 D.L.R. (3d) 32 (C.A.) [*“Grey-Owen”*].

²¹⁸ *Ibid.* at para. 15.

²¹⁹ *Re Borough of Scarborough and Scarborough Fire-fighters' Association, Local 626, International Association of Fire-fighters et al.* (1979), 26 O.R. (2d) 298, 104 D.L.R. (3d) 748 (H.C.J.) [*“Borough of Scarborough”*].

²²⁰ *Ibid.* at para. 12.

²²¹ *R. v. Canadian Pacific Railway Co.*, [1961] O.J. No. 334 (QL) (Ont. H.C.J.) [*“C.P.R.”*].

²²² *Ibid.* at para. 23.

been said that there was a right to strike at common law. This was not a right that was created and might more properly be described as a freedom. Unless it amounted to an unlawful conspiracy, employed persons were free to withhold their services. There were no incidental rights associated with that freedom and, prior to the trade union legislation of the 19th century, there was no statutory regulation of such freedom.²²⁴ In *Hotel and Club Employees*,²²⁵ magistrate Elmore stated that “[t]he right to strike is a common law right and can be exercised only as it could at common law, subject to any change made by the statute.”²²⁶ In *Broadview*,²²⁷ Hall J.A. stated: “In my opinion, the law now recognizes that any person has the right to withhold his services, either as an individual or together with others, so long as he commits no breach of contract, or tort, or crime; in this case also, as long as the action is not contrary to any statutory provision.”²²⁸ In *Bhindi*,²²⁹ Anderson J.A. (dissenting) stated that “[u]nions did possess the right to strike under the common law. In practice this was their only means of enforcing collective agreements. Striking was not specifically forbidden by the common law and therefore, according to the general principle that anything not forbidden is permitted, was considered lawful (c.f. *C.P.R. v. Zambri* (1962), 34 D.L.R. (2d) 654 (S.C.C.)).”²³⁰ In *Moose Jaw*,²³¹ Vancise J. stated:

The trustees further submit that the teachers do not have a right to strike because such right was not guaranteed them by statute and teachers do not have the right to strike at common law. I do not agree with that submission. I agree with Hall, J.A. (as he then was) in *Board of Broadview School Unit No. 18 et al v. Saskatchewan Teachers' Federation*, [1973] 1 W.W.R. 152, when he stated at page 165 and 166:

²²³ *Newfoundland Association of Public Employees et al. v. Newfoundland* (1985), 85 C.L.L.C. 14,020, 53 Nfld. & P.E.I.R. 1, 156 A.P.R. 1, 14 C.R.R. 193 (Nfld. S.C. T.D.) [“NAPE”].

²²⁴ *Ibid.* at para. 170.

²²⁵ *Hotel and Club Employees Union, Local 299 v. Canadian Pacific Railway* (1961), 61 C.L.L.C. para.15372 at 326, [1961] O.J. No. 392 (QL) (Ont. Mag. Ct.) [“*Hotel and Club Employees*”].

²²⁶ *Ibid.* at para. 7.

²²⁷ *Broadview School Board v. Saskatchewan Teachers' Federation*, [1973] 1 W.W.R. 152, 32 D.L.R. (3d) 33 (Sask. C.A.) [“*Broadview*”].

²²⁸ *Ibid.* at para. 65.

²²⁹ *Bhindi v. British Columbia Projectionists, Local 348* (1986), 4 B.C.L.R. (2d) 145, [1986] 5 W.W.R. 303, 86 C.L.L.C. 14,052, 29 D.L.R. (4th) 47, 24 C.R.R. 302 (C.A.) [“*Bhindi*”].

²³⁰ *Ibid.* at para. 45.

²³¹ *Moose Jaw Roman Catholic Separate School Division No. 22 v. Hansen* (1983), 32 Sask. R. 97, 1983 CarswellSask 507 (WLeC) (Q.B.) [“*Moose Jaw*”].

“In my opinion, the law now recognizes that any person has the right to withhold his services, either as an individual or together with others, so long as he commits no breach of contract, or tort, or crime; in this case also, as long as the action is not contrary to any statutory provision.

In the instant case, it is evident that the action taken by the teachers was as a genuine attempt to forward their position in the negotiations for a new salary agreement ...”

The teachers do have a right to strike.²³²

However, writing for 3 of the 6 Justices of the Supreme Court of Canada in the *Alberta Reference*, Le Dain J. stated: “The rights for which constitutional protection is sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise.”²³³ McIntyre J. stated: “the right to strike accorded by legislation throughout Canada is of relatively recent vintage. It is truly the product of this century and, in its modern form, is in reality the product of the latter half of this century. It cannot be said that it has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy.”²³⁴

But the majority in *Dunmore*, stated that “a constitutional freedom to organize a trade association ... exists independently of any statutory enactment, even though the so-called ‘modern rights to bargain collectively and to strike’ have been characterized otherwise in the *Alberta Reference*... While it may be that the effective exercise of this freedom requires legislative protection in some cases, this ought not change the fundamentally non-statutory character of the freedom itself.”²³⁵ And in *Health Services* the majority explicitly overturned the *Alberta Reference* on this point, stating that

²³² *Ibid.* at para. 24; adopted by Gerein J. in *Kondra v. Moose Jaw Roman Catholic Separate School Division No. 22* (1985), 38 Sask. R. 161, 1985 CarswellSask 506 at para. 8.

²³³ *Alberta Reference*, *supra* note 1 at para. 142.

²³⁴ *Ibid.* at para. 179.

²³⁵ *Dunmore*, *supra* note 5 at para. 24.

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.²³⁶

...the origin of a right to collective bargaining in the sense given to it in the present case (i.e., a procedural right to bargain collectively on conditions of employment), precedes the adoption of the present system of labour relations in the 1940s. The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society.²³⁷

While employers could refuse to recognize and bargain with unions, workers had recourse to an economic weapon: the powerful tool of calling a strike to force an employer to recognize a union and bargain collectively with it. The law gave both parties the ability to use economic weapons to attain their ends. Before the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it... The unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislation...²³⁸

...workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the *Wagner Act* model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the *laissez-faire* era through the use of strikes—the right to collective bargaining with employers.²³⁹

Collective bargaining, despite early discouragement from the common law, has long been recognized in Canada. Indeed, historically, it emerges as the most significant collective activity through which freedom of association is expressed

²³⁶ *Health Services*, *supra* note 6 at para. 25.

²³⁷ *Ibid.* at para. 41.

²³⁸ *Ibid.* at para. 54.

²³⁹ *Ibid.* at para. 63.

in the labour context. In our opinion, the concept of freedom of association under s. 2(d) of the *Charter* includes this notion of a procedural right to collective bargaining.²⁴⁰

There is arguably a right to strike at common law in Canada, as the Supreme Court has impliedly recognized that there is a right to collective bargaining at common law; however, even if there is a common law right to strike, the common law can be supplemented, modified or superseded by legislative intervention. In *Bell ExpressVu Limited*,²⁴¹ Iacobucci J., speaking on behalf a unanimous seven-member panel, commented on the impact of legislation on the common law: “Statutory enactments embody legislative will. They supplement, modify or supersede the common law.”²⁴² Only if the *Charter* s. 2(d) freedom of association is interpreted by the Supreme Court as including the right to strike will that right receive protection from legislative interference subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

ii. There is No Constitutional Right to Strike Presently

Recall that the majority in the Labour Trilogy made it clear that the *Charter* s. 2(d) freedom of association in the context of labour did not guarantee the right of organized workers to strike. In *Health Services* the majority stated that “the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.”²⁴³ While it did not overturn the Labour Trilogy on the right to strike, neither did it explicitly endorse the reasons of the majority in Labour Trilogy on the right to strike. However, until the Supreme Court revisits the scope of the freedom of association in the context of labour’s right to strike in a future case, the Labour Trilogy stands on that point; *viz.* the right to strike does not fall within the scope of *Charter* s. 2(d) protection.

iii. Will there be a Constitutional Right to Strike in the Future?

²⁴⁰ *Ibid.* at para. 66.

²⁴¹ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 [“*Bell ExpressVu*”].

²⁴² *Ibid.* at 597.

²⁴³ *Health Services*, *supra* note 6 at para. 19.

In *Health Services* the majority stated that “Canada’s international obligations can assist courts charged with interpreting the *Charter's* guarantees”²⁴⁴ and endorsed Dickson C.J.’s dissenting statement in the *Alberta Reference* that “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”²⁴⁵ According to the Court, “[t]he sources most important to the understanding of s. 2(d) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3..., the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ..., and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17...”²⁴⁶

The *International Covenant on Economic, Social and Cultural Rights* Article 8(1)(d) states: “The States Parties to the present Covenant undertake to ensure: The right to strike, provided that it is exercised in conformity with the laws of the particular country.”²⁴⁷ Further, in the *Alberta Reference*, Dickson C.J. observed of the *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize* that “[t]he general principle to emerge from interpretations of Convention No. 87 by [international] decision-making bodies is that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits.”²⁴⁸

Should the Supreme Court choose to continue its journey through the door opened in *Dunmore* and widened in *Health Services*, by interpreting the *Charter* as matching Canada’s promises to implement the ILO freedom of association principles, then it is possible that in a future case the Supreme Court will overturn what remains of the Labour Trilogy and interpret the *Charter* s. 2(d) freedom of association as including a right to strike subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

²⁴⁴ *Ibid.* at para. 69.

²⁴⁵ *Ibid.* at para. 70.

²⁴⁶ *Ibid.* at para. 71.

²⁴⁷ Emphasis added.

²⁴⁸ *Alberta Reference*, *supra* note 1 at para. 68 [emphasis added]; see also *Health Services*, *supra* note 6 at para. 75.

VII. *Health Services: The Potential Effect on Alberta's Labour Relations Code*

This part of the paper discusses possible effects that the decision in *Health Services* may have on the Alberta *Labour Relations Code*. It should be noted that merely because the Supreme Court of Canada renders judgment on an issue, it does not necessarily follow that a given provincial government will amend its legislation to comply with the decision. For example, after the Supreme Court's judgment in *Dunmore* was released, the Ontario government, whose legislation was directly impugned in the case, enacted a statute²⁴⁹ to comply with the Court's judgment. The *Act* gives agricultural employees the right to form or join an employees' association but it does not give agricultural workers the right to establish and join trade unions or to bargain collectively. However, workers in agriculture in Alberta are still excluded from the coverage of labour relations legislation and thereby deprived of protection concerning the right to organize and collectively bargain six years after *Dunmore*. In its 2005 report, the ILO Committee of Experts on the Application of Conventions and Recommendations ["CEACR"] "note[ed] with regret ... that there are no plans for a legislative review in Alberta and New Brunswick (the Alberta government indicates that this issue may be addressed in the next review of the *Labour Relations Code* and the New Brunswick government maintains that limiting the scope of the law to workplaces with five or more agricultural employees is fair and equitable)."²⁵⁰

It is, therefore, unlikely that any of Alberta's labour legislation will be voluntarily amended by the government to comply with the Supreme Court's judgment in *Health Services* without further direct challenge of offending statutory provisions in the courts.

i. **The *Labour Relations Code* (Excluding Part 3)**

It should be noted that although the *Labour Relations Code* recognizes "that legislation supportive of free collective bargaining is an appropriate mechanism through which terms and conditions of employment may be established,"²⁵¹ agricultural²⁵² and

²⁴⁹ *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16.

²⁵⁰ ILO Comments made by the Committee of Experts on the Application of Conventions and Recommendations, 2005, 76th Session ["CEACR Comments"].

²⁵¹ *Labour Relations Code*, *supra* note 7, preamble.

domestic²⁵³ workers are still totally excluded from Alberta's statutory labour relations regime despite the Supreme Court's judgment in *Dunmore* nearly six years ago. Further, members of the medical, dental, architectural, engineering and legal professions, and nurse practitioners, who are employed in their professional capacities are not "employees" under the *Labour Relations Code* and are thus excluded from the rights and protections granted to employees pursuant to the *Act*.²⁵⁴ This although the CEACR has repeatedly stated "that all workers without distinction whatsoever (with the sole possible exception of the armed forces and the police) have the right to organize under the [Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)]."²⁵⁵ The CEACR has censured the Alberta government as recently as 2005 for not amending its legislation to "guarantee the right of agricultural workers to organize," and to allow "nurse practitioners [to] recover the right to establish and join organizations of their own choosing," and "to ensure that those workers in the health and hospital sectors who are not providing essential services, in the strict sense of the term, are not deprived of the right to strike."²⁵⁶ The CEACR also censured the Ontario government for excluding architects, dentists, land surveyors, lawyers and doctors from the scope of that province's labour relations law.²⁵⁷

Recognizing that Alberta has yet to bring the *Labour Relations Code* in compliance with *Dunmore*, the question becomes which provisions may now infringe the *Charter* s. 2(d) according to the Supreme Court's recent decision in *Health Services*? Recall that "[w]hat is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*."²⁵⁸ However, "limitations of s. 2(d) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free

²⁵² *Ibid.*, s. 4(2)(e)(ii) in combination with *Employment Standards Regulation*, Alta. Reg. 14/97, s. 1.1; see also *Labour Relations Code*, *supra* note 7, s. 4(2)(c) in combination with *Agrology Profession Act*, S.A. 2005, c. A-13.5, s. s. 3(4) excluding professional agrologists.

²⁵³ *Labour Relations Code*, *supra* note 7, s. 4(2)(f).

²⁵⁴ "An employee has the right to be a member of a trade union and to participate in its lawful activities, and to bargain collectively with the employee's employer through a bargaining agent": *ibid.*, s. 21.

²⁵⁵ CEACR Comments, *supra* note 250.

²⁵⁶ *Ibid.*; the author predicts that comments from the CEACR 2007/78th Session will evidence no legislative reaction on the part of the Alberta government to the CEACR's repeated sanctions for the province's failure to adhere to ILO freedom of association principles.

²⁵⁷ CEACR Comments, *supra* note 250.

²⁵⁸ *Health Services*, *supra* note 6 at para. 19.

and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.²⁵⁹

Since the above-mentioned classes of workers are either totally excluded from the *Labour Relations Code*, or precluded from enjoying the rights and protections afforded to “employees” under the *Act*, *a fortiori* it is arguable that some of those classes may not only be *substantially incapable* of exercising their right to form associations outside the statutory framework, but they may also not have access to a *process* of collective action to achieve workplace goals. Therefore, the provisions excluding certain classes of workers from the rights and protections of the *Labour Relations Code* may infringe the *Charter* s. 2(d) on the authority of both *Dunmore* and *Health Services*.

Pursuant to the *Labour Relations Code*, s. 96, firefighters,²⁶⁰ employees of hospitals²⁶¹ and employees of all regional health authorities²⁶² are denied the right to strike. While the Court in *Health Services* explicitly declined to revisit the right to strike, by interpreting the *Charter* as matching Canada’s promises to implement the ILO freedom of association principles the Court left open the possibility that in a future case it may overturn what remains of the Labour Trilogy and interpret the *Charter* s. 2(d) freedom of association as including a right to strike subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In the case of a constitutional challenge to the *Labour Relations Code*, s. 96 by one of the aforementioned excluded groups, the Court may choose to continue its journey through the door opened in *Dunmore* and widened in *Health Services* and declare s. 96 to infringe the *Charter* s. 2(d) freedom of association. If the Court were to rely on Dickson C.J.’s dissent in the Labour Trilogy, as it did in both *Dunmore* and *Health Services*, then it would likely hold on its *Charter* s. 1 analysis:

- ✓ that the protection of services which are truly essential is a legislative objective of sufficient importance provided that “essential services” is defined as a service

²⁵⁹ *Ibid.* at para. 108 [emphasis added].

²⁶⁰ *Labour Relations Code*, *supra* note 7, s. 96(1)(a).

²⁶¹ *Ibid.*, s. 96(1)(b), as “hospitals” is defined in the *Hospitals Act*, R.S.A. 2000, c. H-12.

²⁶² *Labour Relations Code*, *supra* note 7, s. 96(1)(c).

- “whose interruption would endanger the life, personal safety or health of the whole or part of the population”,²⁶³
- ✓ that the essentiality of firefighters is obvious and self-evident,²⁶⁴
 - ✓ that to deny all employees of hospitals and regional health authorities the freedom to strike is too drastic a means for securing the purpose of protecting essential services;²⁶⁵
 - ✓ that if the prohibition of strike activity of firefighters, with the object of preventing interruptions in essential services, is to be the least drastic means of achieving this purpose it must be accompanied by adequate guarantees for safeguarding firefighters’ interests²⁶⁶ like an arbitration system that is fair and effective to adequately restore to employees the bargaining power they are denied through prohibition of strike activity.²⁶⁷

On a *Charter* challenge of the *Labour Relations Code*, s. 96(1), the Court might hold that s. 96(1) infringes the *Charter* s. 2(d) freedom of association by prohibiting the right to strike. On the *Charter* s. 1 analysis the Court may hold that while firefighters under s. 96(1)(a) are an essential service, the prohibition of strike activity of firefighters is not accompanied by an arbitration system that is fair and effective²⁶⁸ because there is an absence of a non-discretionary right to refer collective bargaining disputes to binding interest arbitration.²⁶⁹ Sections 96(1)(b) and (c) would likely also not be saved under *Charter* s. 1 because they deny all employees of hospitals and regional health authorities the freedom to strike and do not distinguish employees who truly provide essential services from those who do not—ss. 96(1)(b) and (c) are likely over-inclusive. Further, the prohibition of strike activity of employees of hospitals and regional health authorities is not accompanied by an arbitration system

²⁶³ *Alberta Reference*, *supra* note 1 at para. 107; citing Committee of the Governing Body of the I.L.O., *Digest of Decisions and Principles of the Freedom of Association*, 3rd ed. (Geneva: International Labour Office, 1985).

²⁶⁴ *Alberta Reference*, *supra* note 1 at para. 110.

²⁶⁵ *Ibid.* at para. 111.

²⁶⁶ *Ibid.* at para. 118.

²⁶⁷ *Ibid.* at para. 124.

²⁶⁸ *Labour Relations Code*, *supra* note 7, ss. 97-104 ; see s.98 gives the Minister discretion.

²⁶⁹ See *supra* notes 57-63 and accompanying text.

that is fair and effective because there is an absence of a non-discretionary right to refer collective bargaining disputes to binding interest arbitration.²⁷⁰

VIII. Conclusion

Following *Dunmore* and *Health Services* the *Charter* s. 2(d) freedom of association in the context of labour guarantees the freedom of workers to organize collectively to embody the interests of individual workers, and the effective exercise of this freedom may require the exercise of certain collective union activities, such as making collective representations to an employer, adopting a majority political platform, or federating with other unions. In certain contexts, governments have positive obligations to include groups in protective labour legislation to enable them to exercise their freedom of association. The *Charter* s. 2(d) protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*. Legislative limitations of s. 2(d) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

Since agricultural and domestic workers, and members of the medical, dental, architectural, engineering and legal professions, and nurse practitioners, who are employed in their professional capacities are either totally excluded from the *Labour Relations Code*, or precluded from enjoying the rights and protections afforded to “employees” under that *Act*, it is arguable that some of those classes may not only be *substantially incapable* of exercising their right to form associations outside the statutory framework, but they may also not have access to a *process* of collective action to achieve workplace goals. Therefore, the provisions excluding certain classes of workers from the

²⁷⁰ See *supra* notes 268 and 269.

rights and protections of the *Labour Relations Code* may infringe the *Charter* s. 2(d) on the authority of both *Dunmore* and *Health Services*.

The Supreme Court's judgment in *Health Services* has left the status of the right to strike uncertain. However, until the Supreme Court revisits the scope of the freedom of association in context of labour's right to strike in a future case, the Labour Trilogy stands on that point; *viz.* the right to strike does not fall within the scope of *Charter* s. 2(d) protection. On a *Charter* challenge of the *Labour Relations Code*, s. 96(1), the Court might hold that s. 96(1) infringes the *Charter* s. 2(d) freedom of association, and that that the section is not saved under s.1: in the case of firefighters under s. 96(1)(a) because the prohibition of strike activity of firefighters is not accompanied by an arbitration system that is fair and effective; in the case of employees of hospitals and regional health authorities under s. 96(1)(b) and (c) for the same reasons, and in addition because they deny all employees of hospitals and regional health authorities the freedom to strike and do not distinguish employees who truly provide essential services from those who do not—ss. 96(1)(b) and (c) are likely over-inclusive.

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