Reading the Trilogy last rites:
section 2(d) and a constitutional right to strike
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[* Please note that this paper is loosely written for discussion purposes only, does not yet provide footnotes, and requires further thought and conceptualization. JC]

Precedents and paradoxes

By clearing away the precedential wreckage of the past, the Supreme Court of Canada has set the constitutionalization of labour relations in motion. Not only did B.C. Health Services (“BCHS”) grant collective bargaining status under the Charter, in reaching that conclusion the Court overruled its own “charter” decisions on freedom of association. Still, the joint majority opinion claimed that BCHS simply instated the contextual approach under section 2(d) and, in defining the entitlement in process terms, took careful, well-measured steps. Despite the qualifications, BCHS will have dramatic consequences. The decision places a new frame around collective bargaining which fundamentally alters relationships between parties to the process in public, as well as potentially in private, spheres. Moreover, the Court’s eagerness to overrule precedent and constitutionalize collective bargaining has implications for other aspects of labour relations. Specifically, the decision to overrule the Labour Trilogy on collective
bargaining makes re-consideration of the other key conclusion – that the Charter does not protect the right to strike – all but unavoidable. Those who favour Charter solutions to labour issues can once again dare to dream of a constitutional right to strike.

Still, there is little in the jurisprudence to breed confidence in the Supreme Court’s interpretation of section 2(d). A literature that divides on the constitutional status of labour relations nonetheless agrees that the Court’s performance is confounding. To begin, the Trilogy judges were unable to articulate any view of associational freedom, much less one that was coherent. Thereafter, and despite remaining unable to settle on a definition for some years, the Court refused to protect the activities of an association. In concept and design, section 2(d) was only generous enough to protect the skeletal right to form an association. During this period the Court maintained control over the guarantee by insisting on an individualistic definition of the right and a formal distinction between the establishment of an association and the activities for which it exists.

Not long after endorsing Professional Institute (“PI”)’s doctrinal framework concretizing the above principles, the Court abruptly – and effectively – reversed itself in Dunmore v. Ontario. There, the Court constitutionalized collective activity, but obscured that development in reasoning that was convolutedly case-specific, and in a remedy that imposed an obligation on the government to secure “meaningful association” for one set of distinctively disadvantaged workers. Dunmore was a victory for labour and at the same time a paradox, because the decision expanded section 2(d) beyond all expectations but set demanding criteria which would have to be met in other circumstances. A similar
paradoxical pattern was repeated in BCHS, which extended s.2(d) to collective bargaining but confined the right to the procedural aspects of the process. The compromises the Court made in the two cases were designed to give labour some constitutional protection, but not too much.

It remains as difficult now – as it always has been – to make sense of freedom of association under the Charter. Dunmore and BCHS are case- and issue-specific, and in BCHS the Court declared that decisions should rest on contextual considerations rather than on “abstract” principles, which it made a point of maligning. At present, it is unclear what section 2(d) means – apart from context. This uncertainty makes it intriguing to consider what the Court might do, if and when asked to constitutionalize the right to strike.

**Last rites for the Trilogy**

The logic of BCHS is that the remaining vestige of the Trilogy should also be overruled and that the right to strike, like collective bargaining, be given Charter status. In other words, now that the Trilogy and Professional Institute (“PI”) have been overruled on collective bargaining, symmetry suggests that the Trilogy’s companion ruling should not be far behind. This view finds supports in the Reference dissent, which would have constitutionalized the right to strike in 1987, as well as in Dunmore and B.C. Health Services, which offer alternative pathways to that conclusion. From that perspective it seems a simple matter for the Court to finish the task which was begun in
BCHS and overrule the Trilogy in toto. Little more than bare precedent stands in the way of a Court that has shown a willingness to overrule itself once already.

In this it helps that the Reference dissent laid the foundation for a right to strike and has been waiting—quiescent since 1987—for vindication. There, Chief Justice Dickson relied on a collective definition of associational freedom to support that entitlement. Many years later, Dunmore v. Ontario sidestepped PI’s four-point framework—which was based on an individualistic conception of the right—and proposed a variation on the Dickson definition. Justice Bastarache’s test, which was abstract in nature, would protect a variety of collective activities and catch statutory restrictions on the right to strike.1 Though the Court did not apply the test in Dunmore or BCHS, the Bastarache definition set a new, low threshold for breach under section 2(d). With a collective conception ensconced in authoritative precedent it is highly unlikely that the Court will return to the Trilogy’s individualistic definition of the right.

The contextual approach, which led to the constitutionalization of collective bargaining, offers yet another route to the same conclusion. In BCHS the Court indicated its disdain for abstract principle and heaped praise on the merits of a context-based approach to constitutional interpretation. The backstory there begins with Justice Wilson’s objections to the Trilogy and her determination to challenge the Court’s practice of devising abstract definitions to determine the scope of Charter entitlements. Her resentment of the Reference’s comparison between the right to golf or curl and the

1 His section 2(d) test simply asks whether the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals. (para. 16)
activities of labour unions found its way into her concurrence in *Edmonton Journal v. Alberta*, which proposed that the Court adopt a contextual approach to *Charter* interpretation. This approach was picked up in section 2(b) adjudication and migrated from there to section 15 and other *Charter* guarantees, but did not find its way to section 2(d) until *BCHS*.

*BCHS* corrected this deficiency by stating its unequivocal support for a contextual approach to freedom of association questions. That led to a judicial exegesis on the history of collective bargaining, the purpose of which was to validate the conclusion that collective bargaining is within the scope of “*Charter* values” and constitutionally protected for that reason. In this way the Court blunted the force of precedent and overruled the *Trilogy* and *PI* on that point. A context-based approach is flexible enough, once a similar historical work-up is undertaken, to lead to the conclusion that the right to strike also falls within the Court’s concept of *Charter* values.

Under this chain of logic the *Trilogy* should be overruled once and for all, and what remains of the decisions replaced by a constitutional right to strike. Since *Delisle v. Canada*, labour’s *Charter* trajectory has been steadily upward, and though *Delisle* was the only *Trilogy* precedent to survive the *BCHS* purge, the decision may have been spared in deference to Bastarache J. It remains intact today, but more as an anomaly than as a source of authority. When placed in alignment, the *Reference* dissent, Dunmore’s collective concept of associational freedom, and *BCHS*’s context-based approach to *Charter* values together suggest that the Court may find the right to strike just as
fundamental as collective bargaining. In other words, collective bargaining and the right to strike are similarly situated, for purposes of the *Charter*. Both were erroneously excluded from section 2(d) in 1987, and now that collective bargaining has been constitutionalized, the right to strike must follow suit.

**Second thoughts**

The question is whether the comparison holds. With the exception of last week’s *Wal-Mart* decision, which did not engage the *Charter*, labour claims have fared well at the Court in recent years. Still, that does not change the fact that the jurisprudence is based on *ad hoc* decision making, and is fundamentally unstable. There are ways for the Court to avoid equating collective bargaining and the right to strike, if that is what it chooses to do.

As mentioned, *Dunmore* and *BCHS* imposed positive obligations under section 2(d), but took care each time to place boundaries around the scope of entitlement. For example, the exceptional circumstances which led to a remedy in *Dunmore* generated a three-part test which makes it difficult to establish a violation of fundamental freedoms under the *Charter*. Then in *BCHS*, the Court constitutionalized collective bargaining but limited the entitlement to matters of process. The Court was adamant, in doing so, that any right to collective bargaining was procedural, rather than substantive, in nature. The prospects for a constitutional right to strike could depend on the Court’s willingness to characterize it as being procedural and protected by the *Charter* for that reason, or substantive, and therefore outside the scope of section 2(d). In addition, the Court
discussed the Trilogy-PI distinction between an association and its activities, but without disavowing that part of doctrine. As long as the distinction remains in place it is difficult to see how the right to strike can be brought into section 2(d).

Finally, the Court provided a contextual analysis of collective bargaining in Canada, which led to the conclusion that the activity is a Charter value. This paper does not offer a contextual analysis of the right to strike, or provide any comparison of the historical circumstances of collective bargaining and strike actions. Instead, it simply observes that the contextual approach is a methodology that is notable in its lack of content and discipline. Though this methodology could result in a similar conclusion for the right to strike, there are no guarantees, and it is open to a Court that is looking for them to find points of distinction between collective bargaining and the right to strike.

To summarize, a lack of confidence in the Court’s interpretation of section 2(d) – from the Trilogy to BCHS – invites wariness and caution about the prospects for a constitutional right to strike. Other factors, in addition to the manipulation of precedent and doctrine, should also be noted. One concerns section 1 and its role in the analysis and the other, current perceptions about the nature of rights under the Charter. First, it is worth noting that even in the heyday of Oakes, Chief Justice Dickson found limits on the right to strike justifiable (in one instance), and only Wilson J. remained firm in her attachment to a strict analysis under section 1. The Oakes test has been watered down in the intervening years, on an as-needed basis, and – generally speaking – the Court has been reluctant to invalidate legislation in recent years. Second, this speaks to a shift in
thinking about the nature of rights and the balance of institutional authority between courts and legislatures.

The Court was clear, at the beginning and in the earlier years of Charter interpretation, that rights would be the rule and limits the exception. Under many guarantees and in many cases the Court acted on the assumption that this was its mandate and an appropriate institutional role for the judiciary to play vis-à-vis the legislatures. Many praised the Court’s Charter-enforcing jurisprudence in this period, but many also opposed it in particular cases, under particular provisions of the Charter, or on broader, institutional grounds. The debate played out in the academic literature and in public discussion as the Court pushed the limits throughout the 1990s under the legal rights, section 15, language rights, and other issues such as judicial independence and the duty to negotiate (i.e., secession), which were the Lamer Court’s signal “unwritten” constitutional principles.

The Court has been substantially altered in recent years, with Beverley McLachlin in command and the departure of others who were relatively fearless in exercising a power of review. Changes in the Court’s composition also coincided with the rise of “dialogue” theory and the role it has played – in domestic and comparative constitutional scholarship – in promoting the argument that Canada’s Charter introduced a “weak” or at least “weaker” form of judicial review than the “strong form” review that is found in the United States. For purposes of this paper, the point is that the assumptions that prevailed during the early period of Charter interpretation – i.e., that rights are the rule and limits
the exception – have lost some of their force. To the contrary, it seems more often the case today that democratic limits are the rule, and constitutional rights the exception.

Dialogue and weak form theories are attractive because they suggest that the Charter staked the middle ground between the intractably competing supremacies. In this middle ground the Court engages in a more qualified version of review – one that is weakened by the presence of sections 1 and 33, as well as by the judiciary’s awareness of the Charter’s distinctive institutional sensibilities. Without commenting on the merits of this development, the paper simply notes that the Charter is not the same today as it was in 1987. This is by way of saying that shifts in thinking about institutional roles present an additional variable which should be taken into account in considering not only what the Court might do, but also what it should do in addressing a constitutional right to strike.

**Conclusion**

Whether the Court will constitutionalize a right to strike – and whether it should do so – are different matters. Though it is open for the Court to do so, doctrinally under the authority of *Dunmore* and *BCHS*, the institutional consequences of taking that step may give the Court pause. As discussed, the jurisprudence is fluid enough to permit the Court to avoid that conclusion. On the merits, the arguments will line up on both sides, and will focus on the consequences – of constitutionalization or no constitutionalization – for labour policy. What is likely to be neglected, or overlooked, in that discussion is the
guarantee itself – what freedom of association should mean and how the guarantee should be defined, not as a matter of labour policy but as a matter of constitutional interpretation.