DOES FREEDOM OF ASSOCIATION UNDER THE CHARTER INCLUDE THE RIGHT TO STRIKE AFTER BC HEALTH SERVICES? PROGNOSIS, PROBLEMS AND CONCERNS

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Introduction

A little more than 2 years after the SCC’s decision in Health Services\(^1\), the paradigm shift that has resulted from the Court’s conversion from spectator to star player in the Charter review of labour relations policy is notable. The decision has been responsible for an almost perfect record of union success in numerous court challenges to existing legislation.\(^2\) In addition it

\(^{1}\) Health Services and Support – Facilities Subsector Bargaining Association v British Columbia, 2007 SCC 27, released on June 8/07. (hereinafter “Health Services”)

\(^{2}\) I received an email from a former student who represents employers in these matters to advise me that he had just lost another Health Services based challenge to provisions in the Ontario Labour Relations Act regulating the acquisition and loss of bargaining rights in the construction industry (Independent Electricity Market Operator and LIUNA and Att-Gen of Ontario (OLRB File No 2118-4-R, Nov. 23/09). By his count the post Health Services box score was 7 - 0 for the union side. Other union successes include: a challenge to government attempts in Quebec to alter bargaining unit structures and decentralize bargaining as part of a restructuring of its delivery of health care and social services, Confederation des syndicats nationaux v. Quebec (Procureur general), [2007] J.Q. No. 13421. (S.C.); a challenge to the Ontario Agricultural Employees Protection Act, 2002, the minimal statutory scheme put in place by the Ontario government to comply with the ruling in Dunmore that its prior exclusion of agricultural workers had violated s. 2(d) - after much delay the government passed a statute that prohibited employers from discriminating against employees for forming associations and presenting association proposals to employers but did not impose any duty on the employer to bargain with such associations, Fraser v Ontario (Attorney-General) (2008), 92 OR (3d) 481 (C.A.); a challenge to the federal legislation which excluded RCMP officers from the Public Service Labour Relations Act and imposed a management controlled system of employee representation and
appears that it may have played a factor in the Ontario government’s recent decision to enact legislation that sets up a framework for collective bargaining by part-time employees in community colleges.\(^3\)

Nevertheless, for many the biggest question concerning the implications of *Health Services* is whether the reasoning adopted in that watershed decision means that the right to strike has gained, or will gain, Charter protection as a component of the freedom of association. There is already at least one challenge underway in Alberta, where construction unions are arguing that legislative restrictions on strike activity resulting from special super majority requirements for strike votes in the construction industry are a violation of the principles of freedom of association adopted in *Health Services*.\(^4\) And I have heard more than one consultation but did not allow for actual collective bargaining or employee choice of bargaining agent - the Court struck down the management imposed system of worker representation but not the exclusion on the finding that the employees had proven capable of forming their own union associations and the Charter imposed a direct obligation on the employer to bargain in good faith, *Mounted Police Association of Ontario v Canada (Att. Gen.)* (2009), 96 O.R. (3d) 20 (S.C.). See also *United Food and Commercial Workers Union, Local No. 401 V Old Dutch Foods Ltd. And Minister of Justice and Attorney General of Alberta* (File No.: GE-05611 - decision of Alb. LRB, Nov. 9/09) holding that Alberta labour legislation violated section 2(d) by not including a right for unions to have the Rand formula as a minimum union security provision in collective agreements. This latter decision probably means the box score today is at least 8-0.

\(^3\) Previously the legislation had excluded 17,000 part-time academic and non-academic staff working at Ontario community colleges. Apparently in response to *BC Health Services*, the province introduced legislation (Bill 90) in June of 2008 to enact a new *Colleges Collective Bargaining Act, 2008* to replace the old CCBA and extend the right to bargain collectively to part-time staff, both academic and non-academic. (Lancaster House, Labour Law E-Bulletin (2008), Issue No. 213).

\(^4\) Under the Alberta scheme the Labour Board consolidates groups of unions and employer associations into a bargaining cluster for each round of bargaining. There must be a strike vote before any strike can take place, but such a vote can only take place if 60% of unions
government lawyer privately express the view that one of the reasons the Ontario Government was not introducing back to work legislation in recent high profile public sector strikes involving municipal workers and university employees in Toronto and Windsor (in some cases where the union was in fact requesting such legislation) was concern that it could well be found to be unconstitutional under the standard of substantial interference with the process of collective bargaining imposed in *Health Services*. This issue will undoubtedly arrive on the Supreme Court of Canada’s door sooner rather than later, and likely in the form of a variety of cases challenging different aspects of the many limitations on the right to strike that are very common in all jurisdictions in Canada, as was the case in the original Labour Trilogy in 1987, where three different types of restrictions on the right to strike were confronted.

In this short paper I will offer my prognosis for the future treatment of the right to strike under the principles adopted in *Health Services*. I will then move on to a discussion of the problems and concerns that are likely to arise from constitutional protection for the right to

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5 *Reference re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 460; *Public Service Alliance v. The Queen,* [1987] 1 S.C.R. 424; *R.W.D.S.U., Local 544 v. Government of Saskatchewan,* [1987] 1 S.C.R. 313. The first case dealt with longstanding prohibitions on strike activity in several statutes for public servants, including firefighters, police and hospital workers and the substitution of interest arbitration to resolve bargaining impasses. The second dealt with a temporary suspension of the right to strike as part of the imposition of significant wage restraints and the extension of collective agreements. The third dealt with ad hoc back to work legislation to bring an end to a strike by dairy workers.
strike. My crystal ball suggests a very qualified Charter protection for the right to strike is the likely to be the ultimate outcome of the numerous challenges that are likely to come forward. The qualified nature of the protection that is likely is not so much a consequence of the actual reasoning provided in *Health Services*, but rather arises from pragmatic concerns about the complex and virtually continuous judicial oversight that would be required by a broad and open ended protection for the right to strike under the Charter.

**Prognosis - The Right to Strike and Charter Values After *Health Services***

Although the SCC declared very early in its reasons in *Health Services*\(^6\) that it was not dealing with the right to strike, which had been dealt with in the Labour Trilogy, both the positive statements concerning the scope of the freedom, and the negative statements of the type of restrictions that will violate the newly defined freedom, indicate that some form of Charter protection for the right to strike is the likely outcome of application of the new standard to prohibitions or significant curtailment of the right to strike. First, the Court made the following statements concerning the positive scope of protection:

The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity

\(^6\) *BC Health Services*, at para 19.
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 health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.  

Strike activity, by its very definition in Canadian statutes and common law precedent, is comprised of employees acting in common to reach shared goals related to workplace issues and terms of employment. It is concerted activity by employees “banding together to achieve particular work-related objectives”. Once the positive statement of the freedom of association has been broadened to go beyond an individual right to act in common, to also encompass associational activities that are carried out in pursuit of common associational goals, and may in fact only be capable of being carried on by a collective, it is difficult to see how strike activity could be excluded from this expanded notion of freedom of association. This of course was the outcome in all the early right to strike decisions from the 1980's which did adopt a broader notion of freedom of association to include a right to bargain collectively, before that approach was rejected by the SCC in the Labour Trilogy.

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7 Ibid., at para 89.

Similarly the statements in *Health Services* concerning the type of government interference that will violate the new version of the freedom leads to the same result. Although the broadened freedom does not protect all associational activity in aid of collective bargaining it will be violated where there is “substantial interference” with collective bargaining activity.

The effect of the state law or government action must:

“…*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.”

The Court also tried to define the concept of “substantial interference” and the criteria to be used for its determination. The intent or effect of the government action must seriously undermine the activity of workers in joining together to negotiate workplace conditions and terms of employment. Examples such as ‘union breaking’ actions or laws, denying a union access to labour laws providing for collective bargaining in circumstances such as *Dunmore*, and acts of bad faith or unilateral nullification of negotiated agreement terms without meaningful discussion or consultation, were given by the Court. The issue in every case is whether a process

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9 *Health Services*, at para. 90. Thus the Court attempts to limit the scope of the protection in three ways. It is a right to a process or procedure and not particular substantive outcomes. Second, it is a right to a general process of collective bargaining, not a particular model of labour relations or bargaining regulation. Third the interference must be so substantial that it interferes with the very process that enables workers to pursue workplace objectives by engaging in negotiations with their employer.
of voluntary, good faith collective bargaining has been or is likely to be significantly and adversely affected.\(^{10}\)

In determining substantial interference, two inquiries or criteria should be employed: (1) the importance of the matter affected to the process of collective bargaining and the capacity of union members to pursue collective goals in concert; and (2) the manner in which the government action impacts on the right to good faith negotiation.\(^{11}\)

The application of these limitations on government action that substantially interferes with the process of collective bargaining to legislation that prohibits or curtails strike activity takes us back to consideration of the central role played by the right to strike in the collective bargaining process. Virtually every serious judicial consideration of the role played by strikes and lockouts in collective bargaining has concluded that the right to strike is the only substantial economic weapon available to employees and that the right to bargain collectively is only an illusion if the right to strike does not go with it.\(^{12}\) In short they have concluded that the right to impose economic sanctions is essential to any meaningful process for collective bargaining.\(^{13}\)

\(^{10}\) Ibid., at para 92.
\(^{11}\) Ibid., at para 93.
\(^{12}\) Supra, footnote 8. For eg. in *Broadway Manor Nursing Home*, at p. 342, the majority stated that “To take away an employee’s ability to strike so seriously detracts from the benefits of the right to organized and bargain collectively as to make those rights virtually meaningless.” Chief Justice Dickson made very similar statements on the centrality of strikes to collective bargaining in his dissent in the *Reference re Public Service Employee Relations Act (Alta.)*, relying on statements from the Woods Task Force, at para. 94-96 of his reasons.

\(^{13}\) It also appears that this is the conclusion that has generally been reached by ILO bodies when considering complaints under the ILO Conventions concerning freedom of association and the freedom to organize (Conventions 87 and 98). Chief Justice Dickson also concluded in his dissent in the Labour Trilogy that international law concerning the freedom of
If one accepts this premise then government measures that either totally prohibit the right to strike or so severely restrict it that it results in the denial of access to a meaningful process of collective bargaining in which workers can act in concert to pursue collective goals must be held to violate the *Health Services*’ standard for freedom of association. This would also seem to be quite consistent with the Court’s new found respect for adherence to Charter values when reviewing labour law for compliance with the Charter. In *Health Services* the Court held that protection for collective bargaining under section 2(d) was supportive of the Charter values of dignity, personal autonomy, equality and enhancing democracy. To the extent that protection for the right to strike is necessary for workers to have access to a meaningful process of collective bargaining it would appear to also be consistent with those same Charter values. While one might have referred to deference to legislative policy choices on labour law as a Charter value prior to *Health Services*, that value appears to have been subordinated by the more traditional fundamental human rights values recognized in *Health Services*. However, as alluded to below, I don’t think *Health Services* can be read as signaling the death of deference to legislative choices on labour policy.

**Problems and Concerns**

If the Court does in fact recognize the right to strike as an important component of access to a meaningful process of collective bargaining, the more interesting question then becomes the

association under the ILO conventions and art. 22 of the ICCPR and art. 8 of the ICESCR indicated that freedom of association included both the right to bargain collectively and the right to strike. However, it is my understanding that others will be dealing with the impact of international law on the right to strike.
scope of the Charter protection to be given to the right to strike, or perhaps more accurately the scope of limitations on strike activity that will be found to be consistent with freedom of association under s. 2(d), thus avoiding the need for section 1 scrutiny in all cases of restrictions on the right to strike.

As any student of labour law in Canada knows, the restrictions on strike activity in every jurisdiction are numerous and almost continuous. They range from the prohibition on strikes for recognition, to numerous and restrictive regulations on the timing of lawful strikes, to the requirement for strike votes, to the total prohibition on strike activity for many public sector workers, particularly those involved in the provision of essential services.

Although restrictions on lawful strike activity may be greater than in some other comparable jurisdictions (such as the United States), state regulation of strike activity that is necessary to balance the interests of workers with those of other citizens who may be detrimentally affected by such activity is recognized as legitimate under international law as demonstrated by the decisions of the Freedom of Association Committee of the ILO, particularly when dealing with essential services. However, if the SCC were to adopt a very broad notion of the right to strike as protected associational activity, as was done by Dickson C.J. in the

14 From the earliest days of the adoption of the Wagner Act model in Canada (i.e. in PC 1003), Canadian legislation has been noted for its greater limitations on the use of economic sanctions than the American model, ranging from the prohibition on mid contract work stoppages to the imposition of a mandatory conciliation process and cooling off period before lawful strikes could take place.

15 See for example the discussion of ILO jurisprudence on this subject at para 107 to 110 in Dickson’s dissent in Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 460.
Labour Trilogy, that could result in all restrictions on the right to strike being subject to scrutiny under section 1 to determine whether they are constitutional. Indeed the actual detailed scrutiny by Dickson C.J. of all aspects of the restrictions on strike activity and the substituted interest arbitration mechanism in his dissent in the Reference re Public Service Employee Relations Act ( Alta.)\textsuperscript{16} itself, and his analysis of the restrictions imposed on strikes in the two companion cases in the Trilogy, probably provide good examples of the kind of very detailed second guessing of legislative choices that could ensue from recognition of a broad and unrestricted right to strike.

In addition, recognition of a very broad and open ended right to strike under 2(d) could lead to challenges against provisions that make it unlawful for a minority of workers to strike without union support and thereby open the door to a number of challenges to the fundamental basis of exclusive representation by majoritarian unions that is central to our current regulatory regime for collective bargaining. As well, it is likely that it will result in claims for recognition of a right not to strike and consequently to be free from union discipline or punishment of individual workers for refusing to honour a union supported strike.\textsuperscript{17}

The prevalence of interest arbitration as a legislatively compelled substitute to resolve collective bargaining impasses in the public sector, particularly when dealing with essential

\textsuperscript{16} [1987] 1 S.C.R. 460

\textsuperscript{17} Of course as I have indicated in an earlier paper, it will undoubtedly be the case that the inclusion of collective bargaining as protected activity under 2(d) will lead to a renewal of challenges against compulsory unionism and exclusive representation by claiming the negative aspects of the freedom, a freedom to not associate and to be free from compelled participation in or support for union activity. See Etherington, The B.C. Health Services and Support Decision – the Constitutionalization of a Right to Bargain Collectively in Canada – Where Did it Come from and Where Will it Lead? (2009), 30 Comp. Lab. Law & Policy J. 715.
services, raises significant concerns about the degree to which the Court could get embroiled in ongoing judicial review of legislative choices concerning a wide array of policy issues that arise when dealing with public sector labour relations. These policy choices include the definition of essential services, the regulation of subjects of bargaining, the selection of relevant criteria for the determination of interest disputes, and the very basic and often debated issue of the extent to which interest arbitration can be effective as a method of impasse resolution that enables meaningful collective bargaining to take place in the absence of resort to economic sanction. Some of these issues were addressed directly by Chief Justice Dickson in his dissent in Reference re Public Service Employee Relations Act ( Alta.), albeit not always in a very comprehensive or satisfactory manner.\(^{18}\)

\(^{18}\) This kind of judicial oversight of policy decisions will undoubtedly lead to battles of expert opinion in which each side trots out affidavits from their labour relations expert, one suggesting that the model of interest arbitration adopted by the government is a suitable substitute for economic sanctions that does not substantially interfere with the collective bargaining process and the other arguing that it does. Although this type of advocacy has undoubtedly become more common after Health Services, and would likely be even more prevalent if the right to strike is given broad recognition, it still seems somewhat unsightly and not all that appropriate for establishing labour policy. For a recent examples of this, albeit not dealing with the right to strike issue but rather access to collective bargaining, see Mounted Police Association of Ontario v Canada (Att. Gen.) (2009), 96 O.R. (3d) 20 (S.C.); where the judge considers the affidavits of Prof. Michael Lynk in support of the Association and Prof. Richard Chaykowski for the government on the issue of whether the employer instituted system of employee representation provided for access to meaningful collective bargaining. See also the discussion of opposing affidavits by Professors. Fudge and Chaykowski in Fraser v Ontario (Attorney-General), infra. My concern is not with the content of the affidavits but rather the notion that this is an appropriate device to determine effective labour policy or the appropriate balance between the freedom of association rights of the claimants and policy concerns of the government.
In order to avoid continuous oversight of the plethora of restrictions on the right to strike in all jurisdictions, I believe it is fairly likely that the pragmatic interests of the Court will lead it to recognize a fairly limited right to strike, one that is limited to protection for a right to strike, or a suitable substitute in the form of some other form of bargaining impasse resolution, that will enable access to a meaningful process of collective bargaining. Under this model the right would be violated only where strike activity was prohibited or so severely restricted as to substantially interfere with the process of collective bargaining by effectively denying the affected employees access to any meaningful collective bargaining. In the case of legislative attempts to substitute interest arbitration or some other form of third party resolution, the right would be violated if the substitute process did not ensure meaningful collective bargaining by ensuring a fair and impartial process with adequate incentives for the parties to negotiate in good faith to attempt to reach a bargained agreement.

While recognition of this more limited right will not avoid judicial oversight of legislative labour relations policy, it will keep it to a minimum in several respects. First, it will avoid detailed section 1 scrutiny of any and all restrictions on the right to strike, in particular in respect of the plethora of restrictions concerning the timing of strikes and demonstration of majority support for a strike. The type of restrictions on strike activity that are common in all general labour relations statutes in Canada would likely not require section 1 justification under this limited protection for the right to strike. Similarly, legislation substituting an adequate
system of interest arbitration that ensured meaningful collective bargaining was possible\textsuperscript{19} would not require section 1 scrutiny.

The contention that binding arbitration can be constructed and accepted as an adequate substitute for the right to strike that does not violate the freedom of association of workers can perhaps be supported to a degree by the fact that one of Canada’s largest and most successful private sector unions recently negotiated an agreement with a major international automotive manufacturer to agree to forego its right to strike in favour of a system of binding interest arbitration in the event that negotiations for a collective agreement are not successful.\textsuperscript{20} In that agreement the CAW agreed to give up the right to strike in exchange for the opportunity for employees of Magna International to vote to join the CAW unimpeded and unopposed by the employer. The agreement has been controversial among members of the trade union movement and some academics have criticized the union for failing to recognize the critical importance of defending the right to strike.\textsuperscript{21} However, although a union cannot contract out of the Charter, the fact that the most powerful union in the manufacturing sector has agreed to binding arbitration as

\textsuperscript{19} This type of legislation is very common in the police, fire fighter and hospital sectors in many jurisdictions in Canada. While there are many criticisms of these systems in terms of whether they have a chilling effect on bargaining, there is remarkably little dissatisfaction expressed by most of the workers and unions that have been subject to them for years, and in fact in recent disputes in Ontario it has generally been employers that have complained about them and in recent protracted municipal and university strikes in Ontario it has generally been unions that have been calling for binding interest arbitration as a substitute for strikes and employers who have been asking that the government not impose binding arbitration.\textsuperscript{20} CAW - Magna International agreement, concluded in October of 2007. See the discussion of this agreement in Yates, In Defence of the Right To Strike, [2009] 59 UNB LJ 128. \textsuperscript{21} Yates, supra note 19, at 136-7.
a substitute for the right to strike is significant for those who would contend the provision of such a system should not be regarded as a violation of the freedom of association.

This position is also supported by the Ontario Court of Appeal decision in *Fraser v Ontario (Attorney-General)*. After concluding that the Agricultural Employees Protection Act failed to provide any protection for collective bargaining and thus fell afoul of the principles espoused in *Health Services*, Chief Justice Winkler concluded that if legislation is to provide for meaningful collective bargaining it must go beyond stating principles to include provisions to ensure that the right can be realized. In his view the minimum statutory protections required to ensure that agricultural workers could have access to meaningful collective bargaining are as follows: a statutory duty to bargain in good faith; statutory recognition of the principles of exclusivity and majoritarianism; and some statutory mechanism for the resolution of bargaining impasses and disputes arising under collective agreements. On the requirement for a mechanism to resolve bargaining impasses, the Chief Justice explained:

The bargaining process is jeopardized if the parties have nothing to which they can resort in the face of fruitless bargaining. There exists a broad range of collective bargaining

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22 (2008), 92 OR (3d) 481 (C.A.), (leave to appeal to the SCC has been granted).
dispute resolution mechanisms. I reiterate that the appellants have stated that they do not seek the right to strike as the dispute resolution mechanism.\textsuperscript{23}

This reasoning is very similar to the finding of Dickson CJ in the Labour Trilogy that a right to bargain collectively is hollow and meaningless without the right to strike. However, the Ontario Court of Appeal has clearly accepted the notion that, at least for the purposes of Charter protection for a right to bargain collectively, there are other methods of resolving bargaining impasses that can work to ensure access to meaningful collective bargaining. While Dickson CJ did not consider this possibility expressly in his reasoning on the scope of freedom of association under section 2(d), he does indirectly acknowledge it in \textit{Reference re Public Service Employee Relations Act (Alta.)} in his section 1 analysis concerning whether the interest arbitration mechanisms put in place for public servants in Alberta to resolve bargaining impasses could be upheld as reasonable limits on the right to strike. Although he ultimately found that the three interest arbitration mechanisms at issue fell short of being a justifiable substitute for the right to

\textsuperscript{23} Ibid, at para. 82. Although beyond the scope of this paper, I recognize that the second requirement of freedom of association recognized in \textit{Fraser}, statutory support for the principles of exclusive representation and majoritarianism has been controversial among proponents of a more boisterous Charter recognition for freedom of association. Roy Adams in particular has been very critical of recognition of these principles under section 2(d0. See Adams, Prospects for Labour’s Right to Bargain Collectively After \textit{B.C Health Services} (2009), 59 UNB LJ 85. Faced with the employer argument that these principles were not recognized in many collective bargaining regimes around the world, the Chief Justice relied on the prescriptions in \textit{Health Services} to apply a contextual approach taking in to account the history and reality of labour relations in Canada. He also relied on arguments that these principles were consistent with the Charter values of “enhancing democracy” in the workplace and redressing the historical inequality of bargaining power that were recognized in \textit{Health Services}. Finally, he also found that they were required in the interests of pragmatism to avoid the “chaos in the workplace” that could result from giving a meaning to freedom of association that would provide Charter protection for bargaining rights for minority unions. (See para. 88-95).
strike because none of them gave the union a clear right to refer a bargaining dispute to arbitration, he expressed the view that all three would have survived section 1 scrutiny had they given the union the right of referral. 24 The approach adopted by the Ontario Court of Appeal in *Fraser* accepts that there will be no substantial interference with the right to bargain collectively under section 2(d) as long as there is access to some form of impasse resolution mechanism that will ensure meaningful collective bargaining. Under this framework, section 1 scrutiny can be avoided as long as the legislature provides for a fair interest arbitration mechanism for employees in workplaces where they have decided there are policy reasons for denying the right to strike or bringing an end to an existing strike that threatens the public interest, a very common scenario in the case of essential services in all jurisdictions in Canada.

While this more limited protection for a right to strike may not be satisfactory to proponents of broader protection of labour rights as human rights, I think it is quite consistent with the principles and Charter values recognized in *Health Services* for several reasons. First, if one focuses solely on the fundamental threshold of substantial interference with the activity of collective bargaining and the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining that was established in *Health Services*, one can make a strong argument that this is not violated as long as there is some fair mechanism for resolving bargaining impasses that ensures meaningful collective bargaining will take place. Second, Canada has a lengthy history of meaningful collective bargaining taking place in hundreds of public sector workplaces under collective bargaining regimes in which bargaining


24 See paras. 130 - 135 in *Reference re Public Service Employee Relations Act (Alta.)*, supra note 5.
impasses are resolved by interest arbitration. The contextual approach to giving meaning to the freedom of association prescribed in *Health Services* suggests that this history cannot be ignored when giving meaning to the standard of substantial interference with collective bargaining. Third, although the SCC has made it clear in *Health Services* that it will no longer adhere to the Charter value of total deference to legislatures on labour policy to the extent of declaring it a “no go” zone for Charter review, at the same time it did not indicate that deference to legislative choices was dead. In fact it expressed the view on several occasions in *Health Services* that the right being recognized was a limited right to a general process of collective bargaining, not to a particular model of labour relations, or to a specific bargaining method or set of procedures. In addition it noted that not all regulation that interfered with collective bargaining would violate the freedom of association, only those which resulted in interference that was so substantial that it interfered with the process of bargaining that enabled meaningful negotiations with the employer.\(^{25}\) In my view these statements were made with a view to preserving the Court’s ability to defer to legislative choices concerning appropriate procedures and mechanisms to ensure access to meaningful collective bargaining while taking into account competing interests and values. I am sure the Court was already wary of being asked to rule on the constitutionality of specific details of the regulation of bargaining unit composition or the timing of strike activity or the demonstration of membership support for strikes. Fourth, this approach would appear to be consistent with international jurisprudence on the right to strike as a component of freedom of association which allows for significant curtailment of the right to strike in the public sector as

\(^{25}\) See for eg., *Health Services*, supra note 1 , at para 91.
long as there are adequate substitute mechanisms for impasse resolution provided to preserve meaningful collective bargaining.\textsuperscript{26}

Conclusion

My review of the expanded concept of freedom of association adopted in \textit{Health Sciences}, one which includes a right to a process of collective bargaining and prohibits governments acting in a manner which substantially interferes with the right of workers to have access to meaningful collective bargaining, leads me to conclude that Supreme Court will ultimately recognize some limited form of protection for a right to strike. The Court’s adoption of an instrumental test for violation of the newly adopted right to bargain collectively, one based on substantial interference with the process of good faith bargaining, makes it very difficult to find that a prohibition or serious curtailment of the right to strike does not violate the freedom of association. Early Charter decisions that accepted that freedom of association included a right to bargain collectively, and international jurisprudence on the freedom of association and the right to bargain collectively, have recognized the central importance of the right to strike to meaningful collective bargaining. Given this premise the outright denial of the right to strike is likely to be found to substantially interfere with the process of collective bargaining.

However, given the widespread nature and variety of restrictions on the right to strike in all jurisdictions in Canada, it is likely that the SCC will use the narrow instrumental threshold for

\textsuperscript{26} See discussion in dissent of Dickson C.J. in \textit{Reference re Public Service Employee Relations Act (Alta.)}, supra note 5, at para 118, citing ILO Committee on Freedom of Association, Case No. 1247, ILO Official Bulletin, at p. 36. The minimum requirements for interest
violation of the right to bargain collectively from Health Services to recognize a very limited protection for strike activity. Protection is likely to be limited to a basic minimum right to strike that can be subjected to a variety of restrictions concerning timing and demonstration of support, or a suitable substitute in the form of some other form of bargaining impasse resolution, that is the minimum required to ensure meaningful collective bargaining. Under this pragmatic model, the right would be violated only where strike activity was prohibited or so severely restricted as to substantially interfere with the process of collective bargaining by effectively denying the affected employees access to any meaningful collective bargaining. In the case of legislative attempts to substitute interest arbitration or some other form of impasse resolution, the right would be violated only where the substitute process did not ensure meaningful collective bargaining because it failed to provide a fair and impartial process with adequate incentives for the parties to negotiate in good faith to attempt to reach a bargained agreement.

This limited protection for the right to strike will likely be motivated by the pragmatic interests of the Court in avoiding detailed Charter scrutiny under section 1 of the numerous restrictions on strike activity that are prevalent in both private and public sector legislation. But in my view it will also be consistent with the limited and instrumental view of a right to a general process of collective bargaining that was adopted in Health Services and the contextual approach to interpreting the freedom prescribed in that case, in light of Canada’s rich history of decades of meaningful collective bargaining processes which incorporate interest arbitration as a substitute for the right to strike or lockout to resolve bargaining impasses. It would appear to also be arbitration as an adequate substitute are stated as being “adequate, impartial and speedy .. in which the parties can take part at every stage.”
supported by the recent decision of the Ontario Court of Appeal in *Fraser*, and acceptance of legislative curtailment of the right to strike in the public sector in international freedom of association jurisprudence where there are adequate substitute mechanisms for impasse resolution.

Finally, in my view this recognition of a fairly limited protection for the right to strike is also be consistent with the new stance adopted by the SCC in *Health Sciences* concerning its role as interpreter and protector of fundamental Charter rights and freedoms and what constitutes an appropriate degree of deference to legislative choices in the labour policy realm. As I have indicated elsewhere, the Court’s shift in *Health Services*, from its former stance of total deference to the legislature in this area to finally constitutionalize a right to collective bargaining, was likely a reaction to the actions of conservative governments in enacting increasingly aggressive measures to strip or deny collective bargaining rights for the purpose of dealing with fiscal problems. The Court may have felt compelled to step in, albeit somewhat reluctantly, or give up any potential for the Charter freedom of association to have meaning in the labour context. But I sense from the Court’s attempts in *Health Services* to define the scope of the right to collective bargaining in a fairly limited fashion that it is unlikely to be willing to embrace judicial review of the minutiae and details of the regulation of collective bargaining processes or the numerous limitations on strike activity that are common in Canada. While Charter review of labour policy is no longer a “no go” zone, a considerable degree of deference is likely to continue in the recognition of a limited form of protection for the right to strike.

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27 Etherington, supra, note 17 at pp. 747-8.