

The Supreme Court of Canada and the Right to Bargain Collectively:
The Implications of the *Health Services and Support* case in Canada and Beyond
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In June 2007, the Supreme Court of Canada expressly overruled twenty years of jurisprudence that interpreted the freedom of association as excluding collective bargaining. This about face by the Supreme Court was unexpected. What gave rise to this remarkable decision and what does it portend for the role of the courts in labour relations in Canada and beyond? The recent successes before courts have led some observers to suggest that it may now be a propitious time for a co-ordinated and proactive litigation strategy to vindicate labour's collective rights. This article offers some preliminary answers to these broader questions and issues by focussing on the Supreme Court's decision in the *Health Services and Support* case.

In its June 8, 2007 decision, *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, the Supreme Court of Canada held that “the s. 2(d) guarantee of freedom of association [in the *Canadian Charter of Rights and Freedoms*] protects the capacity of members of labour unions to engage in collective bargaining on workplace issues.”¹ In so doing, the Court expressly overruled twenty years of jurisprudence that interpreted the freedom of association as excluding collective bargaining. This about face by the Supreme Court was unexpected; not only had the Court reaffirmed the narrow interpretation of freedom of association first provided by the *Labour Trilogy*² in 1987 as recently as 2001 in *Dunmore v. Ontario (AG)*,³ the *Health*

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¹ 2007 SCC 27 (“the *Health Services and Support* case”) at para. 35.

² The Labour Trilogy refers to three concurrently released appeals: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Alberta Reference*”), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. The main reasons were delivered in the *Alberta Reference*, a case involving compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes. Of the six justices participating in the case, three held that collective bargaining was not protected by s. 2(d); four held that strike activity was not protected. The next case to deal with the issue was *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (“*PIPSC*”), in which the

Services and Support case dealt with collective bargaining in the health-care sector, a politically charged area in which the Court's recent forays had been extremely controversial.⁴

What gave rise to this remarkable decision and what does it portend for the role of the courts in labour relations in Canada and beyond? Domestically, a couple of factors are likely to have helped to shift the Canadian Supreme Court's *Charter* jurisprudence pertaining to labour rights. At a jurisprudential level, the narrow interpretation of freedom of association adopted by the Court was hard to justify in light of its expansive reading of the freedom of expression. In addition, international human rights have been gaining more traction in the reasoning of the Supreme Court. At a political level, the Court's refusal to provide constitutional protection for collective labour rights placed no restraints on governments determined to run roughshod over labour's hard fought for rights. Some provincial governments had abolished collective agreements and repealed labour legislation without even bothering to consult with the affected trade unions or to engage in a public debate over specific measures.⁵ But these domestic drivers are only part of the explanation; increasingly trade unions, especially those of Anglo-Saxon heritage, are turning to the courts, institutions that historically have not been receptive to recognizing labour's rights, and using litigation as a strategy to preserve collective bargaining rights from legislative retrenchment. Faced with political parties and ideologies that are not

government of the Northwest Territories refused to enact legislation required in order for the PIPSC union to bargain collectively on behalf of nurses. A majority of four held that collective bargaining was not protected by s. 2(d).

³ [2001] 3 S.C.R 1016.

⁴ The Supreme Court has evinced great concern for the fiscal health of Canada's health-care sector, which is essentially a single (government) payer system. In *Chaoulli v. Quebec (AG)*, [2005] 1 S.C.R. 791, the Court opened the door to the privatization of health care by permitting private health insurance in limited circumstances in Quebec, while in *Newfoundland (Treasury Board) v. NAPE*, [2004] 3 S.C.R. 381, the Court accepted the Newfoundland government's fiscal concerns as an acceptable justification to cancel an agreed upon pay equity payment and thereby to violate women's equality rights.

⁵ Two notable examples were the Ontario government's repeal, without consultation or debate, of legislation extending collective bargaining rights to agricultural workers, which was the subject of the constitutional challenge in *Dunmore* (*supra* note 3), and the British Columbia government's action regarding health service workers, which was the subject of the *Health Service and Support* case.

friendly towards them, unions are turning away from traditional electoral politics and political lobbying to bring complaints to national and transnational courts and international organizations. Canadian unions have developed a strategy of complaining to the ILO that federal and provincial governments are breaching their rights,⁶ and unions in the UK have repeatedly gone to the European Court of Human Rights to strike down legislation.⁷ This shift from legislative politics to rights litigation mirrors a broader transformation in the justificatory discourse for labour's collective rights from social democracy and industrial pluralism to human rights.⁸ The recent successes before courts have led some observers to suggest that it may now be a propitious time for a coordinated and proactive litigation strategy to vindicate labour's collective rights.⁹

This article offers some preliminary answers to these broader questions by focussing on the Supreme Court's decision in the *Health Services and Support* case. First, it puts the case in its labour relations and legal context, and it examines in detail the Supreme Court's reasoning. Second, it evaluates the scope of the case in order to assess what it means for future constitutional challenges to limitations on collective bargaining and other collective labour rights such as the right to strike. Third, using the *Health Services and Support* case, in which the Supreme Court relies on international labour law in its interpretation of s. 2(d), as the point of departure, the article focuses on two issues in order to explore the relationship between domestic constitutional law in Canada and international norms in the labour context. It concludes by considering what light the

⁶ See Brian W. Burkett, John D.R. Craig, and Jodi Gallagher, "Canada and the ILO: Freedom of Association since 1982," (2003) 10 C.L.E.L.J. 231; Derek Fudge with John Brewin, *Collective Bargaining In Canada: Human Right or Canadian Illusion* (Ottawa and Toronto: National Union of Public and Government Employees and United Food and Commercial Workers, 2005) Legislative jurisdiction over labour-related matters in Canada is divided between the federal and provincial and territorial governments, with each level of government having exclusive jurisdiction over matters within its competence.

⁷ *ASLEF v United Kingdom* [2007] IRLR 361 and *Wilson v. United Kingdom* [2002] IRLR 128.

⁸ Judy Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights?" (2007) 29(1) *Comparative Labour Law and Policy Journal* 29-66

⁹ Keith Ewing, "The Implications of the ASLEF Case," *Industrial Law Journal* forthcoming.

Health Services and Support case sheds on the broader strategic question of the role of courts in protecting labour rights.

I. From Rhetoric to Right: Constitutionalizing Collective Bargaining

On January 25, 2002, the Liberal government in British Columbia, which won 77 of 79 seats in the provincial election on May 16, 2001, introduced Bill 29, which it justified as a crucial response to a “crisis of sustainability” in the health care system. Bill 29 was designed to override provisions in collective agreements for health-care workers in areas such as transfer and reassignment rights, restrictions on contracting out, and layoff and bumping rights. The Bill also proposed to change the legislative recognition of successor rights, which in Canada is the term used to refer to transfer of business undertakings, by making it less likely that a health sector employer would be considered the “true” employer owing duties to the union and its members if work were contracted out.

Bill 29 was rushed through the legislative process, coming into force a scant three days after having received first reading.¹⁰ There was no consultation with the unions representing the health care workers who would be affected by the legislation, despite their express willingness to consult with the government over the issue of health care restructuring.¹¹ The Minister of Health Services simply telephoned a union representative twenty minutes before Bill 29 was introduced in the legislature to inform the union that the government would be introducing legislation dealing with employment security and other provisions of existing collective agreements.¹² The lack of meaningful consultation by the government was likely *the* fatal flaw in the government’s process; both the

¹⁰ The Bill received third reading on January 27, 2002 and came into force the next day as *The Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2. The relevant subordinate legislation was *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002

¹¹ In British Columbia, the collective bargaining structure in the health care sector is sectoral such that individual employers and the unions bargain in employer and union association respectively. The constitutional challenge to Bill 29 involved three union associations, several individual unions (including the Hospital Employees’ Union, the British Columbia Government and Service Employees’ Union, and the British Columbia Nurses Union) and several individual health care workers who were affected by Bill 29.

¹² *Health Services and Support* case, *supra* note 1, para. 7.

International Labour Organization's Committee on Freedom of Association and the Supreme Court of Canada focussed on it in their decisions concerning the unions' complaint that Bill 29 violated their freedom of association.¹³

The health care unions' initial response to Bill 29 was to organize rallies of its members, public meetings, and information pickets to protest the legislation. Upping the ante, they announced a Day of Protest, a one-day work stoppage designed to put political pressure on the government to amend the legislation. However, the unions cancelled it in response to the BC Labour Board's declaration that the proposed protest constituted an illegal strike.¹⁴ They turned to the courts in their battle against Bill 29, launching a constitutional challenge against it on the ground that specific provisions violated the *Charter of Rights and Freedoms*. Together with their national federations, the unions also lodged a complaint with the International Labour Organization that Bill 29 violated Convention 87.¹⁵ As the constitutional challenge and ILO complaint wound their way through their respective procedures, the health care unions fought rearguard actions at the

¹³ Case No. 2180, Report No 330 (Canada), para. 302; the *Health Services and Support* case, *supra* note 1, para.156.

¹⁴ HEU news release Feb 2, 2002 at http://www.heu.org/?act=news&article_ID=4912&type=1&call2=0641F179 (accessed August 31, 2007). However, the Hospital Employees' Union (HEU) engaged in a number of job actions protesting Bill 29, which culminated with a province-wide day of protest on January 23, 2003 to coincide with the anniversary of the enactment of the legislation. The BC Labour Relations Board issued an interim order declaring the day of protest to be an illegal strike and prohibiting picketing at hospitals, and the HEU challenged the order as unconstitutional on the ground that it violated the union and its members' *Charter*-protected freedom of expression. The Board held the part of the order declaring the political strike to be unlawful to be an unjustified violation of the *Charter*, but upheld that part of the order prohibiting the picketing as a demonstrably justified limitation, *Health Employers Association of British Columbia and Hospital Employees' Union*, BCLRB No. B64/2004. For a discussion of HEU's resistance to Bill 29 and its sequela see David Camfield, "Neo-liberalism and Working-Class Resistance in British Columbia: The Hospital Employees' Union Struggle, 2002-2004," (2006) 57 *Labour/Le Travail* 9-41.

¹⁵ The complaint in Case No. 1280 was contained in a communication dated March 1, 2002 from the Canadian Labour Congress, the National Union of Public Employees, the British Columbia Government and Service Employees Union, and the Health Sciences Association of British Columbia, Case No. 2180, Report No 330 (Canada).

Labour Relations Board challenging specific instances of the contracting out of public sector work to private health care providers under the BC *Labour Relations Code*.¹⁶

Before the Supreme Court of British Columbia the health service unions argued that Bill 29 and its regulation violated the *Charter*'s guarantees of freedom of association (s.2 (d)), security of the person (s.7), and equal protection and benefit of the law (s. 15), and asked the Court to strike down the legislation. On September 11, 2003, Madame Justice Garson of the British Columbia Supreme Court released her decision upholding the constitutionality of the impugned legislation and regulation.¹⁷ On appeal, the unions dropped the s.7 challenge. I shall focus exclusively on the freedom of association aspect of the case since the Supreme Court of Canada's consideration of s.15 was perfunctory.¹⁸

The union's primary strategy was to use the Supreme Court of Canada's 2001 decision in *Dunmore v. Ontario (AG)*, which expanded the protection afforded by freedom of association from individual rights to include collective rights, to widen the *Charter*'s protection beyond simply associating in a trade union and engaging in such

¹⁶ See, from example, *Health Service Employees' Union and B..C.G.S.E.U. v. British Columbia (Ministry of Health), Health Employers' Association of BC*, BCLRB No. B175/2002.

¹⁷ *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, (2003) 19 B.C.L.R. (4th) 37.

¹⁸ Although the appellant unions were able to demonstrate that the health service sector is one of the most female dominated in the public service with a higher than average proportion of workers who are over the age of 45, members of visible minority groups and immigrant, the s.15 argument was spectacularly unsuccessful at the Supreme Court of Canada; the Court dismissed the appellant unions' s.15 claim in six paragraphs. Despite the pain inflicted by Bill 29 on health care workers, the Court refused to depart from the view of the trial court judge that the effects of the legislation did not constitute discrimination under s.15. The Court concluded "that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here." *The Health Services and Support case*, *supra* note 1, para. 165.

central trade union activities as making representations to employers to include collective bargaining. This was a risky strategy. While the Court declared in *Dunmore* that “the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, and federating with other unions – may be central to freedom of association, even though they are inconceivable on an individual level,” this broad statement was immediately followed by an important caveat. According to the Court, “this is not to say that all such activities are worthy of constitutional protection; indeed, this court has repeatedly excluded the right to strike and collectively bargaining from the protected ambit of s. 2(d).”¹⁹ At issue in *Dunmore* was the total exclusion of agricultural workers in Ontario from any form of labour legislation that protected them against employer retaliation from joining and participating in a trade union. The union did not ask for collective bargaining rights, adopting instead the more circumspect strategy of demonstrating to the Court that the absence of statutory protection meant that agricultural workers, who were an especially vulnerable group of workers, were unable to establish, join, and maintain an employee association. The Court concluded that 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. By contrast, although Bill 29 vitiated collective agreements, it did not prevent health care workers from accessing statutory protection to form, join, and participate in trade unions. Nor were workers in the health services sector

¹⁹ *Dunmore*, *supra* note 3, para. 17, citing the *Alberta Reference*, *supra* note 2, per Le Dain J., at p. 390 (excluding the right to strike and collectively bargain), per McIntyre J., at pp. 409-10 (excluding the right to strike); *PIPSC*, *supra* note 2, per Dickson C.J., at pp. 373-74 (excluding the right to collectively bargain), per La Forest J., at p. 390 (concurring with Sopinka J.), per L’Heureux-Dubé J., at p. 392 (excluding both the right to strike and collectively bargain), per Sopinka J., at p. 404 (excluding both the right to strike and collectively bargain).

as vulnerable a group of employees as agricultural workers, many of whom were temporary migrants to Canada.²⁰

At the British Columbia Court of Appeal, the appellant unions invited the Court to follow the new direction signalled in *Dunmore* and move away from the law as propounded in the Labour Trilogy. However, Thackery J. declined the invitation, stating that if *Dunmore* mandated a new direction it was up to the Supreme Court of Canada and not the lower courts to chart it. Thus, he concluded, “the door which the appellants say was opened by *Dunmore* is not wide enough for their claim to fit through.”²¹

To the surprise of most pundits, the Supreme Court of Canada opened the constitutional door to collective bargaining. According to Chief Justice McLachlin and Mr. Justice LeBel, the authors of the judgment with which five other members of the Court concurred,²²

[i]n earlier decisions, the majority view in the Supreme Court of Canada was that the guarantee of freedom of association did not extend to collective bargaining. *Dunmore* opened the door to reconsideration of that view. We conclude that the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter*'s protection of freedom of association do not withstand principled scrutiny and should be rejected.²³

This proposition along with three others – Canada's historic recognition of the importance of collective bargaining to freedom of association, international law's understanding of collective bargaining as an integral component of freedom of

²⁰ The concern was that the attempt by health care unions to extend the reasoning in *Dunmore* to include protections for collective bargaining in such a politically charged area as health care could backfire.

²¹ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2004), 243 D.L.R. (4th) 175 at para .108.

²² Madame Justice Deschamps also agreed that freedom of association included collective bargaining, but she both offered a different test for determining when that right had been violated and provided a different s.1 analysis of what constituted a lawful infringement of the right. Mr. Justice LeBel is the only member of the Court with a strong background in labour law; in fact, throughout the majority decision reference is made to his co-authored texts on Quebec labour law.

²³ *Health Service and Support* case, *supra* note 1, para 22.

association, and the compatibility of a right to collective bargaining with the promotion of other *Charter* rights, freedoms and values – were advanced by the majority for the conclusion that s. 2(d) of the *Charter* protects the process of collective bargaining. These four propositions warrant greater scrutiny, because, as I will attempt to demonstrate, there is a disconnect between the breadth of the reasons offered by the Supreme Court of Canada for recognizing a constitutional right to bargain collectively and the actual test provided by the Court for determining when such a right has been violated.

In the most astonishing part of the decision, McLachlin C.J. and LeBel J. systematically subject the five reasons provided in the Labour Trilogy and the follow-up decision of *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner) (PIPSC)*²⁴ to critical analysis. They simply dismiss the first reason, that the rights to strike and bargain collectively are “modern rights” created by legislation and not “fundamental freedoms,” as “failing to recognize the history of labour relations in Canada,”²⁵ which they develop in their second proposition. They also dispatch the second reason, judicial deference to labour relations policy, as quickly as they did the first, claiming not only that it also ignores history, but that, in addition, it takes “an overbroad view of judicial deference.”²⁶ They assert that the third reason, “freedom of association protects only those activities performable by an individual,” was overtaken by *Dunmore*, where the Court recognized that certain collective activities have no individual analogue and yet are deserving of protection.²⁷ They also reject the fourth reason, suggested by L’Heureux-Dubé J. in *PIPSC*, that freedom of association was not intended to protect the objects or goals of an association. In so doing, McLachlin C.J. and LeBel J. develop a distinction – between a procedure and its substantive outcome – that is a crucial element in their positive definition of the right to bargain collectively. They claim, in contradistinction to L’Heureux-Dubé J., that it will always be possible to characterize the pursuit of a particular activity in concert with others as the “object” of

²⁴ *Supra* note 2.

²⁵ *Health Services and Support* case, *supra* note 1, para. 25.

²⁶ *Ibid.*, para 26: “It may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws. But to declare a judicial ‘no go’ zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values.”

²⁷ *Ibid.*, para 28.

that association. However, they acknowledge that her “underlying concern — that the *Charter* not be used to protect the substantive outcomes of any and all associations — is a valid one.”²⁸ Invoking an early article by Bora Laskin – the grandfather of Canadian labour law and a former Chief Justice of the Supreme Court of Canada – in support of their preferred distinction, they declare that “ ‘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).”²⁹ Thus, they conclude “it is entirely possible to protect the “procedure” known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.”³⁰

The final and overarching concern that McLachlin C.J. and LeBel J. identify with the majority judgments in the Labour Trilogy and *PIPSC* is their adoption of a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The most notorious example of this decontextualized approach was the concurring decision by McIntyre J. in the *Alberta Reference*, where he compared trade unions to gun and golf clubs. According to McLachlin C.J. and LeBel J., the main problem with this generic approach is that it ignores the difference between organizations and has “the unfortunate effect” of “overlooking the importance of collective bargaining” – both historically and currently – to the exercise of freedom of association in labour relations.³¹

In stressing the need for a more contextualized approach, McLachlin C.J. and LeBel J. put great store in *Dunmore*, which recognized that s.2 (d) may place positive obligations on the government to extend legislation to particular groups. However, they are also careful to emphasize the limitations expressed in *Dunmore* on the scope of this positive duty; “there must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime.”³² From this limitation, they develop the principle that “government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-

²⁸ *Ibid.*, para.29.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, para. 30.

³² *Ibid.*, para. 34.

related interests violate the guarantee of freedom of association under s. 2(d) of the *Charter*.”³³

Having made the case for overturning precedent, McLachlin C.J. and LeBel J. resort to history, international law, and *Charter* values to make the positive case that collective bargaining is protected by the constitutional guarantee of freedom of association. In order to demonstrate that the “protection enshrined in s. 2(d) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining,”³⁴ they review the history of labour relations, beginning with the Middle Ages in England and culminating with the Parliamentary hearings that occurred in 1981 just before the adoption of the *Charter*. The burden of this review is to show not only that the right to bargain collectively precedes the adoption in the 1940s of Canada’s current system of labour relations, but also that the history of Canadian labour law has been a movement from repression to toleration to recognition of collective bargaining, which is described as “the most significant collective activity through which freedom of association is exercised in the labour context.”³⁵ This thumbnail sketch of the history of Anglo-Saxon labour law relies on labour law scholars and social and legal historians, among them Harry Glasbeek, Karl Klare, Bryan Palmer, Eric Tucker, and Lord Wedderburn, who have been extremely critical of the role of the courts in restricting labour’s freedoms.³⁶ In the Court’s narrative, industrial pluralism, which in Canada was embraced in the post-war period when a variation on the Wagner Act model of collective bargaining was enacted, is the apogee of the right to bargain.

To bolster their case that collective bargaining is an essential element of freedom of association, McLachlin C.J. and LeBel J. resort to international law as an interpretive tool. They identify the *International Covenant on Economic, Social and Cultural Rights*,³⁷ the *International Covenant on Civil and Political Rights*,³⁸ and the International

³³ *Ibid.*, para 35.

³⁴ *Ibid.*, para. 68.

³⁵ *Ibid.*, para. 66.

³⁶ Eric Tucker, “Constitutionalizing the Right to Collectively Bargain: The Ironies of Labour History in the Supreme Court of Canada,” *Labour Le/Travail* forthcoming.

³⁷ 993 U.N.T.S. 3 (“ICESCR”)

Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*,³⁹ each of which Canada has ratified, as important sources for the interpretation of s.2 (d). They go on to note that all of these international documents have been interpreted as including the right to bargain collectively, and they specifically refer to a summary of ILO principles concerning collective bargaining.⁴⁰

McLachlin C.J. and LeBel J. end their case for interpreting s.2 (d) to include the right to bargain collectively by referring to the *Charter's* underlying values. Relying on a smattering of statements made by academic commentators and in Supreme Court judgments about the importance of work and collective bargaining to people's lives, they conclude that "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."⁴¹

Having devoted the first half of their decision to the positive case for recognizing a right to bargain collectively, McLachlin C.J. and LeBel J. proceed to explain what this right entails. In light of the judgment's expansive rhetoric extolling collective bargaining as tantamount to a fundamental human right what is striking is just how limited the right is. First, the *Charter* only applies to state action, that is, to legislation or to the government as an employer. The *Charter* does not apply to private employers directly. To succeed in arguing that under-inclusive legislation violates freedom of association, a claimant would have to demonstrate "the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime."⁴² Second, s. 2(d) does not guarantee the particular objectives sought through associational activity, only the process through which those goals are pursued. Third, the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity. According to McLachlin C.J. and LeBel J., "the state must not substantially interfere with the ability of a union to

³⁸ 999 U.N.T.S. 171 ("*ICCPR*"),

³⁹ 68 U.N.T.S. 17 ("*Convention No. 87*"),

⁴⁰ *Health Services and Support* case, *supra* note 1, para. 77.

⁴¹ *Ibid.*, para. 86

⁴² *Ibid.*, para. 34 referring to *Dunmore*.

exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith.”⁴³

Thus, despite the bold statement at the beginning of judgment “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,” the actual

right to collective bargaining ...is a limited right. First, as 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.... Finally, and most importantly, the interference, as *Dunmore* instructs, 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.⁴⁴

Moreover, substantial interference is to be assessed on two bases, both of which are essential: (1) the importance of the matter affected to the process of collective bargaining, and (2) the manner in which the measure impacts on the collective right to good faith negotiation and consultation. This is a very qualified right indeed.

The essential question relating to the first basis is whether the subject matter of the particular instance of collective bargaining is such that interfering with bargaining over it will affect the ability of unions to pursue common goals effectively. While not determinative of this inquiry, the majority asserted that the more important the matter is to a union and its members, the more likely there is substantial interference with a s.2 (d) right.⁴⁵

Once it is established that the government action impacts on a subject matter important to collective bargaining, then the second basis for determining substantial interference comes into play: does the state action respect the duty to consult and

⁴³ *Ibid.*, para 90.

⁴⁴ *Ibid.*, paras. 2 and 91.

⁴⁵ The examples the Court provided were laws or state actions that prevent meaningful discussion or consultation about working conditions or that nullify significant negotiated terms in existing collective agreements.

negotiate in good faith? In attempting to give this notoriously vague and indeterminate duty some content, the majority refers to ILO principles concerning collective bargaining, the *Canada Labour Code* and provincial labour relations legislation, remarks made by Senator Walsh in the Senate Committee hearings on the *Wagner Act*, academic commentators, and Supreme Court judgements.⁴⁶ The result is a confusing mishmash, in which the procedural aspect of the duty is emphasized, although a court's right to evaluate the substance of negotiations in determining whether the duty of good faith had been met is reaffirmed. Further complicating matters, the majority introduces factors more appropriate to the s.1 analysis, which addresses whether the infringement of the right is justified, into the determination of whether s.2 (d) has been breached. According to McLachlin C.J. and LeBel J, the circumstances surrounding the adoption of legislative provisions, such as situations of exigency and urgency, may "affect the content and modalities of the duty to bargain in good faith."⁴⁷ However, it is difficult to see how these factors differ from those considered in the determination of the justification for the violation. In fact, in the very next paragraph, they state that s.1 "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."⁴⁸

In essence, the majority develops a two-part test to determine whether the s.2 (d) right to bargain collectively has been interfered with. The first part requires the claimant to demonstrate that there has been state interference with the collective bargaining process. The second part requires the claimant to establish that the interference was substantial, which, in turn, involves two inquiries – the first, into the significance of the subject matter interfered with and, the second, into the manner of the interference. Once the claimant has established all of these elements, then the onus shifts to the government to demonstrate that the infringement was demonstrably justified.

The application of the test to the facts at bar illustrates just how limited the constitutional protection for collective bargaining actually is. The majority found that the

⁴⁶ *Ibid.*, para. 97 to 107

⁴⁷ *Ibid.*, para. 107.

⁴⁸ *Ibid.*, para. 108.

legislative provisions that invalidated existing collective agreements and that prohibited dealing with specified matters in future collective agreements interfered with collective bargaining. However, a provision establishing a more onerous definition of what constitutes a successor employer and, thereby depriving health care workers of their collective bargaining rights and seniority, was found not to infringe the protection of collective bargaining offered in s. 2(d) because it modified statutory provisions and did not deal with employee entitlements derived from collective bargaining.⁴⁹ In determining whether the interference with collective bargaining was substantial, McLachlin C. J. and LeBel J. found that the provisions in the legislation dealing with contracting out, layoffs, and bumping constituted a substantial interference with collective bargaining were significant matters, but those relating to transfers and reassignments were not. In the second inquiry, they focussed “squarely and exclusively on how the provisions affect the process of good faith bargaining and consultation.”⁵⁰ Despite acknowledging that the government was facing a situation of exigency, they concluded that the absolute prohibition on contracting out, the invalidation of collective agreements provisions requiring consultation prior to contracting out, and the preclusion of consultation prior to layoffs or bumping constituted “a virtual denial of the s.2 (d) right to a process of good faith bargaining and consultation.”⁵¹

Having found that ss. 6(2), 6(4), and 9 of the *Health and Social Services Delivery Improvement Act* violated s. 2(d), McLachlin C.J. and LeBel J. turned to consider whether the British Columbia government could justify the infringement as a reasonable limit under the four components of the *Oakes* test.⁵² They found that the explicit

⁴⁹ Similarly, a program giving employees in the health care sector training, assistance and financial support that was abolished by Bill 29 did not violate the right to collective bargaining because the program did not arise out of collective bargaining but instead was imposed by the government on health sector employers pursuant to the recommendations of an inquiry commission.

⁵⁰ *Ibid.*, para. 133.

⁵¹ *Ibid.*, para. 135.

⁵² 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

objective given by the government for the legislation, which was to improve the delivery of health care services, was pressing and substantial. In light of Court's ruling in *Chaoulli* that governments are constitutionally obliged to provide public health care of a reasonable standard in a reasonable time this finding was almost a foregone conclusion.⁵³ They also found that the government met the second step of the *Oakes* test; the means adopted – such as loosening the restrictions on health service sector employers' capacity to contract out non-clinical services, to transfer and to reassign employees, and to lay them off – were logically and reasonably related to the government's objectives of improving the delivery of the health care system. However, they held that the legislation failed the third step, which requires the government to establish that the legislation minimally impairs the *Charter* right. The fatal flaw in the government's case was the absence of supporting evidence to demonstrate that it had considered other less restrictive means for achieving its objective. According to McLachlin C.J. and LeBel J, "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 this matter."⁵⁴ Despite the fact that they claimed "legislators are not bound to consult with affected parties before passing legislation," they repeatedly returned to the failure of the government to consult with the unions affected by the legislation as the reason for their finding that the government failed to consider other means for achieving its objective.⁵⁵

The division of labour between the inquiry into whether s. 2(d) has been violated and the inquiry into whether the violation, if established, is justified according to s.1 is not very clear in the majority judgment. Nor is the distinction between the process of collective bargaining and its substantive outcome. Moreover, the majority's treatment of the government's duty to consult is ambiguous at best and contradictory at worst. Justice

adopted by the law, and more specifically, between the salutary and deleterious effects of the law (*R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 140.

⁵³ *Supra* note 4. However, given that in *NAPE v. Newfoundland* (*supra* note 4) the Court justified overriding a negotiated pay equity agreement on the ground that the government of Newfoundland was in the midst of a fiscal crisis, it was somewhat surprisingly that McLachlin C.J. and LeBel J. noted that two of the government's objectives, cutting costs and increasing the rights of management, were suspect.

⁵⁴ *Health Service and Support* case, *supra* note 1, para. 156.

⁵⁵ *Ibid.*, para. 157.

Deschamps raised similar criticisms in her decision, which dissents in part from the reasons provided by the majority.

Although she accepts the reasoning of the majority regarding the scope of s. 2(d), Deschamps J. demurs over the specific test for establishing a violation of the freedom adopted by the majority. She criticizes the majority's focus on the need to establish a substantial interference with a collective bargaining process as mistakenly applying the *Dunmore* test, which dealt with under-inclusive legislation and thus required a heavier burden on the claimant, to a situation involving state interference. Moreover, she claims that the first part of the inquiry into substantial interference – the importance of the matter affected – introduces a concern with the substantive outcomes of collective bargaining that ought not to play a role in determining whether the right to bargain collectively has been infringed. Regarding the second inquiry, she claims that the majority places too much weight on the manner of infringement rather than on the infringement itself. According to her, the questions relating to consultation by the government and the circumstances surrounding the adoption of the legislative provisions are relevant to the s. 1 analysis, and not to the violation of the right.

For these reasons, she offers a different test for determining whether the s.2 (d) right to bargain collectively has been violated:

Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements.⁵⁶

Like the majority's test, Deschamps J.'s involves two inquiries: "the first is into whether the process of negotiation between employers and employees or their representatives is interfered with in any way, and the second into whether the interference concerns a significant issue in the labour relations context."⁵⁷ Where her test differs from that of the majority is that only after the Court has determined that there has been interference with a process of negotiation should it turn to the second inquiry and consider whether the issues

⁵⁶ *Ibid.*, para. 180.

⁵⁷ *Ibid.*, para. 181.

involved are significant. Ultimately, however, she agrees with the majority that there may be matters covered by collective agreements that do not warrant constitutional protection. She also shares the majority view that constitutional protection only extends to the process of collective bargaining and not to specific statutory entitlements.

Under her more expansive test for determining that s.2 (d) has been infringed, Deschamps J. added the legislative provisions relating to transfers and to reassignments to the list of provisions that the majority found to have run foul of the *Charter*. However, under her contextual approach to s.1, which emphasized the serious nature of the crisis in health care in Canada, only the provision of the legislation that declared any clause in a collective agreement providing for consultation over contracting out to be void was not justified under s.1. Thus, her more expansive test for determining a violation of s.2 (d) is matched by a more expansive approach to determining whether the rights violation is justified under s.1.

II. The Implications of the Right to Bargain Collectively

Taken together the *Health Services and Support* case and *Dunmore* signal a shift in the judicial discourse concerning labour rights from industrial pluralism and legislative compromise to fundamental human rights and constitutional values. At the symbolic level, this shift is important because it means that labour's hard-won collective bargaining rights are now considered worthy of constitutional protection and labour unions are no longer considered to be on the same constitutional footing as golf and gun clubs. Elevating collective bargaining to a constitutional right provides a halo of much needed legitimacy to one of organized labour's core activities. Discourse and symbols matter, and given the declining fortunes of trade unions in Canada and other Anglo-Saxon countries the Supreme Court of Canada's decision in the *Health Services and Support* case is both unexpected and welcome.

But, what the decision means in concrete terms for the workers and unions affected by Bill 29 and for Canadian workers and unions in general are open questions. As a result of Bill 29, thousands of workers in the health services sector lost their jobs and accrued seniority, and suffered substantial wage cuts, ranging from 15 to 40 per

cent.⁵⁸ The unions representing these workers lost thousands of members, and they had to devote substantial resources to re-organizing them and negotiating collective agreements on their behalf. In addition, these unions spent a great deal of time and money before the labour board challenging health service sector employers who contracted out health care work.

The remedy awarded by the Supreme Court in the *Health Service and Support* case was to declare the legislation invalid, but to suspend the effect of the declaration for one year in order to give the British Columbia government time to address the repercussions of the decision. In *Dunmore*, a similar remedy resulted in a parsimonious response by the Ontario government, which simply enacted legislation requiring employers in the agricultural sector not to discriminate against employees who formed or joined employee associations and to accept representations made by employee associations.⁵⁹ Not surprisingly, this response was challenged as unconstitutional (and unsuccessfully so at the first level) by the union seeking to represent agricultural workers.⁶⁰ Thus, the extent to, and ways in, which the British Columbia government will address the plight of the thousands of hospital workers who were detrimentally affected by the legislation is far from clear. However, it is likely that the government will delay its response as long possible and adopt a minimalist approach to the Court's decision.⁶¹ In

⁵⁸ Marjorie Griffin Cohen and Marcy Cohen, *A Return to Wage Discrimination: Pay Equity Losses through the Privatization* (Vancouver, B.C., Canadian Centre for Policy Alternatives, April 2004) http://policyalternatives.ca/documents/BC_Office_Pubs/bc_pay_equity.pdf (accessed September 2, 2007); Camfield, *supra* note 14.

⁵⁹ In *Dunmore*, *supra* note 3, the Supreme Court of Canada declared the legislation repealing the extension of collective bargaining rights to agricultural workers to be invalid, but suspended the declaration of invalidity for 18 months. *Agricultural Employees Protection Act*, 2002, S.O. 2002, c.16, discussed in Judy Fudge, "Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association," (2004) 67(2) *Saskatchewan Law Review*, 25-52.

⁶⁰ *Fraser v. Ontario (A.G.)* (2006), 263 D.L.R. (4th) 425 (Ont. S.C.).

⁶¹ Ian Bailey, "Campbell in no rush to respond to landmark ruling on Bill 29," *The Globe and Mail*, June 12, 2007, 31.

the meanwhile, health service sector jobs continue to be contracted out,⁶² although the government and the health service unions have begun to meet and to discuss remedies.⁶³

How much protection have workers gained from the constitutionalization of collective bargaining? Once again, the answer to this question is not obvious. The Court explicitly states that it does not guarantee workers access to any particular process of collective bargaining. Thus, the exclusion of a group of workers from a statutory collective bargaining scheme, such as Ontario's agricultural workers, is not, *ipso facto*, a violation of their right to collective bargaining. Rather, such workers will still have to establish that they are unable to exercise their right to freedom of association and to bargain collectively *because of* the absence of facilitating legislation. Second, the Court is adamant that the constitutional protection of collective bargaining does not ensure the achievement of a particular outcome. Third, labour rights that are provided through legislation rather than through collective bargaining, such as successor rights that obtain when a business is transferred, can be altered by the government without consultation or negotiation without violating workers' freedom of association. All that is protected is the *process* of collective bargaining. And, finally, the government always has the opportunity to argue that its violation of s.2 (d) is demonstrably justified in a free and democratic society.

How robust the constitutional right to bargain collectively is depends to a great extent to meaning the Court will give to the duty to bargain in good faith and to consult. In *NAPE v. Newfoundland*, a unanimous seven-member bench of the Supreme Court of Canada upheld legislation cancelling a pay equity debt owed to health service workers on the ground that the province's financial crisis justified violating the (predominantly women) workers' equality rights.⁶⁴ In deciding that the government's response was

⁶² Mark Hume and Ian Bailey, "Additional firings prompt warning from union, *The Globe and Mail*, June 20, 2007, S1.

⁶³ National Union of Public and Government Employees, "BC Health Care Unions Open Talks on Supreme Court Ruling" 7 September 2007, http://www.nupge.ca/news_2007/n07se07.htm (accessed September 12, 2007). The biggest hurdle in fashioning a remedy will be dealing with the issue of retrospectivity.

⁶⁴ *NAPE v. Newfoundland*, *supra* note 4. For a discussion of this case see Judy Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) 23 (2) *South African Journal on Human Rights* 235-253.

proportional to its objective, an important factor was the union's refusal of the government's invitation to participate in the government process examining alternatives.⁶⁵ By contrast, in the *Health Services and Support* case, the majority made much of the union representatives' repeatedly expressed desire to consult with the government regarding specific aspects of the legislation and the government's abject failure to consult with them. What if the government had consulted with the unions and then simply gone ahead and introduced the same legislation over the unions' objections? Would that amount to a violation of s.2 (d)?

To answer this question it is useful to turn once again to the majority decision. The duty to bargain in good faith is primarily procedural and requires the parties to meet, to engage in meaningful dialogue, to make a reasonable effort to arrive at an acceptable contract. It does not impose on the parties an obligation to conclude a collective agreement or to accept any particular contractual provision. However, parties cannot simply go through the motions of the bargaining process if the nature of the proposals and positions is designed to avoid the conclusion of a collective agreement or to destroy the collective bargaining relationship.⁶⁶ What the Court misses in this recitation of the key elements of the duty to bargain in good faith is the fact that the parties can resort to dispute resolution measures once they reach impasse is what gives the duty to bargain in good faith its bite. In Canada, the primary dispute resolution measure to resolve impasses after the duty to bargain in good faith has run its course is resort to strikes and lockouts. Even in the public sector, economic sanctions, rather than compulsory arbitration, tend to be the preferred mechanism for settling disputes that arise in the course of negotiating collective agreements.

Thus, the big unanswered question looming behind the *Health Services and Support* case is whether the right to collective bargaining can be limited to the duty to bargain in good faith or whether it will be extended to include the right to strike. The Court simply avoided answering this question, "noting that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the

⁶⁵ *NAPE v. Newfoundland*, *supra* note 4, paras. 88, 98.

⁶⁶ *Health Services and Support* case, *supra* note 1, paras. 98-101, 102 – 103, 104-106, summary at para. 107.

guarantee of freedom of association.”⁶⁷ But, what the Court fails to acknowledge is that it was the Labour Trilogy that decided that freedom of association guaranteed by the *Charter* did not include the right to strike on the basis of the very same reasoning used to decide that freedom of association did not include collective bargaining – reasoning that the Court rejects as no longer surviving scrutiny.

III. The Role of International Labour Rights in Constitutional Litigation

Grounding its decision in the *Health Services and Support* case in international law, specifically International Labour Organization and United Nations Conventions that Canada has ratified, the Supreme Court of Canada has opened the door to several controversial questions. I will limit my examination to only two.⁶⁸ Does the freedom of association also include the right to strike? Will the *Health Services and Support* decision make collective bargaining more accessible by, for example, assisting in the growing movement for forms of minority unionism that fall outside of the conventional structure of majority-based unionism associated with the *Wagner Act* and its Canadian counterparts?⁶⁹

In their judgment, McLachlin C.J. and LeBel J. state that Canada’s international obligations can assist courts charged with interpreting *Charter* guarantees, and they invoke Dickson C.J.’s observation 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.⁷⁰ The former Chief Justice made this observation in the course of a dissenting judgment in which he relied on Canada’s international obligations to support his interpretation of freedom of association as

⁶⁷ *Ibid.*, para. 19.

⁶⁸ Other issues related to the freedom of association in the labour context include closed shop agreement and other forms of compelled union membership.

⁶⁹ Roy J. Adams, *Labour Left Out: Canada’s Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Canadian Centre for Policy Alternatives, 2006); Steven Greenhouse, “Seven Unions Ask Labor Board to Order Employers to Bargain,” *New York Times*, August 15, 2007, http://www.nytimes.com/2007/08/15/us/15labor.html?_r=1&oref=slogin (accessed August 18, 2007).

⁷⁰ *Health Services and Support* case, *supra* note 1, para. 70.

including the right to strike. In the twenty years since it was written, Dickson C.J.'s dissent has taken on iconic status in Canadian labour law and has clearly displaced the majority's reasoning in the Labour Trilogy as the dominant approach to s. 2(d) of the *Charter*. Moreover, McLachlin C.J. and LeBel J. refer to the same international obligations (Article 8 of the ICESCR, Article 22 of the ICCPR, and ILO Convention No. 87) in defining freedom of association to include as collective bargaining as Dickson C.J. did in extending the definition to include the right to strike. In fact, they quote Dickson's use of Convention 87 for the principle that the ability "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"⁷¹ And, like him, they rely on the jurisprudence of the ILO's Committee of Experts and Committee on Freedom of Association to give meaning to s. 2(d). However, unlike him, they do not discuss these Committees' jurisprudence on the right to strike, limiting their consideration to ILO principles regarding collective bargaining.

Now that a clear majority of the Supreme Court has stated that "it is reasonable to infer that s. 2 (d) of the *Charter* should be interpreted as recognizing at least the same level of protection as the international conventions to which Canada is a party,"⁷² it is difficult to see how the Court can find a principled way to avoid opening the door of constitutional protection far enough to allow the right to strike to enter.⁷³ The Court has adopted an incremental approach to using Canada's international labour obligations to interpret the freedom of association protected in the *Charter*. In *Dunmore*, it focused on the articles in Convention 87 and the ILO's Committee of Experts and Committee on Freedom of Association jurisprudence that affirmed workers' right to join organizations of their own choosing.⁷⁴ In the *Health Services and Subsector* case, it took the second step, and relied on the same international sources, only this time with respect to the right

⁷¹ *Ibid.*, para 75.

⁷² *Ibid.*, para. 79.

⁷³ Diane Pothier states that "it would be quite possible to reject a right to strike, as covered in freedom of association, while endorsing collective bargaining as covered"; "Twenty Year of Labour Law and the *Charter*" (2002) 40(3&4) *Osgoode Hall Law Journal* 369 at 381. However, it is difficult to see how this would be possible on a principled basis after the reasoning in the *Health Services and Support Sector* case.

⁷⁴ *Health Services and Support* case, *supra* note 1, para, 27 referring to Articles 2 and 10.

to bargain collectively. It is almost certain that some union somewhere in Canada will, at the very least, bring a challenge to legislation that prohibits the use of strikes to resolve disputes relating to the negotiating of a collective agreement. Thus, the Court will have to address the issue of whether s.2 (d) protects the right to strike.

In such a case, it is likely that the s.1 analysis may play a more prominent role, as it did in the dissenting judgment of Deschamps J. in the *Health Services and Support* case and in Dickson C.J.'s dissents in the *Alberta Reference* and the two companion decisions that made up the Labour Trilogy.⁷⁵ In fact, the expansive definition that he gave to freedom of association was matched by his deferential approach to the government's justification for its action under s.1. The only legislation that he did not find to be justified was that already condemned by the ILO's Committee on Freedom of Association – the absolute prohibition on strikes by public sector workers in Alberta; in that case and the two others in the Trilogy, he found that all of the other statutes that violated the right to strike were demonstrably justified limitations on the basis of what Wilson J. considered in her dissenting decisions to be insufficient evidence.⁷⁶

The answer to the second question, will the *Health Services and Support* decision make collective bargaining more accessible to workers, is easier, albeit less satisfactory for those who happen to believe that there is a need for collective bargaining legislation that departs from the Wagner model. The jurisprudence of the ILO's Committee on Freedom of Association is clear that in jurisdictions that provide exclusive bargaining rights for majority unions, in situations in which there is no union representing a majority of workers at a workplace, unions representing a minority of those workers should be entitled to represent them and to negotiate an agreement on their behalf.⁷⁷ However, these rights derive from Convention 98, which Canada has not ratified. Since the Supreme

⁷⁵ It might even creep into the determination of whether or not s.2 (d) has been violated, see McLachlin C.J. and LeBel J. and the discussion at *supra* notes 46 and 46.

⁷⁶ For a discussion of the s.1 analysis in the Labour Trilogy see Judy Fudge, "Labour, the Charter and Old Style Liberalism," *Labour Under the Charter* (Kingston, Ont.: *Queen's Law Journal* and the Industrial Relations Centre, 1988) 61-111 at 85-86.

⁷⁷ Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5th revised edition (Geneva: International Labour Office, 2005) at paras. 976-78

Court has relied only on international conventions that Canada has ratified, it is unlikely that this jurisprudence will provide persuasive authority for interpreting s.2 (d).

Moreover, in the *Health Services and Support* case, McLachlin C.J. and LeBel J. were very careful to state that the right to collective bargaining protected by s.2 (d) of the *Charter* was a limited right; “it is a right to a general process of collective bargaining, not to a particular model of labour relations, not to a specific bargaining method.”⁷⁸ The Court did *not* consider modifications to collective bargaining legislation to violate s.2 (d). In *Dunmore*, the Supreme Court held that the state had a positive duty to enact legislation to protect workers’ *Charter* rights if the party seeking the legislative protection could establish an evidentiary foundation that without legislative protection the workers would not be able to enjoy form, join, and participate in trade unions. According to the Court, the state had to be accountable for the workers’ inability to exercise their fundamental freedoms. In *Dunmore*, Bastarache J. concluded that the repeal of legislation extending labour legislation to agricultural workers was a signal to employers that they did not have to respect the workers’ fundamental rights. Nothing in *Dunmore* requires the state to provide collective bargaining legislation where there is none. Nevertheless, it may be difficult for the state to repeal collective bargaining legislation in the private sector entirely without putting anything in its place since this action could be considered a signal to employers to interfere with workers’ fundamental rights. At the very least, in the private sector some restrictions on employers’ exercise of their civil rights (such as to discharge employees for being union members) would seem to be warranted. In the public sector, since the employer is a state actor, there may be a more robust duty to bargain, perhaps even with unions representing less than a majority of workers.⁷⁹

It is possible to derive with some confidence three general propositions from the Supreme Court of Canada’s treatment of international labour law. First, international labour law is relevant for the interpretation of s.2 (d). The presumption is that the *Charter* provides as least as great of protection as that afforded by similar provisions in international human rights documents that Canada has ratified. Second, the Court will be selective in its use of the ILO’s jurisprudence on freedom of association, referring only to

⁷⁸ *Health Services and Support Sector* case, *supra* note 1, para. 91.

⁷⁹ Thanks to Eric Tucker for the latter observation.

those principles needed to address to the specifics of the case before it. Third, ILO decisions regarding complaints submitted by unions that Canada has violated Convention 87 are relevant to the outcome of a constitutional challenge, although they may not even be cited by the Court in its decision. In the *Alberta Reference*, Dickson C.J. referred to the ILO's Committee on Freedom of Association's decision recommending the government consider amending its legislation to confine the prohibition of strikes to services that are essential in the strict sense of the term.⁸⁰ In *Dunmore*, Bastarache J. referred to the Committee on Freedom of Association's decision regarding to the exclusion of agricultural workers from collective bargaining legislation in his discussion of the role of labour legislation in protecting workers from common law inhibitions on organizing activity.⁸¹ And, although the Supreme Court did not refer to the Committee's decision regarding the Bill 29 complaint, its reason for holding that Bill 29 violated the right to bargain collectively was very similar to Committee's decision that changes of the nature made in Bill 29 should be preceded by consultation with the appropriate organizations.⁸²

IV. The Role of the Courts: The Last Bastions against Neo-liberalism?

This shift in the Supreme Court of Canada's constitutional jurisprudence regarding labour rights is part of some broader trends. It mirrors the increasing push at an international and transnational level to conceptualize labour rights as a form of fundamental human right.⁸³ It also signals the importance of the ILO and its complaint mechanisms for unions as a line of defence against governments that are intent on rolling back collective bargaining rights. Moreover, it is emblematic of the turn to the courts and litigation by trade unions seeking to defend labour rights from legislative incursion.⁸⁴ In light of the recent success by unions before the Supreme Court of Canada and the European Court of Human Rights, Keith Ewing suggests that now might be the time to

⁸⁰ *Alberta Reference*, *supra* note 2, para. 71.

⁸¹ *Dunmore*, *supra* note 3, para. 41.

⁸² The trail decision refers to the ILO observations about Bill 29, see *supra* note 17, at para. 122.

⁸³ Fudge, *supra* note 8.

⁸⁴ Ewing, *supra* note 9.

launch “an ambitious, co-ordinated and proactive litigation strategy” to defend and entrench labour’s traditional rights. However, he also acknowledges that liberalism’s “embrace of trade unions is not yet universal or complete.”⁸⁵

It is important to identify a few of the problems associated with relying on the courts to defend labour rights. The first is the problem of delay inherent in a litigation strategy. Bill 29 was enacted in the middle of the night on January 28, 2002. The constitutional challenge was launched later that year, but it took over four years for the case to make its way to the Supreme Court of Canada and then more than a year for the Court to reach a decision. In the intervening five years, thousands of health care workers lost their jobs due to contracting out and privatization, and the health service unions signed collective agreement in 2004 that conceded wage-cuts and further weakened job security provisions. The government has until June 2008 to remedy its breach of the Charter, but no one is clear what the appropriate remedy is, especially since the Court went to great lengths to limit the constitutional guarantee of freedom of association to the process of collective bargaining and not its substantive outcomes.

The second problem with a litigation strategy is that is difficult to celebrate the successes and at the same time ignore or minimize the defeats if the overall strategy is to use legal decisions to legitimate labour rights. For example, the same year that the Court issued *Dunmore*, it also released *R. v. Advance Cutting & Coring Ltd.*,⁸⁶ in which for the first time the Supreme Court of Canada considered whether collective bargaining legislation that required mandatory union membership violated the freedom of association protected in the *Charter*. A divided court narrowly (five to four) upheld the Quebec government’s construction industry collective bargaining legislation that required contractors to hire only construction workers who are members of one of five union groups listed in the statute.⁸⁷ The legislation barely survived the s. 1 analysis on the

⁸⁵ Ewing, *supra* note 9.

⁸⁶ [2001] 3 S.C.R. 209, 205 D.L.R. (4th) 385, 2001 SCC 70 [*Advance Cutting & Coring*]. This discussion is based on Fudge, *supra* note 59.

⁸⁷ A nine-member Court participated in the appeal. Four judges found no breach of the *Charter*. Le Bel J., with Gonthier and Arbour JJ., stated that freedom of association only protects individuals from forced ideological conformity and that compulsory union membership does not amount to forced ideological conformity. L’Heureux-Dubé J. stated that freedom of association does not include the freedom not to associate. Five judges

ground that the legislation stabilized what had been violent labour relations within the construction industry.⁸⁸ Significantly, eight members of the Court interpreted the freedom of association as including the right not to associate and a slight majority considered that mandatory union membership violated that right. Bastarache J., who held that compulsory union membership itself amounted to forced ideological conformity, drew support, as he had done in *Dunmore*, from international human rights law.⁸⁹ *Advance Cutting & Coring* indicates that international labour and human law rights can cut both for and against unions, although generally it tends to favour them. Moreover, it “provides a stark reminder of the complexity of applying constitutional analysis in balancing competing visions of how a labour law regime should be constructed.”⁹⁰

The third problem with litigation is that it typically is defensive. Unions have gone to court to defend the key features of industrial pluralism – a system of collective bargaining that originated with the *Wagner Act* in 1935 and was adapted to Canada with the Wartime Labour Relations Regulations (PC 1003) in 1944. That system was designed for the post-war economy, and even at its apogee covered less than half of the working population in Canada. Since the early 1980s, at the very time the *Charter* was entrenched, this system has proven to be less effective as the supply and demand sides of the labour market have changed; the wages of unionized workers have stagnated and union density has declined. While it is heartening for people who are concerned with the dignity of workers that the Supreme Court has elevated collective bargaining to a constitutional right, it is unlikely that defensive battles fought in courts can turn the economic and political tide that has undermined the basis for transforming these rights

found a violation of the *Charter*, although one of them (Iacobucci J.) held that the legislation was saved under s. 1. Bastarache J., together with McLachlin C.J., Major and Binnie JJ., held that compulsory trade union membership is a form of forced ideological conformity that violates the *Charter*. Iacobucci J. rejected the narrow test of forced ideological conformity and held that the freedom of association was violated by forced union membership.

⁸⁸ *Advance Cutting & Coring*, *supra* note 86, para. 117.

⁸⁹ *Ibid.*, para. 11. He referred to art. 20 of the *Universal Declaration of Human Rights*, GA Res. 217(III), 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 and the *International Covenant on Economic, Social and Cultural Rights*, 16 December, 1966, 993 U.N.T.S. 3, art. 8.1:

⁹⁰ Michael MacNeil “Unions and the *Charter*: The Supreme Court of Canada and Democratic Values” (2002) 10 *C.L.E.L.J.* 3, 23.

into job security and improved wages for working people. Nor is it likely the courts will devise legislative models of representation that can revive a flagging labour market. Courts appear to be helpful only when unions are weak.

Yet, despite its limitations, the Supreme Court of Canada's decision in the *Health Services and Support* case is an important symbolic and moral victory for health service sector workers, their unions, and the Canadian labour movement in general, which has been on the defensive for the past twenty-five years. The failure of the Supreme Court to interpret the guarantee of freedom of association in the *Charter* to include collective bargaining had been taken as a signal by governments across the country that they could safely ignore labour rights. The British Columbia government's treatment of the non-clinical health care workers epitomized governments' cavalier attitude to public sector workers and their unions. As the Supreme Court of Canada emphasized, the government introduced Bill 29 without consulting the unions representing the thousands of workers who would be detrimentally affected by the legislation, and it used its majority to pass the legislation in three days. After this decision, at a minimum, governments will have to consider workers' rights and to consult with their unions before introducing draconian legislation. While the Court is clear that its decision protects only the process of collective bargaining, and neither a specific legislative model nor the substantive outcomes embodied in collective agreements, the emphasis on the government's duty to bargain in good faith fosters democratic deliberation, at the expense of an instinctive vilification of public sector workers.