WHY ARE CANADIAN JUDGES DRAFTING LABOUR CODES -- AND CONSTITUTIONALIZING THE WAGNER ACT MODEL?

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ABSTRACT: In BC Health Services, a revolutionary 2007 decision of the Supreme Court of Canada, the constitutional guarantee of “freedom of association” was interpreted to comprehend a constitutional “right” to bargain collectively. Further, this new constitutional guarantee was held to include a duty to bargain on the part of the employer. This legal duty was non-existent at common law, and is in fact a very prominent innovation of the of the American Wagner Act model of collective labour relations which has been in place, with some local modification, in Canada since the 1940s. BC Health constituted an invitation to constitutional litigators and judges in Canada to get on with the job of constitutionalizing other structural elements of the Wagner Act Model. This invitation was accepted and dramatically acted upon in the 2008 decision of the Ontario Court of Appeal in Fraser v Ontario (appeal to be heard by the Supreme Court of Canada on December 17, 2009) where other idiosyncratic but critical elements of the model, including the idea of “exclusive” union representation, were constitutionalized. This paper argues that the twin ideas of judges creating a comprehensive labour code, “cut and pasted” from the Wagner Act Model, and giving it the status of a constitutional guarantee, are both undesirable and avoidable.

I INTRODUCTION – The World We Live in Now

Judges in Canada now adhere to the view that it is their task to draft labour codes for Canadians – a position recently and fully embraced by the Ontario Court of Appeal in Fraser v. Ontario.1 Some commentators believe this is a sound legal development.2 Others are equivocal.3 I think it is a very serious mistake.4 Given the alternatives, it is a strange and undesirable turn of legal events.

But the strangeness does not end with the mere fact that we now live with what I call a “judicial labour code” (JLC). There is more. Judges undertaking this exercise, enthusiastically but nonetheless disconcertingly, insist that their nascent labour code happens to contain most of the provisions inserted over the years by Canadian legislators in an overtly political effort to “balance” or (in Paul Weiler’s term) to “reconcile”5 the interests of labour and capital. Those

1 (2008), 92 OR (3d) 481. Appeal to be heard by the Supreme Court of Canada, December 17, 2009.
2 Roy Adams is the headliner here – see the pieces cited infra. at p.17-25.
5 Weiler, Reconcilable Differences, (Carswell, 1980).
provisions relate, for example, to the duty to bargain, to unfair labour practices, to “rights” arbitration of disputes under collective agreements, and even to the peculiarly North American notion of “exclusivity” of union representation. Even more disconcerting is the reason why our judges insist that these originally legislative protections and processes form part of their JLC. The reason is not the plausible or sound one that because most workers have access to those protections and processes, it would violate our basic sense of equal treatment for all to exclude some workers from what the majority enjoy. Rather, the judges say that these often idiosyncratic and indigenous Canadian legislative ideas flow from three words in section 2(d) of the Canadian Charter of Rights and Freedoms – “freedom of association”. This is neither a plausible nor a sound idea.  

6 This is, in my view as I explain briefly below, the right argument (and the one the Supreme Court of Canada actually deploys, although on its own view of the world it is not allowed to say so). Many critics of my view seem to misunderstand my point about the failure of the Court to take up the obvious, direct, legitimate, coherent and available equality argument. (See, for example, Brian Etherington, supra n.2 at 739) They believe that my point is a bad one because, as everyone knows, and as they relentlessly remind us, the Court’s jurisprudence has “read down” the idea of equality to the point where it is merely the idea of nondiscrimination on certain prohibited grounds, and is thus unavailable to me. But I am quite aware of the Court’s stand on equality. My problem is not that I do not understand the Court’s view; it is that I think that the Court is mistaken about the idea of equality. This is not a matter of reading the cases and seeing what they say. It is, rather, a conceptual point about the very idea of equality. My hope is that that the world in which we live in as a result of this mistake (a world in which we end up with a JLC is such a strange one that the Court will come to see the point.  

7 And it is tied to another under-considered idea which I discuss in the papers cited supra, n.4. This is the idea that all of this can in large part be justified by references to international labour law, which is clearly, and rightly, committed to “freedom of association” for workers. , we have become accustomed to having the Supreme Court of Canada say, and other courts echo, the following: “international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the Charter should be interpreted as recognizing at least the same level of protection.” (Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391 (“B.C. Health”) at para 79). This is an idea which must be handled with great care. This is true for a number of reasons. First, one must be quite careful in determining what Canada’s international law obligations are. This is particularly true of obligations under ILO treaties. (See “Can We Rely?” supra n.4). Second, while it may be true that there an international treaty committing Canada to respect and promote “freedom of association” it is not true that any of the specific and detailed provisions of Canadian collective bargaining laws flow directly, necessarily, or indeed in any way from that international treaty. Canada, along with every other ILO member, has a very local, specific, and very idiosyncratic way of instantiating the very broad and simple words of the ILO’s Freedom of Association Convention. Not one of those ways is demanded by the international human right, although many may be consistent with it. Third, insofar as ILO bodies (in large part non-constitutionally mandated administrative innovations such as the Committee on Freedom of Association known as the CFA) in charge of “supervising” ILO conventions, and who issue comments about their interpretation of the relevant texts, are relied upon to determine our international obligations, one must be extremely careful. Even if these bodies were “authoritative” within the ILO legal system, which they are not, one should never say that we are “bound” by their interpretation of the treaties involved. To be fair, the Supreme Court denies it adheres to this hard view. But it is difficult to see exactly what they are saying. It seems to me that what the Court actually does is use the determinations of the CFA, and other ILO bodies, to fix what international law is – and then hold that law to be “persuasive”. And, as we have seen the Court goes on the say 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”. That is rather close to saying that these bodies are themselves are persuasive authorities in the matter. (And, as I say it is difficult to see where exactly we have stopped short of treating them as binding.) In my view the Court had it right when it said that the international treaties to which Canada is a party articulate “principles that Canada has committed itself to uphold.” That is where the court should have stopped. The key word there, as we shall see, is “principles”. We are, in our Charter, committed to the same principle, expressed in the same three words, as we are committed to under ILO
In two other recent essays, I have set out what is for some a controversial view of these matters. Specifically, in “The Freedom of Association Mess,” I criticized the Supreme Court of Canada’s decision in *BC Health*, which struck down as breaches of freedom of association certain provincial statutory provisions expressly overriding collectively negotiated rights of health care workers. The drafting of the JLC, which had started its life meekly in the Court’s 2001 decision in *Dunmore*, acquired a bold vitality in *BC Health*. I wrote that the latter decision was “taken by constitutional litigators as an invitation to ‘start your engines’”, and I asked where it would all end. Just as that article went to press, the Ontario Court of Appeal issued its decision in *Fraser v. AG Ontario*. This decision represents in my view the most radical extension of the project endorsed by *BC Health*. It is a truly breathtaking instance of judicial labour code drafting. If you want to see where it all ends, read *Fraser*. It is that decision which is the focus of this brief essay.

Here is a hint of what *Fraser* achieved: arbitrators across the country popped champagne -- no, vintage champagne -- corks as they read that their important (and lucrative) role is constitutionally guaranteed by the three constitutional words, “freedom of association”. This in spite of the fact that almost no other country in the world (not even the USA, from which we borrowed the Wagner model) has legally imposed mid-contract rights arbitration. And there is more, much more, to which I turn below. But it is right to note at the outset that one of the most striking aspects of the decision in *Fraser* is that it was written by Winkler C.J.O. Warren Winkler has long been one of Canada’s outstanding labour lawyers. Before assuming judicial office, he practiced management-side labour law at the highest level, and he is held in universal

Convention 87. That is what we ratified. And it is what we are committed to in virtue of the 1998 ILO Declaration on Fundamental Principles and Rights at Work. But the idea that the detailed “jurisprudence” of ILO bodies, especially that of the CFA, fixes what it is we are committed to uphold is, in my view, wholly unwarranted. Further, the idea that we are bound by their interpretations of conventions we have not ratified is even more legally removed from reality. The idea that the Supreme Court of Canada is to take interpretations of the CFA as fixing or importantly constitutive of what our international obligations are, which are then in turn “persuasive”, is in great need of very careful examination, not unreflective boosterism. More on this later and in another paper. I do touch on this point infra at p. 17 et seq.

8 Supra, n.4.


13 Ibid. at pp. 203 and 208.

14 Supra n.1 And as this paper is being edited I have just been made aware of a decision of the Alberta Labour Board which has decided that Charter s.2(d) guarantees that all collective agreements must include a Rand formula, and orders the Alberta legislature to amend the Labour Relations Code to include a mandatory Rand formula provision. Available at [http://www.alrb.gov.ab.ca/decisions/GF_05611A.pdf](http://www.alrb.gov.ab.ca/decisions/GF_05611A.pdf).
esteem by the labour bar. As a judge, he has extended even further his reputation as a labour lawyer’s labour lawyer. Several years ago he received the Bora Laskin Award for Distinguished Contributions to Canadian Labour Law. He knows our labour law system inside and out. I mention these facts because they make clear that the Fraser decision is not an accident. It is the application of the logic of BC Health by someone who knows exactly what he is doing. It is JLC drafting at the highest level of expertise – a fact which is not at all comforting.

II The Problem with BC Health (and Dunmore) – A Picture Held Us Captive

All Canadian labour lawyers know that in BC Health, the Supreme Court of Canada explicitly overruled its own recent precedents and held that there does exist in Canada a constitutional “right” to collective bargaining under 2(d) of the Charter. It also explicitly left open the question of whether there is a constitutional “right” to strike. Furthermore, it held that the right to collective bargaining included a duty to bargain on the part of the employer. In reaching this decision, the Court relied on its view of Canadian labour law history, its view of Canada’s international labour law obligations, and its view of other Charter values. BC Health is probably the most important labour law decision in my lifetime. It is also profoundly flawed, for reasons which I explain at length in the two recent papers referred to above and which are demonstrated so remarkably in Winkler CJO’s Fraser judgment. Fraser is BC Health on steroids. Everything that is wrong about BC Health is on large scale view in Fraser.

The long and complex decision in BC Health attends to a lot of law, both over time and over space. But complex as it is, it makes some simple and basic errors. What for our purposes is the most basic of those mistakes flowed from the fact that the Court’s earlier constitutional law jurisprudence on a number of controversial points led it to conclude, as it had in 2001 in Dunmore v. Ontario, that it was “forced” to treat, what was really a section 15(1) “equality” case as a section 2(d) “freedom of association” case. Of course, Dunmore and BC Health are indeed freedom of association cases – their real world facts involved governments clearly violating just that freedom of agricultural and health care workers. But treating them as s.2(d) cases is fraught with what turns out to be very large problems, not the least of which is the need to draft a JLC, conjured up out of the three words “freedom of association”. Those problems could easily have been avoided, because there was (and still is) a better way of addressing Dunmore and BC Health. There is a prior constitutional argument to be made in those cases – an argument that simply sees them as what they are. They are first and foremost, in constitutional law terms, equality cases. The real problem in Dunmore and BC Health is not that workers were

15 For details see “the Freedom of Association Mess” supra n. 4.

16 Supra, n. 4.

17 Let me first mention one factor that is omitted from most accounts of the Fraser saga but is actually at the root of the problem. Fraser involves mushroom factory workers, and the Ontario Labour Relations Board held that they were agricultural workers within the meaning of the statutory exclusion. This was not a model of purposive statutory interpretation. When a farm becomes a factory (a “factory farm,” in Winkler CJO’s words), are its employees really agricultural rather than industrial workers?

denied their freedom of association “rights”, but that they were denied those rights in a very particular way – their fundamental rights were denied while those same fundamental rights were provided to most other workers. Their first and best argument was not to ask the Court to conjure up a labour code to respect and secure their abstract freedom, but to say to the Court: “Here is the labour code everyone else gets. Here is the way their freedom of association is respected and protected. How can the government deny us that real freedom it has given to others? It must give us a good reason for that.”

The equality argument comes first for many reasons, including what used to be called, and perhaps used to be, “the passive virtues”. In other words, the equality argument would avoid multiple disasters: judges drafting labour codes out of whole cloth and (as in BC Health) misreading history, international law, and “Charter values” while so doing; a world without end of litigation (of which Fraser is just a prime example); and so on. That is the prudential and negative point in favour of the equality argument. Here is the positive point. In these cases, the structure of the litigation is quite different than in most constitutional cases. Usually, the claim is that some state interest (security, for example) impinges upon a Charter right (to due process, say). The freedom of association cases have a different structure. The Charter contains the three words, “freedom of association”. So do many international human rights documents, as well as in basic ILO instruments. But the Ontario Labour Relations Act contains thousands of words, all of them aimed at making that “freedom” legally real and respected, as well as legally protected and enforceable. It does so by, for example, creating the concept of unfair labour practices in order to protect the right to associate, and creating the Ontario Labour Relations Board to enforce those protections. The OLRA is not a statute advancing some other state interest which is alleged to impinge upon the rights of workers. On the contrary, the OLRA instantiates freedom of association; that freedom is the state interest. The complaint of the agricultural workers in Dunmore and Fraser is not against the legislation; it is that they are excluded from it. Their complaint is that the legislature has made the freedom real for most workers, but has left them out. They want what others have. That is an equality argument. It is what these cases are all about.

The claim, thank heavens, is not that the OLRA is the only way of instantiating the right, and that we must have it and nothing else. Rather, the claim is simply that if this is the way we have decided to instantiate (i.e., to make real) the freedom of association in Canada, then it is unfair to make that real freedom available to some and not others, unless you have a good reason for so doing. This point is especially important because the Court in BC Health was so keen to rely on the international law on freedom of association, especially the ILO law. The ILO and its law are very instructive here. There are more than 180 ILO members. Even among the relatively few that are rich developed nations – such as Canada, Germany, Japan and Sweden – each one has its own way of making concrete the abstract norm of freedom of association. Their labour law systems are radically different and are embedded in local histories, economies, cultures and labour relations systems. Yet all of those countries are ILO members in good standing, and each one has its own way of making concrete the abstract norm of freedom of association. Their labour law systems are radically different and are embedded in local histories, economies, cultures and labour relations systems. Yet all of those countries are ILO members in good standing, and each one has its own idiosyncratic and imperfect way, by and large respects and protects its workers’ freedom to associate. So, even a moment’s reflection brings home the point that there cannot be one particular type of labour code which flows from the basic human “right” expressed in the three words, “freedom of association”. There are myriad ways of instantiating and making that freedom real, respected, and enforceable. For this reason alone, we can see that the idea of a judicially drafted, constitutionally guaranteed labour code, said to flow directly from those three
words, is a bad one. And the idea that it flows from ILO law is a very bad one. What the creation of a JLC in these cases does is to “constitutionalize” one possible version of the real life story of the freedom – ie, to engrave it in something a lot more stone-like than a statute. And the engraving is being done not by our elected representatives, but by judges.

Finally, taking the equality claim seriously also avoids what is a truly bizarre outcome. When all is said and done, these cases are based on an equality argument, lead to an equality holding and generate an equality remedy. Incongruously, though, this is said to occur not under section 15(1) but under section 2(d). Rather than simply insisting that the workers in question be treated as others are treated, and simply applying to them the rules applicable to those others, the Court is driven to draft its own parallel set of rules, its own constitutional JLC. And, lo and behold, those rules are taken entirely from the statutory regime from which the workers in question have been excluded. To reiterate, we have an equality argument, an equality holding and an equality remedy. But the Court dares not speak the name of equality.

At its core, the Supreme Court’s approach reveals a profound parochialism. The Court declares boldly that it seeks to establish the independent, pre-statutory, enduring, international, human rights-based, and constitutional meaning of “freedom of association” (and not, via the equality argument, to simply extend to the claimant workers the “mere” statutory, contingent, recent, and local Canadian take on freedom of association). But then, what does the Court actually do? Where does it finds the content of that freedom? In … wait for it! … those very same local, recent, contingent statutes which it has insisted all along it is not in the business of extending to the claimants.

Canadian labour lawyers have grown up in a world where for as long as any of us can remember, we have instantiated freedom of association on the Wagner model, with some real Canadian innovations such as mandatory rights arbitration and the no-strike rule during the life of a collective agreement. We cannot, it seems, imagine any other way of “doing” freedom of association. We are stuck with our own local practices, and have no ability to bring to bear any wider or deeper perspective. This is what is revealed in Dunmore and BC Health. What the Court gives workers in Dunmore are the unfair labour practice provisions of the Wagner model. In BC Health the workers get the duty to bargain in good faith, again taken directly from the Wagner model. To drive home the point that it is impossible to derive such detailed, specific content from international norms, we can note that the Wagner Act duty to bargain exists in only three or four of the ILO’s more than 180 members.

The result is that our own local, contingent, recent, political compromises and legal practices have become the outer limits of our world. The norms we now happen to have are, in Dunmore and BC Health, transmogrified into our ultimate law. This is a very puzzling constitutional development; the better line of thought, and until fairly recently the dominant one, is that charters and bills of rights are supposed to stand on guard against this sort of thing. But, puzzling though it may be, it is all understandable. As Keynes wisely wrote, in terms that may help us to see what was going on in these cases:
The difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds.\textsuperscript{19}

The Wagner model does indeed, as these cases show, ramify very deeply “into every corner of our minds”. But that does not excuse what happened. As we will now see, the gift of \textit{Fraser} may be that it brings so clearly to light what we are doing that we will be able to understand how, in Wittgenstein’s words, a very particular “picture held us captive”.\textsuperscript{20} \textit{Dunmore} and \textit{BC Health} in effect issue an invitation to other judges to get on with the job of drafting of the JLC – the job of cutting and pasting from the Wagner model, while hardly dropping a footnote. \textit{Fraser} indeed shows that \textit{Dunmore} and \textit{BC Health} are turning out to be just the beginning of the constitutionalization of that model. When such an invitation is issued to an old labour law hand, such as Winkler CJO, who knows the Wagner model as well as anyone, we can in one sense only stand back and admire how much can be achieved.

\section*{III How \textit{Fraser} takes the \textit{BC Health} ball and throws deep}

The November 2008 decision of the Ontario Court of Appeal in \textit{Fraser} represents another (not final) chapter in a long legal drama, set in Ontario, involving agricultural workers, the New Democratic Party government of Bob Rae, the Conservative Mike Harris regime, the Liberal government of Dalton McGuinty, the \textit{Ontario Labour Relations Act} and the \textit{Canadian Charter of Rights and Freedoms}. The story has been told many times, and it can be reduced to the following essentials. Agricultural workers in Ontario (as in some other provinces) were long excluded from the OLRA, which protects and regulates collective bargaining rights and processes for other private sector workers. The Rae government changed this in 1993 by extending collective bargaining rights to agricultural workers.\textsuperscript{21} Some workers in large industrial-like agricultural operations (“factory farms”\textsuperscript{22}) did organize. But the Harris government took away those new rights in 1995\textsuperscript{23}. That legislative removal of protection was challenged as a violation of the guarantee of freedom of association under section 2(d) of the \textit{Charter}.

On the basis of earlier Supreme Court of Canada precedent, that challenge failed, predictably, in the Ontario courts. Surprisingly, though, it met with some limited success in the Supreme Court of Canada. In 2001, in \textit{Dunmore}, the Supreme Court held that the denial of any statutory protection for the efforts of agricultural employees to make collective representations to their

\begin{itemize}
\item \textsuperscript{19} In his Preface to \textit{The General Theory of Employment, Interest and Money} (New York, Harcourt, Brace & World, 1964).
\item \textsuperscript{20} Ludwig Wittgenstein, \textit{Philosophical Investigations}, para 115.
\item \textsuperscript{21} \textit{Agricultural Labour Relations Act, 1994}, S.O. 1994, c. 6.
\item \textsuperscript{22} \textit{Fraser}, supra n.12, at p. 511 (per Winkler CJO).
\item \textsuperscript{23} \textit{Labour Relations and Employment Statute Law Amendment Act, 1995}, S.O. 1995, c. 1.
\end{itemize}
employer deprived them of freedom of association. In response, in 2002, the Harris government passed a new, separate statute (the Agricultural Employees Protection Act, \(^{24}\) or AEPA) extending exactly the degree of protection Dunmore had said was constitutionally due – much weaker protection than that extended to employees in general under the OLRA. Agricultural workers were given the right to form a union, to present their views to their employer, and to be protected against employer interference in so doing. This was the first element in the new JLC and, as with everything else which followed, it was borrowed directly from the OLRA. Although agricultural employees thus had a degree of unfair labour practice protection, they were given no right to bargain collectively, let alone to strike.

The AEPA was in turn challenged in Fraser. Farley J., who heard the motion, rejected the Charter challenge.\(^{25}\) This, once again, was predictable; as Farley J. (and everyone else) read the AEPA, it gave agricultural workers exactly what Dunmore had said was their constitutional due - not a gram more, but not a gram less. It was this decision that was appealed to the Ontario Court of Appeal and led to the unanimous decision of that court, authored by Winkler CJO, which is the subject of this essay. Of course, between Farley J.’s 2006 decision and that of the Court of Appeal in 2008, the Supreme Court of Canada issued its 2007 decision in BC Health. That changed everything.

The essence of Winkler CJO’s judgment in the Court of Appeal in Fraser is stated by him as follows:

> In light of the combined effect of Dunmore and B.C. Health Services, I conclude that the AEPA breaches s. 2(d). While the application judge correctly found that the AEPA provides the minimum requirements necessary to protect the appellants’ freedom to organize, he did not have the benefit of the Supreme Court’s judgment in B.C. Health Services to guide him in his analysis of the claims concerning collective bargaining. Taking into account the change in the legal landscape, I conclude that the AEPA substantially impairs the capacity of agricultural workers to meaningfully exercise their right to bargain collectively. This is not surprising in that the legislation itself was drafted with an apparent view to complying with the more limited interpretation of s. 2(d) set out in Dunmore.\(^{26}\)

Essentially, because the AEPA did not protect the “right” to collective bargaining which had just been articulated in BC Health, it fell short of the new constitutional mark. Winkler CJO wrote:

> It is important to note what is missing from the AEPA. It does not impose an obligation on employers to bargain in good faith – or, indeed, to bargain at all – with an employees’ association. The AEPA does not include mechanisms to resolve either bargaining impasses or disputes regarding the interpretation or administration of the collective agreement. Another notable omission from the legislation is that it does not preclude the

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\(^{24}\) S.O. 2002, c. 16 (“AEPA”).

\(^{25}\) (2006), 79 OR (3d) 219.

\(^{26}\) Fraser supra n.12 at p. 485-84.
formation of multiple employees’ associations within a single workplace, purporting to simultaneously represent employees in that same workplace with similar job functions.27

For Canadian labour lawyers, “brought up [in Keynes’s words] as most of us have been”, that paragraph is very easy to read. In it, Winkler CJO is saying four things:

1. The AEPA imposes no duty to bargain.
2. The AEPA provides for no mechanism to resolve a bargaining impasse – i.e., a failure to reach a collective agreement. That is, it contains no strike/lockout mechanism, or any alternative such as binding interest arbitration.
3. The AEPA provides for no mechanism for resolving disputes during the term of a collective agreement – i.e., “rights” arbitration.
4. The AEPA does not provide for exclusive union representation – i.e., for the idea that once the majority of a group of workers have chosen a union to represent them, that union represents everyone in the group, including the minority who voted against it, to the exclusion of all other unions and indeed to the exclusion of the right of the workers themselves to bargain individually with their employer.

Canadian labour lawyers know by the time they finish reading this early paragraph that Winkler CJO clearly intends to correct this situation by supplying these elements he identifies as “missing”. And that is precisely what he does. But we should start by noting what is not on his “missing” list: unfair labour practice protection against employer interference with the exercise of organizational rights. That was ordered in *Dunmore*, and it the only part of our familiar legislative setup that the AEPA had given to agricultural workers in response to *Dunmore*. When we look back at Winkler CJO’s “missing” list, we see that the first item – the duty to bargain – is simply that part of the Wagner Act model which *BC Health* had very recently required to be put in place. But *Dunmore* and *BC Health* nowhere address items 2 to 4 on the list – dispute resolution mechanisms and the idea of exclusivity – and in fact *BC Health* explicitly refrained from deciding on item 2. Winkler CJO therefore does not simply apply the actual result in *BC Health*; he applies the logic and methodology of that decision, and he does so with skill and gusto.

Items 2 to 4 on the “missing” list are in fact very basic elements of the Canadian version of the Wagner model. They represent, once again, a classic cut and paste job from that model. It is a very large cut and paste, and as we would expect from Winkler CJO, a very well defended one. What he says about the notion of exclusivity, for example, encapsulates classic North American labour law thinking and writing. He outlines the complex justification of that unusual idea as clearly as Derek Bok did a generation ago in his famous article, “Reflections on the Distinctive Character of American Labor Laws”28. Winkler CJO undertakes, achieves and justifies an extension to the agricultural sector of virtually the whole Ontario Labour Relations Act29. Are

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27 Ibid at 488.
29 Or the Canadian Wagner Act model as represented or expressed by the OLRA.
there any other major components in the OLRA, or in other Wagner-model legislation across the
country, that agricultural workers do not have after his decision?30

As I have indicated, giving those workers access to the OLRA is indeed the right thing to do in response to their unjustifiable exclusion from the OLRA. It is the right remedy – an equality remedy, really - for the violation of their right to equality in the distribution by the legislature of the protection of the fundamental freedom of association. But -- and this is the main point -- it would be much better, and much less worrisome, if Winkler CJO could admit that this is what he is doing. Instead, he makes the same set of plainly hard to credit claims that the Supreme Court of Canada made in BC Health.31 The first of those claims is that this is not an equality case but a section 2(d) case. Second is the claim that the content being given to the section 2(d) right is “non-statutory”, and is “independent” of the statute.32 Third is the claim that the court will not tolerate applications which merely seek “access to a particular statutory regime”?33 Fourth is the claim that the court is not constitutionalizing a “particular statutory scheme”.

At some point, all of these claims just collapse in the face of the objective evidence provided by what the judges do rather than what they say they are doing. In BC Health and in Fraser, the courts speak as if they have found find a fig leaf in the idea that they must “contextualize” the meaning of the freedom of association. But what this turns out to mean is that we must take the Canadian statutory model and all of its familiar parts, along with their familiar justifications, as providing the content of section 2(d) and the JLC. In a very transparent way, that simply contradict Winkler CJO’s four claims, which are at the core of what our courts say they are doing.

The really interesting question is why our courts are offering us such weak and transparently self-contradictory reasoning. I believe the answer must be that they are convinced they cannot let the idea of equality out of the cage in which they have incarcerated it -- the cage of non-discrimination law, which (as our American constitutional law colleagues have long put it) is limited to the protection of “discrete and insular minorities”34. This is indeed a part, a subset, of the idea of equality. It is the subset that rests on the idea of “prohibited reasons” – a very short

30 The union’s duty of fair representation? It is not really missing; the Supreme Court has held that such a duty also exists at “common law”. Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057, [1990] 1 S.C.R. 1298. The question in the text is actually a question worth pondering.

31 BC Health, supra, n. 10 at paras. 166-167.

32 Winkler CJO offered this summary in Fraser, at p.495:
In Dunmore and B.C. Health Services, the Supreme Court recognized that the freedom to organize and the right to bargain collectively exist independently of statute. In Dunmore, the court referred to the “fundamentally non-statutory character” of the freedom to organize, which “exists independently of any statutory enactment”. Also, in B.C. Health Services, McLachlin C.J. and LeBel J. wrote that “[t]here is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature”. They continued, “[t]he history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society”.

33 Ibid.

34 But see the use of this language by Rothstein J. in Baier v Alberta [2007] 2 SCR 673, cited by Winkler CJO in Fraser, at p. 506.
list of reasons which are in fact best conceived of as legally “deemed irrelevant”. They are only a part of the world of irrelevant reasons for making distinctions, whether in the distribution of jobs or legal rights. But the idea of equality is not so limited. Its domain is that of all of the irrelevant reasons for exclusion, a domain which is much broader. The fact that the subset of prohibited reasons is a part of the domain of irrelevant reasons, does not mean that other irrelevant distinctions do not exist. The law in question in Fraser provides a clear example of such a distinction. Or, consider this example: what if a legislature passed a law excluding not agricultural workers, but Wal-Mart workers? (Do not say that no legislature would do this; it was done to Michelin workers in Nova Scotia.\(^{35}\) What would then be the result, on the current emaciated view of equality?

The idea of equality is at the core of the idea of legality. It stands against senseless exercises of power. It speaks rationality to arbitrariness. Our Charter is not, and should not be read down to be, “merely” the Human Rights Code (important as that part of the domain of the idea of equality may be.)\(^{36}\)

The problem seems to be that the Supreme Court believes that acknowledging the truth about the idea of equality would be to open a Pandora’s Box of a constitutional guarantee. But that need not worry us in connection with the equality argument which our courts say they reject in theory but apply in practice in these alleged section 2(d) cases. In constitutional law, the idea of equality has historically had two prime roles – not only the protection of discrete and insular minorities, but also the protection of fundamental rights. The latter is the basic idea that the unequal protection of fundamental rights calls for judicial scrutiny just as much as the unequal distribution of other entitlements or opportunities (such as jobs) according to prohibited reasons. What is really going on in Dunmore, BC Health and Fraser, in my view, is the extension of our idea of equality to the protection of a fundamental right. Our judges (correctly) cannot resist the instinct to undertake this specific, limited and legitimate extension. But, simultaneously, they cannot see and articulate the limits of this new venture. As a result, they are stalked by the fear of an unbridled approach to the idea of equality, even though that idea is a very basic and pervasive element of our idea of both law and justice. Thus we end up in our current world, where judges apply the idea of equality but do not say so. Karl Llewellyn said, rightly, that “covert tools are never reliable tools”\(^{37}\). Once again, as we tally up the unfortunate side effects of this specific use of covert tools – not the least of which is the constitutionalization of “exclusivity” and other elements of the Wagner Model – we can appreciate the deep truth of that remark. Such elements


\(^{36}\) This eviscerating of our constitutional guarantee of equality was carried out under the conceptual fog created by simultaneously claiming to be establishing an equality jurisprudence which protects real, substantive equality (as opposed to mere “formal” equality). I am uncertain what to make of this. Will it eventually be seen as a diversionary tactic? Or is it simply conceptual confusion? There is much confusion here because the distinction between real and formal equality, something rightly dear to the hearts of labour lawyers, is a matter separate from the scope of our concerns. It is a point about the depth and seriousness of our concerns, not their scope and domain. We can see this in Fraser itself - the problem with the legislation was that it was a sham – formal, not real, equality in the instantiation of the freedom. What the workers involved really wanted to obtain was real equality of instantiation - ie what other workers have. This is the claim the Court actually responded to, but could not say so.

may be an important part of today’s statutory scheme, and may demand extension to excluded categories of workers on the basis of the idea of equality, but they fall far short of meriting constitutional entrenchment in their own right.

There is much else that can be said about Fraser. Others will write at length about the impact of constitutionalizing the idea of exclusive representation. Not so long ago, some our best minds were making just the opposite argument— that the idea of exclusivity contradicted section 2(d). And the idea survived constitutional death by only the slimmest of judicial margins and justifications. Now we are told that far from contradicting the Charter, exclusivity is guaranteed by it. This is remarkable in itself. The reality is that in the cases we are discussing, no one challenged the idea of exclusivity, and no one relied upon it. There was no need either to condemn it as inconsistent with the Charter or to grant it the status of a constitutional guarantee. All the courts had to do was to say that exclusivity is part of the local (“contextual”) way we instantiate freedom of association in Canada and that it is unfair to so protect that fundamental freedom for some but not all, in the absence of a good reason for so doing.

IV  Roy Adams’ Dilemma

Roy Adams has been an untiring Canadian advocate of labour rights as internationally recognized human rights. He is also a tenacious critic of the Wagner model, seeing it as a very inadequate expression of the fundamental rights to associate and to bargain collectively. When Dunmore was decided, he immediately saw what he called its “radical potential” to advance both of these causes. He has also defended vigorously the decision in BC Health, especially the Supreme Court’s use of international law in general, and ILO law in particular, to establish the meaning of section 2 (d) of the Charter with respect to collective bargaining rights. After

38 Beatty, Putting the Charter to Work (McGill-Queens, 1987).

39 Other of our leading thinkers were making parallel non-constitutional arguments even earlier. See, for example, Adell, “Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles Be Lowered?” in G. England (ed.), Essays in Labour Relations Law, CCH Canadian, 1986, p. 3 (reprinted, Queen's Industrial Relations Centre Reprint Series, no. 60).

40 In In Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211 (see especially the judgment of LaForest J.).


Dunmore and BC Health, it looked like things were going very much his way. Then comes Fraser. Trouble at mill for Adams.\textsuperscript{45} Why? This requires some steady focus.

First, as we have seen, the Supreme Court may have been a bit ambiguous in BC Health about the role of international law and about just how the Court was using the decisions of the CFA, and to a lesser extent the other ILO “supervisory” bodies, to determine the meaning of our Charter\textsuperscript{46}. Adams, in contrast, is very clear. He starts with the Court’s statement that the “Charter should be presumed to provide at least as great a protection as is found in the international human rights documents Canada has ratified”\textsuperscript{47}. He then asserts that “[i]n the international system the ILO has been given the task of developing international labour law”.\textsuperscript{48} This leads him into a close doctrinal reading of ILO “jurisprudence”, especially CFA commentary on complaints with respect to collective bargaining rights. In Adams’ eyes, these “decisions” define what international labour law is. The result? CFA decisions constitute the “floor for workers’ rights in Canada”.\textsuperscript{49} So, to take but one example of how this logic plays out on a specific issue, Adams concludes that, given what the Court said in BC Health about the Charter having to take international law as a minimum, the Court “must constitutionalize the right to strike.”\textsuperscript{50} Why? Because the CFA has held that the right to strike is an essential part of freedom of association (even though the word strike is not contained in the relevant Conventions.) In other words, according to Adams, the CFA writes the meaning of section 2(d) of the Charter.

This position has the virtue of being clear. But not much else. Let us remind ourselves first that Adams has staked out an argument that skates across large areas of very thin legal ice. I cannot mention them all in this essay, but let us consider two points. Adams admits that CFA decisions are not binding and not authoritative within the ILO legal system (nor are the decisions of the Committee of Experts), and that it is not a judicial body. This is perfectly clear.\textsuperscript{51} The CFA is, in ILO terminology, a “political” body. Unlike the Committee of Experts (also not authoritative, also not mentioned in the ILO constitution, but composed of, in the main, of distinguished jurists) CFA members do not have to be lawyers, let alone jurists (although the Governing Body (GB) does not have a rule excluding its members who are lawyers from being put forward by their constituencies). It has nine members – 3 each from the workers, employers, and government “groups” of the Governing Body - plus, since 1978, an “independent” (ie chosen

\textsuperscript{45} Adams, “Fraser v Ontario and International Human Rights: A Comment” (2009), 14 CLELJ 380. (Adams, “Fraser”).

\textsuperscript{46} See supra n. 7.


\textsuperscript{48} Ibid.

\textsuperscript{49} Id. at 91.

\textsuperscript{50} Id. (emphasis added).

\textsuperscript{51} But Adams argues that it does not matter, because “over the years [the CFA] has acquired a quasi-judicial character” See his “Reply to Brian Langille”, supra note 9, at p 115. His authority for this assertion this is an ILO publication written by ILO lawyers. I am afraid more is needed to make his point - and if it were indeed true, it would be unfortunate. See Langille, “The True Story”, (2005), 16 EJIL 405.
from outside the GB) Chair who is now, and has been for some time, a labour law academic. It is a committee of a political body (the GB) and reports to that body. It reaches its decisions by consensus. As important as the work of the CFA is, the CFA is not designed for constitutional legal analysis and this fact alone should give us pause before we hand over the interpretation of our constitution to the CFA, as Adams would have us do. I return to this point below.

Second, Adams has to get around the unfortunate truth that Canada has not ratified Convention 98, the ILO’s core convention on collective bargaining. He attempts to do so by making the common legal error of claiming that we are nonetheless bound by Convention 98 and by the “decisions” of the CFA under its provisions, because of the logic of the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work. But this is wrong. Not only does the Declaration’ letter fail to achieve that legal result; its very purpose is to achieve the exact opposite. The whole point of the 1998 Declaration was precisely to liberate the world from the ILO’s supervisory legal system and from all of the detailed jurisprudence under it, including that of the CFA. 52 The Declaration aimed to put in place another way of “doing” ILO “law” – by “promotion” of basic principles, not “enforcement” of the legal details of ILO Conventions as understood by bodies such as the CFA or the Committee of Experts. That is why some very well-known human rights experts, including Philip Alston, dislike it – precisely because they see that this new ILO way of doing business embodied in the Declaration detaches its “principles” from “the anchor of the ILO’s painstakingly constructed jurisprudence in relation to these rights” 53. But that is precisely what the Declaration sets out to do, and does.

These may seem to Adams to be merely technical points. They are not; they are real barriers to the success of his detailed legal argument. But there is another important fault line in Adams’ thinking – one that is internal to his reasoning and is revealed in his reaction to Fraser. He approves of Dunmore and BC Health, but disapproves of Fraser. Is this possible to do in a principled way?

Adams is a fan of Dunmore and BC Health because he believes them to constitutionalize particular parts of our Wagner model -- in BC Health, the employer’s duty to bargain in good faith and in Dunmore the basic unfair labour practice provisions -- with which he agrees and which he believes (wrongly, in my view, regarding the duty to bargain) is demanded by ILO law. But he disapproves of Fraser, which treats as constitutional necessities a number of other elements of the Wagner Act model with which he has long disagreed -- especially exclusivity and majoritarianism. This is a move he believes to be inconsistent with ILO (ie CFA) law.

First, take Fraser. Adams dislikes it because it plumps for constitutional status for exclusivity and majoritarianism -- very peculiar elements of the Wagner model of which he has long disapproved. Then look at BC Health, where the Supreme Court constitutionalized a very

52 That system is in any event believed by insiders and outsiders alike to be “in difficulty”. See Langille “The True Story”, supra, n. 51.

53 Philip Alston, “Core Labour Standards and The Transformation of the International Labour Rights Regime” (2004), 15 EJIL 457 at p. 494. Or, put in another way, the Declaration (again in Alston’s words (ibid., at p. 518) contains “principles that are effectively undefined and have been deliberately cut free from their moorings in international law which in turn were based on many years of jurisprudential evolution”. See also my reply, “The True Story” supra n.51.
peculiar element of the Wagner Act model of which he does approve – an employer duty to bargain in good faith. Is such cherry picking among the elements of that model permissible? Would it still be a model at the end? Aren’t these two ideas intimately related? (Isn’t the duty to bargain the statutory “reward/trade off” (non–existent at common law) which it is the very purpose of the statute to give only to unions who now have to, and do, obtain majority support?) As we have noted above, exclusivity, majoritarianism, and a real legal duty to bargain in good faith are alien to most labour law systems outside of North America. Few of the ILO’s member states have heard of any of them, let alone all three. Would it not be strange if the ILO maintained that one or two of them were required and one or two prohibited by ILO law? The truth of the matter, in my view, may be that all three look at least a little suspect under some of the sweeping, elaborate and perhaps not altogether consistent jurisprudence surrounding the relevant ILO norms. But the CFA, not a judicial but a political body, has held that they are all permissible nonetheless. They are not required by ILO law – that would have huge implications for all of the ILO’s non-Wagner-model” member states – but neither are they prohibited (which would have huge implications for Canada and the US). They are simply tolerated. A very pragmatic outcome, you might think, rather than a principled one – and I think that you would be right. (We could also note another very real part of the CFA’s political nature and approach here. One of the three “worker” positions on the CFA is, informally and as result of decisions internal to the Workers’ group, occupied by a representative of the AFL-CIO. Given that reality, it seems unlikely that the CFA will ever reach a consensus that the Wagner Act model’s most basic ideas violate ILO norms.)

What is becoming clear is that there is a key distinction which Adams elides, and has to elide, to get his desired results. In spite of the fact that ILO law (as interpreted by the CFA) does not impose a duty to bargain, but simply notes and tolerates it, Adams wishes to treat that duty as required by ILO law -- and thus, on his theory that the CFA writes the content of our section 2(d), as being constitutionally required in Canada.54

In Adams’ treatment of Fraser, in contrast, the elision occurs in the opposite direction. He treats exclusivity, which the CFA also notes and tolerates, as being prohibited by ILO law and thus as being constitutionally suspect in Canada. This is a trickier point to see, because Adams seems to believe that it is possible to permit a system of exclusivity and majoritarianism but also require legal recognition of what he calls minority unions – but that is not possible. Adams’ critique of Fraser makes clear his view that Canadian courts are now bound to apply CFA/ILO “law” on minority unionism. That is, even if an election is held and only a minority of employees vote for the union, the employer is nonetheless bound to recognize the “minority union” for those employees who belong to it. This is because the ILO committees believe in minority unionism. So too, Adams argues that no matter what our labour boards say or, apparently, what the rules of Canadian federalism are, Wal-Mart workers at “all stores across Canada”55 have the right to negotiate with their employer. These assertions should give Canadian labour lawyers pause.56

54 See Adams’ treatment of BC Health, supra, n. 47.

55 Adams, supra n.47 at.87.

56 According to Adams himself, they did give pause to the Canadian labour movement and the federal NDP (as well as to the Green Party.) – Adams, supra n 47.
They must lead to the conclusion, must they not, that the entire apparatus of the Wagner model – bargaining units determined by the labour board, elections in which the majority rules, the existence of a duty to recognize and bargain only if the union gets a majority, and so on -- is inconsistent with the interpretations given to ILO norms? This would mean, on Adams’ argument, that it is all unconstitutional. The conflict here between international and Canadian law is complete. Yet Adams does not follow his own argument to its (dramatic) conclusion. How does he avoid doing so?

Well, Adams’ faith in the CFA is nothing if not complete. He is of the view that the Wagner Act model of “majoritarianism” and “exclusivity” are valid under ILO law because the ILO committees have said that they are. His writes as follows:

One of the most basic ILO principles on freedom of association is that all workers have a right to organize and to bargain collectively with their employers through agents of their own choice. Although majoritarian exclusivity denies a representative of their own choosing to those workers in a designated bargaining unit who are opposed to the certified agent, the ILO committees have nevertheless approved the system as a reasonable limit on the right to organize and bargain collectively.

What is one to think of this argument? Probably the same thing that comes to mind when we learn that the CFA has opined that the Wagner model’s compulsory duty to bargain is not prohibited by, and is consistent with, the ILO’s commitment to “voluntary” collective bargaining. In other words, whatever the CFA is up to, it involves a rather broad, flexible, pragmatic, and “political” approach. What ILO veteran J-M Servais told us in his very useful book looks to be true – that the CFA is engaged in the very different and very pragmatic exercise of international arbitration and mediation, leading to the remedy of what may be called “political cajoling” and often just having to take, or just taking, ‘as given’ the elements of various domestic legal systems. It may well be that some of the basics of the Wagner model are perhaps inconsistent with some of the larger interpretations given to ILO norms by the CFA, often in other and non Wagner Act contexts. But we should not expect the political body which is the CFA to say as much to the United States and Canada.

There are more problems yet with Adams’ approach. After the passage quoted above, he continues:

57 Adams does cite Committee of Experts decisions as well as CFA decisions. However, as he explains, the results are the same and are coordinated by the same group of ILO staff lawyers, so the Committee of Experts defers to and does not contradict the CFA.

58 Adams, “Fraser” supra n.45 at p. 383.

59 Langille, “Can We Rely?” supra n.4.


61 But not necessarily with the basics as actually set out in the Conventions. See also Beatty, supra n.35 for the argument that there are simply two different conceptions of freedom of association in play.
However, the ILO’s position is that if workers decide to organize outside of the bounds of statutory majoritarian exclusivity, their organizations still ought to be recognized for bargaining purposes. In its 2006 Digest of Decisions, the Committee on Freedom of Association had this to say: “Where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members.” On this reasoning, employees who want to be represented by minority unions have an international human right to bargain collectively, in Canada and elsewhere. In *B.C. Health Services* the Supreme Court said that Canadian workers should enjoy “at least the same level of protection” as that provided by “international conventions to which Canada is a party.”

Would the CFA say this about a case from a Wagner Act Model jurisdiction? This is at least unclear – it may be that much and perhaps all of this CFA “law” has arisen from non Wagner Act Model jurisdictions where bargaining units, certification, a legal duty to bargain, “single location of a single firm” level bargaining, and so on, are not part of legal reality and in which contexts “minoritarianism” could means something very different. But assume, for the purpose of argument, that the CFA would say this to Canada. Then I would not be sure what to make of it from a legal point of view. We cannot have, as Adams seems to think we can, one rule to the effect that employers only have to recognize and bargain with “majority” unions – which is what majoritarianism is all about -- and another rule which says the contrary. A legal system can’t do that -- and still be a legal system.

Adams believes that what we have in the Wagner model is what he calls “exclusive majoritarian exclusivity”. He wants us to have “majoritarian exclusivity,” but not “exclusively”. This is very confused. “Non-exclusive majoritarian exclusivity”, which Adams favors, is not a possibility, it is a contradiction.

There are two important ideas at play here – majoritarianism and exclusivity. Take majoritarianism first. To obtain bargaining rights under the Wagner model, a union must demonstrate majority support in a constituency called a bargaining unit. It is “in the nature of things”, as the late Innis Christie explained in his famous Michelin decision, that a third party must decide the contours of the constituency (a task which falls to the labour board). Christie, as so often, was exactly right; it could not be otherwise. If the union were allowed to decide whom it wished to represent – i.e., those who happened to support it – that would not be majoritarianism; it would be unanimity. It is in the grammar of majoritarianism that if you do not have a majority in a constituency, you lose. You cannot, and do not, “win” the minority. If you have majoritarianism this simply follows. You simply cannot have majoritarianism co-existing

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62 Adams, “Fraser”, supra n.45 at p. 383-4. The 2006 CFA Digest of Decisions is available on line at http://www.ilo.org/ilolex/english/digestq.htm If one digs back in the CFA database the sole CFA authority for this quoted assertion appears to me to be a 1983 case from Jamaica, cited in the 1996 Digest (which does not seem to be available on line) involving a refusal of a Minister of Labour to order a vote in contested circumstances, and referring simply to this assertion as the view of the Committee of Experts, but not identifying any particular source.

63 Ibid at p. 380.

64 [1979] 3 Can. LRBR 429.
with “minoritarianism”. That would miss the whole point of majoritarianism, and it would also miss the whole point, fundamental to our understanding of the Wagner model, of the importance of public (i.e., labour board) determination of the dimensions of the unit. If the CFA was in the game of sticking to hard legal principle, which in my view it is not, it would have to say, in light of what is has said about minoritarianism, that majoritarianism must go. But it does not say that. It says that majoritarianism is permitted. If that is so, then it seems to me that those jurisdictions which deploy the notion of majoritarianism do not and cannot also have “minoritarianism”.

The second idea, intimately and grammatically related to majoritarianism, is that of “exclusivity”. This is the idea, basic to the Wagner Act Model, that if a union does obtain the support of a majority in the unit, it then represents everyone in the unit – even those who “voted” against it (i.e., it represents both the minority and the majority). The CFA tolerates this. But how can it be tolerated on a principled basis, given its views, at least as defended by Adams, on minority unions? Why does it not trample the freedom of association rights of the minority? Why is it that the minority’s rights suddenly come into view and deserve protection only if the union does not get a majority – which the passage from the CFA quoted above by Adams reveals to be his view of the CFA’s position? It does no good to say, “Well, the employees have a representative if the union wins a majority, so we should not feel sorry for the minority in such cases.” That could just as well be said if the union was imposed on the minority by the government, or the employer, or someone else, rather than by their co-workers in the majority. What is at stake here, according to Adams, is freedom of association and the free choice of representatives. From the minority’s point of view, its freedom in that regard has been violated in both cases – just by two different culprits. So you cannot have it both ways, as Roy Adams says the CFA does. You must either stick to your guns on majoritarianism and exclusivity or give them up. You cannot have your majoritarian/exclusivity cake and eat minoritarianism too. You have to choose.

We might get that conclusion from the CFA if a hard question about minority unions was asked in a Wagner Act Model jurisdiction, but maybe not. But, given its composition and its mandate, it is unlikely, and perhaps unfair to expect, that they will create a completely coherent international jurisprudence on these issues given the different systems which have to be confronted. It is far more reasonable to expect the CFA to be better at the more manageable task of identifying very basic wrongs which are wrong everywhere, and then dealing with each detailed domestic system in a pragmatic fashion and on its own terms, within that very basic framework. This is why we should not delegate, as Adams would have us do, our Charter’s meaning to the CFA. Charter reasoning has to be just that – principled. The assorted positions

65 This is also revealed in other ways, such as the alertness of our labour boards to pure gerrymandering, “sweeping in”, or “pyramiding” on the part of unions who have an incentive to try to be certified for the largest unit of which their total number of supporters (x) constitute a majority. (x+(x-1)).

66 But, recall, this does not mean that the Wagner Act model is inconsistent with the principles to which Canada is committed under the ILO Declaration and our Charter, such as “freedom of association”. That is an entirely different matter. There are many ways of instantiating that ideal. So, and to be clear, I think the CFA is right. The basics of the Wagner Act model are tolerated by basic ILO law as expressed in the relevant Conventions and in the 1998 Declaration. But that conclusion leads to others - like the ruling out of minority unionism with a duty to recognize and bargain attached. That is simply inconsistent with the conclusion that majoritarianism/exclusivity is permitted,
which the CFA’s pragmatic stance makes available clearly have clearly tempted Adams to cherry pick from them. But our constitutional courts should not be so tempted.

We can now see clearly the dilemma which, as a result, Adams has created for himself. He is thrilled that the Supreme Court of Canada has come around to his view about labour rights as international human rights. He also wants us to import ILO law lock, stock, and detailed barrel. But that turns out to be too large a commitment. So he is forced, and seems to be content, to live with the obvious contradictions this visits upon us if we at the same time try to maintain our own local way of doing business. But our constitutional courts should not be. Nor should our courts overlook the critical distinctions between what is constitutionally condemned, what is constitutionally guaranteed, and what is constitutionally simply tolerated as neither condemned nor guaranteed.  

In my view, most of the fundamentals of our labour law system (duty to bargain, majoritarianism, exclusivity, the strike ban, compulsory rights arbitration, etc) all fall into this important latter category. These ideas are “tolerated” and compatible with “freedom of association” both as a fundamental ILO norm and as a fundamental freedom under the Canadian Charter. Both constitutionally and internationally they are neither condemned nor guaranteed. They are part of simply one among many local ways of legally instantiating and making concrete that abstractly expressed freedom.

V Conclusion: Here are four legal ideas – which ones play together well?

The four legal ideas are:

1. The Charter guarantee of freedom of association.
2. The idea of “contextualizing” this Charter freedom to the history, values, and realities of Canadian collective bargaining, i.e., to the Wagner Act model. (As the Supreme Court of Canada said we must do in BC Health, and as Winkler CJO does so powerfully in Fraser.)
3. The idea that (as Adams puts it) we are bound (or as the Supreme Court puts it) we are to be persuaded by ILO jurisprudence regarding that freedom, especially the jurisprudence of the CFA.

and you cannot have it both ways. Elsewhere full blooded minority unionism may make more sense. Note: in Canada there can be minority unionism in a limited sense (not intended by Adams as I read him). In fact the Wagner Act Model contemplates and protects it. An unhappy minority of employees, represented by a union they voted against, have all their statutory rights to join another union and to organize to have that union displace the current majority union. So too, a minority who voted for a union, and lost, have all their rights, subject to some timing rules, to try to obtain a majority “next time”. This is all anticipated and protected by the Act through unfair labour practice and other provisions. (Moreover, an employer can voluntarily agree to recognize a union.) But there can be no minority unionism in the following sense - there can no duty on the employer to recognize and bargain with anything but a majority union. That is the point of the system.

67 In the Alberta labour board case referred to above in n.14 a certain feature of our familiar regime – the “Rand Formula” – goes, in one fell swoop, from being an infringement, albeit justified, of s.2 (d) (Lavigne) to a guaranteed right under s.2 (d). I am indebted to Robert Charney for pointing out this case to me.

68 But not, for example, unfair labour practices prohibiting for example the firing of those who join a union.
4. The Charter guarantee of equality.

Which of these ideas play well together?

In *BC Health*, the Supreme Court articulated the view that we can believe in 1, 2, and 3 -- all at once. But this is not possible, and it is the virtue of *Fraser* to make that clear. As *Fraser* shows, and as Adams’ strong negative reaction to that case also shows, his interpretation of the CFA’s view of the world is (or at least should be seen to be, on any principled legal analysis) in real and large conflict with our local and contextualized instantiation of freedom of association, - - even though it is not the CFA’s job to say as much. If we are serious in legal terms, we really do have to choose between the “CFA model” as interpreted by Adams and the “contextualized/Wagner model”. We cannot have both. As Roy Adams makes plain with clear distaste, Winkler CJO opts for “contextualized/Wagner”, big time.

In my view, on the facts of *Fraser*, the contextualized/Wagner option (i.e., giving Ontario agricultural workers the Wagner model) is the right result, but Winkler CJO chooses it for the wrong reasons. We need the fourth legal idea – the idea of equality – to get to that option. In other words, the idea of equality is the proper vehicle for contextual thinking. Contextualization is “built into” that idea -- is part of its very “grammar.” Its logic is this. We are entitled to *what others have been given* and we, for no good reason, have been denied. Equality is always relative (that is, contextualized) to what has happened to others -- to what is really going on in the world. That is how the Wagner model should enter into these cases. You cannot make this local way of respecting and protecting a fundamental freedom available just to some and not to others, unless you have a good reason for excluding those others. That is a deep legal wrong. It is identified and precluded by the idea of equality.

So, the two ideas that we *can* choose (and in my view, that we *must* choose) in order to have a coherent and sensible constitutional labour law are 2 and 4. Contrary to what *BC Health* says, we cannot have 1, 2 and 3. But there is a residual question: can we simply have 1 and 2? The answer is no. This is the deep point which calls for more elaboration than I have offered here, but we can see clearly in *Fraser* one very important dimension of the thinking behind it. The result of contextualizing via section 2(d), rather than via section 15(1), is to constitutionalize the Wagner model, and (incidentally) to do so at just the point when most serious labour law thinkers have severe doubts about whether that model has any future at all. This is a very real problem. We should do our best to avoid it, and we can indeed avoid it if we abandon the covert tools currently being used, if we pursue the passive virtue of deciding only as much as needs to be decided in these cases, and (almost as a bonus) if we treat our Charter’s promise of equality with the respect it deserves. Only ideas 2 and 4 – contextualizing the *Charter* freedom of association to our history and our system of collective bargaining, and applying the *Charter* guarantee of equality – play well together.