Freedom of Association and the Procedural Right to Collectively Bargain: From *Health Services* to *Fraser*

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Abstract

In 1987 the Supreme Court of Canada released three decisions concurrently that collectively became known as the "Labour Trilogy", which generally stood for the proposition that the Charter s. 2(d) freedom of association did not include the right to strike. In 1990 the Supreme Court of Canada released its reasons in Professional Institute, which stood for the proposition that the Charter s. 2(d) freedom of association did not include the right to collectively bargain. Fourteen years after the Labour Trilogy was decided, the Supreme Court signalled a shift in its interpretational views concerning the Charter s. 2(d) freedom of association in the context of labour when it released its reasons in Dunmore. The Court favourably discussed international and democratic human rights principles, and left open the possibility of its future interpretation of the Charter s. 2(d) freedom of association as mirroring Canada's international commitments to honour International Labour Organization principles including the right of workers to organize, bargain collectively, and strike. Part II of this paper briefly reviews the Labour Trilogy, Professional Institute, and Dunmore.

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

After Health Services, various courts and administrative tribunals applied the principles as set out by the Court in that case. Part IV of this paper briefly discusses six of the most important of those decisions that arose out of Canada's common law jurisdictions.

On 29 April 2011 the Supreme Court of Canada released its reasons in Fraser. Part V of this paper discusses the Fraser decisions at both the Ontario Court of Appeal and Supreme Court of Canada levels. The Supreme Court of Canada's reasons for judgment were fractured into four divergent camps, with aspects of the reasons that could be described as surprising, if not shocking, departures from established precedent and judicial convention.

Part VI concludes the paper with the observation that the law in Canada as it stands after Fraser remains as it was after Health Services, although arguably with a higher "impossible" standard of proof placed on Charter, s. 2(d) claimants, and the novel introduction of the procedural right to collective bargain being a "derivative right" under Charter s 2(d). Fraser also introduced uncertainty into previously certain principles of statutory interpretation.

Table of Contents

I. Introduction

In 1987 the Supreme Court of Canada released three decisions concurrently that collectively became known as the "Labour Trilogy",[1] which generally stood for the proposition that the *Charter*[2] s. 2(d) freedom of association[3] did not include the right to strike. In 1990 the Supreme Court of Canada released its reasons in *Professional Institute,*[4] which stood for the proposition that the *Charter* s. 2(d) freedom of association did not include the right to collectively bargain. Fourteen years after the Labour Trilogy was decided, the Supreme Court signalled a shift in its interpretational views concerning the *Charter* s. 2(d) freedom of association in the context of labour when it released its reasons in *Dunmore*.[5] The Court favourably discussed international and democratic human rights principles, and left open the possibility of its future interpretation of the *Charter* s. 2(d) freedom of association as mirroring Canada's international commitments to honour International Labour Organization principles including the right of workers to organize, bargain collectively, and strike. Part II of this paper briefly reviews the Labour Trilogy, *Professional Institute*, and *Dunmore*.

On 8 June 2007 the Supreme Court of Canada released its reasons in *Health Services*.[6] The decision represented a sea change in the Court's interpretation of the *Charter* s. 2(d) freedom of association in the context of labour. *Health Services* expressly reversed *Professional Institute* and some, but not all, of the law represented by the Labour Trilogy. The Court interpreted the *Charter* s. 2(d) freedom of association as including the *procedural* right to collective bargain; however the constitutional status of workers' right to strike was explicitly not addressed in the decision, leaving its status less certain. Part III of this paper briefly discusses *Health Services*.

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

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

[3] "2. Everyone has the following fundamental freedoms: …(d) freedom of association."

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

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

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

After *Health Services*, various courts and administrative tribunals applied the principles as set out by the Court in that case. Part IV of this paper briefly discusses six of the most important of those decisions that arose out of Canada's common law jurisdictions.

On 29 April 2011 the Supreme Court of Canada released its reasons in *Fraser*.[7] Part V of this paper discusses the *Fraser* decisions at both the Ontario Court of Appeal and Supreme Court of Canada levels. The Supreme Court of Canada's reasons for judgment were fractured into four divergent camps, with aspects of the reasons that could be described as surprising, if not shocking, departures from established precedent and judicial convention.

Part VI concludes the paper with the observation that the law in Canada as it stands after *Fraser* remains as it was after *Health Services*, although arguably with a higher "impossible" standard of proof placed on *Charter*, s. 2(d) claimants, and the novel introduction of the *procedural* right to collective bargain being a "derivative right" under Charter s 2(d). *Fraser* also introduced uncertainty into previously certain principles of statutory interpretation.

II. Pre-*Health Services*

The repatriation of Canada's constitution in 1982 finally entrenched a bill of rights in the form of the *Charter*[8] into Canada's constitutional law.[9] One of the constitutionally guaranteed rights/freedoms[10] is *Charter*, s. 2(d); *viz*. "Everyone has the … freedom of association."[11] The *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[12]

Even before the *Charter* became effective, there was speculation as to whether the constitutionally guaranteed freedom of association would encompass activities of trade

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[7] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] S.C.J. No. 20 at para 71 (QL) ["*Fraser*"].
[8] *Charter*, *supra* note 2.
[9] Peter W. Hogg, *Constitutional Law of Canada*, Student Ed. (Toronto: Thompson Carswell Ltd., 2004) at 5.
[10] The majority of the Supreme Court of Canada rejected the proposition "that the structure of the *Charter* reflects a rigid distinction between freedoms and rights": *Fraser*, supra note 7 at para 71.
[11] *Charter, supra* note 2, s. 2(d).
[12] *Ibid*, s 1.

unions and those workers they represent—the right to form associations, to collectively bargain with employers, and to strike.[13] The answer to the latter question was provided by the Supreme Court of Canada five years after the *Charter* in three decisions released concurrently that collectively became known as "The Labour Trilogy".[14] After the Labour Trilogy it was clear that the *Charter* s. 2(d) freedom of association in the context of labour did not guarantee the right of unionized workers to strike. But "there was still some doubt whether section 2(d) might include a right to bargain collectively, even if it did not include a right to strike. However, in the [*Professional Institute*[15]] case, the majority of the [Supreme] Court clearly rejected the argument that the right to bargain collectively was included in section 2(d)."[16] The result of *Professional Institute*, combined with the Labour Trilogy, was that the *Charter* s. 2(d) freedom of association in the context of labour guaranteed neither the right of unionized workers to bargain collectively, nor their right to strike. These propositions were followed by the Supreme Court in subsequent decisions until 2001 when the Court delivered its judgment in *Dunmore*.[17]

Dunmore provided: first, that the *Charter* section 2(d) freedom of association in the context of labour guaranteed the freedom of workers to organize collectively to embody the interests of individual workers, and that the effective exercise of this freedom may require the exercise of certain collective union activities, such as making collective representations to an employer, adopting a majority political platform, or federating with other unions; second, in certain contexts, governments have positive obligations to

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[13] "…in the Parliamentary hearings that took place before the adoption of the *Charter*. The acting Minister of Justice, Mr. Robert Kaplan, explained why he did not find necessary a proposed amendment to have the freedom to organize and bargain collectively expressly included under s. 2(*d*). These rights, he stated, were already implicitly recognized in the words 'freedom of association'": *Health Services*, *supra* note 6 at para 67.

[14] *Labour Trilogy, supra* note 1. For a discussion of the Labour Trilogy see E. Wayne Benedict, The Effect of *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* on the Labour Trilogy, *PIPSC v. Northwest Territories (Commissioner)* & Its Potential Effect on the Alberta *Labour Relations Code* (Paper delivered at the Alberta Federation of Labour Labour Day Seminar: "The Supreme Court, Charter Rights and Alberta Labour Legislation", Edmonton, 30 August 2007), [unpublished] at 4 – 19 [the "Effect of *Health Services*"].

[15] *Professional Institute, supra* note 2. For a discussion of *Professional Institute* see the Effect of *Health Services, supra* note 14 at 19 – 24.

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

[17] *Dunmore, supra* note 5. For a discussion of *Dunmore* see the Effect of *Health Services, supra* note 14 at 24 - 29.

include groups in protective labour legislative to enable them to exercise their freedom of association. However, the Court reaffirmed that it had repeatedly excluded the right to strike and collectively bargain from the protected ambit of *Charter* s. 2(d). Further, "*Dunmore* clarified three developing aspects of the law: what constitutes interference with the 'associational aspect' of an activity; the need for a contextual approach to freedom of association; and the recognition that s. 2(*d*) can impose positive obligations on government."[18] In *Dunmore* the Supreme Court adopted Dickson C.J.'s (dissenting) heavy reliance in the Labour Trilogy on Canada's international human rights commitments and international human rights jurisprudence as interpretive aids for the Court's *Charter* s. 2(d) analysis.

III. *Health Services*

The *Health Services*[19] case arose out of the very facts for which the ILO Committee on Freedom of Association censured the British Columbia Campbell government in its 2003 Report No. 330.[20] The issue before the Court in *Health Services* was the same general issue that a different panel of the Court had addressed in *Professional Institute*; *viz*. whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. In a reversal of its own jurisprudence on the point, foreshadowed in *Dunmore*, the Court held:

> …s. 2(*d*) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(*d*) of the *Charter*.[21]

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[18] *Health Services, supra* note 6 at para. 31. For a discussion of *Health Services* see the Effect of *Health Services, supra* note 14 at 29 – 37, 44 – 48.
[19] *Health Services, supra* note 6.
[20] International Labour Organization Committee on Freedom of Association, Report No. 330, Vol. LXXXVI, 2003, Series B, No. 1; see cases 2166, 2173, 2180 & 2196.
[21] *Health Services, supra* note 6 at para. 19.

The *Health Services* majority rejected the majority reasons in the *Alberta Reference*[22] and *Professional Institute*.[23] The Court provided the following guidance with regard to what aspects of collective bargaining do (and do not) fall within the protective ambit of the *Charter* s. 2(d) freedom of association in the labour context:

> …the suggestion … that s. 2(*d*) was not intended to protect the "objects" or goals of an association … overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in concert with others as the "object" of that association. [The] underlying concern—that the *Charter* not be used to protect the substantive outcomes of any and all associations—is a valid one. However, "collective bargaining" as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:
>
> > Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.
> >
> > ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 Food for Thought, at p. 8.)
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[24]
>
> …s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.[25]
>
> …*Dunmore* … stressed that s. 2(*d*) does not apply solely to individual action carried out in common, but also to associational activities themselves. …[T]he protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to … employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining…[26]
>
> Section 2(*d*) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association"

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[22] *Alberta Reference, supra* note 1.
[23] *Professional Institute, supra* note 4; see *Health Services, supra* note 6 at paras 20, 30, 78, 81, 86.
[24] *Ibid*. at para. 29; emphasis added.
[25] *Ibid*. at para. 87.
[26] *Ibid*. at para. 89.

> (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.[27]
>
> …the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. …the interference … must be substantial—so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.[28]
>
> To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. …denying the union access to the labour laws … designed to support and give a voice to unions … [a]cts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may … significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.[29]
>
> …the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion.[30]

Analyzing the *Health Services* decision is made difficult due to the fact that the BC government was both legislator and employer,[31] and due to the Court's use of the concept of "consultation" in at least four different contexts.[32] The Court does not

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[27] *Ibid*. at para. 90.
[28] *Ibid*. at para. 91.
[29] *Ibid*. at para. 92.
[30] *Ibid*. at para. 114.
[31] The majority in *Fraser*, *supra* note 7 at para 35 wrote about the facts in *Health Services*: "The government, directly or indirectly, was the employer. The government wanted to reduce costs by changing the structure of its employees' working arrangements in ways that would have been impermissible under the existing collective agreements. It chose to do so, not through collective bargaining to the end of altering those collective agreements, but by the simple expedient of legislation. In short, the government used its legislative powers to effectively nullify the collective agreements to its benefit, and to the detriment of its employees."
[32] The four contexts of "consultation" in *Health Services*: **(1) At the pure legislative phase (government as legislator has no obligation to consult)**: "Legislators are not bound to consult with affected parties before passing legislation" (*Health Services, supra* note 6 at para 157). **(2) However, whether the government did or did not consult prior to enacting the impugned legislation is relevant at the**

consistently differentiate expressly when it is referring to government in the context of employer or legislator, or in which context it is using the words "consult" or consultation." The *Health Services* majority provided the following legal tests:

> …determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.[33]
>
> …the essential question [in the first inquiry] is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively.[34]
>
> [The] sorts of matters [that] are important to the ability of union members to pursue shared goals in concert [include l]aws or state actions that prevent or deny meaningful discussion and

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minimal impairment stage of the *Oakes* s. 1 justification test: "On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored" (*Health Services, supra* note 6 at para 157). "In this case, the only evidence presented by the government, including the sealed evidence, confirmed that a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it" (*Health Services, supra* note 6 at para 158). **(3) Consultation is a component of the duty to bargain in good faith**: "Consistent with this, the *Canada Labour Code* and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith…" (*Health Services, supra* note 6 at para 99); "A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process…" (*Health Services, supra* note 6 at para 100); The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions…" (*Health Services, supra* note 6 at para 101). **(4) Whether *Charter* s. 2(d) is infringed (2nd stage of "substantial interference" test)**: "Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation." (*Health Services, supra* note 6 at para 93); "Both inquiries are necessary. If the matters affected [by the government action/legislation] do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation." (*Ibid* at para 94). "Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached" (*Health Services, supra* note 6 at para 109. This sentence is ambiguous; does the Court mean that the legislator imposed the legislation ["matter"] in violation of the legislator's duty of good faith negotiation; or that the legislator imposed the legislation ["matter"] and the legislation is in violation of the duty of good faith negotiation? The latter meaning is consistent with the other principles set out above, the former conflicts with them.).

[33] *Health Services, supra* note 6 at para. 93.

[34] *Ibid*. at para. 95.

> consultation about working conditions between employees and their employer [or] laws that unilaterally nullify significant negotiated terms in existing collective agreements.[35] [In other words,] failure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.[36]
>
> Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining—the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(*d*), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.[37]
>
> The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.[38]

In summary, the law in Canada as it stood after *Health Services* was: first, that the *Charter* s. 2(d) freedom of association in the context of labour guarantees the freedom of workers to organize collectively to embody the interests of individual workers, and the effective exercise of this freedom may require the exercise of certain collective union activities, such as making collective representations to an employer, adopting a majority political platform, or federating with other unions; second, in certain contexts, governments have positive obligations to include groups in protective labour legislative to enable them to exercise their freedom of association; third, s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*.[39] However, the Court explicitly declined to reconsider whether the

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[35] *Ibid*. at para. 96.
[36] *Ibid*. at para. 11.
[37] *Ibid*. at para. 97 [emphasis added].
[38] *Ibid*. at para. 98; citing principle H of the ILO principles concerning collective bargaining.
[39] *Ibid*. at para. 19.

right to strike falls within the protected ambit of *Charter* s. 2(d), given the factual context of *Health Services*.[40]

IV. Post-*Health Services*, Pre-*Fraser*

The ratio of the majority in *Health Services* marked a sea change in the Supreme Court's *Charter* s 2(d) jurisprudence, which in turn sparked *Charter* s 2(d) litigation across Canada. Some of the resultant jurisprudence follows.[41]

i) Royal Canadian Mounted Police[42]

The Mounted Police Association of Ontario and the B.C. Mounted Police Professional Association on behalf of all members of the RCMP applied for a declaration that their exclusion from the *Public Service Labour Relations Act*, S.C. 2003, c. 22, and the effect of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, s 96[43] substantially interfere with their *Charter* s 2(d) freedom of association. I.A. MacDonnell J. of the Ontario Superior Court of Justice wrote:

> **55** … members of the RCMP have a constitutional right to form an independent association for labour relations purposes, free of management interference or influence. Any attempt to interfere with the exercise of that right would infringe ss. 2(d) of the *Charter*. Further, subject to principles of majoritarian exclusivity, freedom of association in the labour relations context requires management not only to receive the representations of an independent association with respect to the conditions of employment but also to engage in good faith negotiations. That is,

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[40] *Ibid*. at para. 12. For a discussion of the right to strike in Canada see the Effect of *Health Services, supra* note 14 at 38 – 43.

[41] Quebec decisions are omitted, but there are decisions arising out of Quebec that applied/considered *Health Services*, including: *Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 501 c. L'Écuyer*, 2010 QCCRT 191, [2010] D.C.R.T.Q. no 194 (QL) (Quebec Labour Relations Board ruled that a provision of the *Labour Code* that effectively precluded the acquisition of collective bargaining rights by seasonal farm workers is a breach of *Charter*, s 2(d)); *Plourde v. Wal-Mart Canada Corp*., 2009 SCC 54, [2009] S.C.J. No. 54 at paras 55-57 (QL); *Confédération des syndicates nationaux c. Québec (Procureur general)*, 2008 QCCS 5076 (legislation substantially interferes with "negotiations and in the very existence of unions"; not saved under s 1: para 314); *Québec (Procureur général) c. Centrale des syndicats démocratiques (CSD)*, 2007 QCCS 5513, leave to appeal to QCCA granted, 2008 QCCA 161 (legislation substantially interferes with collective bargaining process and right to bargaining in good faith; not saved under s 1: para 387).

[42] *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, 96 O.R. (3d) 20, [2009] O.J. No. 1352 (QL) (SCJ) ["*RCMP*"].

[43] Establishes a separate employee relations scheme for members of the RCMP. Section 96 reads: "(1) The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters. (2)The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them."

> subject to s. 1 of the *Charter*, the freedom of association guaranteed to members of the RCMP carries with it a right to a process of collective bargaining. …
>
> **60** … the position … that requiring members of the RCMP to deal with management in relation to workplace issues through the SRRP[44] does not constitute a substantial interference with freedom of association is untenable for two reasons: (i) the SRRP is not an independent association formed or chosen by members of the RCMP; (ii) the interaction between the SRRP and management cannot reasonably be described as a process of collective bargaining. …
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> **75** … the current RCMP labour relations scheme denies members of the RCMP the freedom to form an independent association for the purpose of collectively bargaining in relation to workplace issues. …
>
> **77** … the source of the inability of members of the RCMP to exercise their freedom to engage in a process of collective bargaining is not ss. 2(1)(d) of the *PSLRA* [exclusion from the general labour relations regime] but rather s. 96 of the Regulations. Section 96 entrenches the SRRP as the sole entity through which members of the RCMP can collectively interact with management in relation to labour relations issues. …

MacDonnell J. went on to conclude that the s 96 was not saved under *Charter* s 1.[45] The Attorney General of Canada is appealing the decision. The appeal was adjourned pending release by the Supreme Court of Canada of its decision in *Fraser.* The Ontario Court of Appeal granted a stay of the declaration of MacDonnell J. striking down s. 96, expiring 30 days following the release of the Supreme Court of Canada's decision in *Fraser*.[46]

ii) *New Brunswick*[47] Casual Public Employees

Several public sector unions and individual casual employees of the government of New Brunswick challenged the constitutional validity of certain provisions of the *Public Service Labour Relations Act*, R.S.N.B., c. P-25, alleging they infringed *Charter* s 2(d). The impugned legislation excluded "casual employees" from the definition of

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[44] "Staff Relations Representative Program"—"it was created at the behest of management [and] the members have never been given the opportunity to decide whether it is the body within which they wish to associate for labour relations purposes" (*RCMP*, *supra* note 42 at para 63).

[45] The impugned legislation did not pass the minimal impairment branch of the Oakes justification test. "Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law": *Health Services, supra* note 6 at para. 138, citing *R. v. Oakes*, [1986] 1 S.C.R. 103 ["*Oakes*"].

[46] *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, 2010 ONCA 635. The stay expired 29 May 2011.

[47] *Canadian Union of Public Employees v. New Brunswick*, 2009 NBQB 164, [2009] N.B.J. No. 185 (QL) ["*New Brunswick*"].

"employee", and thus from the legislative protections afforded to "employees." P.C. Garnett J., of the New Brunswick Court of Queen's Bench, relied on the Ontario Court of Appeal's judgment in *Fraser ONCA*.[48] Garnett J. found that "'casuals' are a vulnerable group as were the agricultural workers in *Dunmore*" and that "[f]or many years the Province as employer has subjected 'casuals' to practices which can only be described as unfair. As a result, … the exclusion of 'casuals' from the protection of the *PSLRA* has had the effect of infringing their rights under s. 2(d) of the *Charter*."[49] Garnett J. held:

> **29** …"Casuals" do form a vulnerable group. Although they do not share all of the characteristics of agricultural workers as described in *Dunmore v. Ontario (Attorney General*) [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193 and *Fraser v. Ontario*, [2008] O.J. No. 4543, 301 D.L.R. (4th) 335, they do have unique characteristics which render them vulnerable. …
>
> **32** The Province, in its role as employer, has used the exclusion of "casuals" from the legislative protection of the *PSLRA* to create a subgroup of employees. The most egregious practice is that of requiring long-term casuals to take two weeks unpaid holidays every six months so that they will not reach the six month target and become "employees" under the Act. By using the definition in this way, the Province turns what is really full-time, long-term employment into "casual or temporary employment". As a result, the Province gets the benefit of experienced, skilled employees without having to provide the benefits they would receive as "employees".

The Province did not assert that the legislation is justified under s. 1 of the *Charter*,[50] and on 17 July 2009 the New Brunswick government announced it would not appeal the ruling allowing casual government employees to unionize.[51]

iii) *Old Dutch*[52] – Rand Formula

Alberta's *Labour Relations Code*[53] contains no mandatory Rand Formula.[54] Old Dutch refused UFCW Local 401's demand to include a Rand Formula provision in a renewal

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[48] *Ibid* at paras 47-51; Garnett J. considered *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, [2008] O.J. No. 4543 (QL), reversed, 2011 SCC 20 ["*Fraser ONCA*"].
[49] *New Brunswick*, *supra* note 47 at para 56.
[50] *Ibid* at para 63.
[51] The Canadian Press, "N.B. government won't appeal ruling to allow casual civil servants to unionize" (17 July 2009), online: Canada East <http://www.canadaeast.com/news/article/732165>.
[52] *Re Old Dutch Foods Ltd*., 188 LAC (4th) 289, 171 CLRBR (2d) 1, [2009] ALRBD no 56 (QL) ["*Old Dutch*"].
[53] *Labour Relations Code*, RSA 2000, c L-1.
[54] Also known as an "Agency Shop", the Rand Formula is a "union security arrangement, developed by Justice Ivan Rand in 1946, which provides for mandatory checkoff of union dues or their equivalent, but does not require employees to join the union as a condition of employment; legislative requirement in a number of Canadian jurisdictions" (Jeffrey Sack & Ethan Poskanzer, Labour Law Terms, A Dictionary of Canadian Labour Law (Toronto: Lancaster House, 1984) 125 [Sack & Poskanzer]); see also "Agency

collective agreement; the issue was bargained to impasse. The Union called a strike, which was long and acrimonious. The Union applied to the Alberta Labour Relations Board claiming that the absence of a statutorily mandated Rand Formula in the *Labour Relations Code* substantiality impaired the employees' Charter s 2(d) freedom of association, that thus, by bargaining that issue to impasse, the employer had breached its statutory duty to bargain in good faith.[55] The Labour Board wrote:

> **58** Given that the freedom of association now extends to protecting the process of collective bargaining and accepting that payment of dues to a trade union falls within the scope of this freedom, it would seem to follow that a Rand formula type of union security is included within the protection that s. 2(d) provides to the members of the Union to engage in the process of collective bargaining with the Employer. We so declare. But the Union is seeking more than a mere declaration of the rights it and those of its members employed at the ODF facility may possess. It advances a positive rights claim entitling it and its members to government action and, in particular, seeks appropriate amendments to the *Code* to require all employees in the bargaining unit to pay union dues. …
>
> **69** Although we have declared the absence from the Code of a statutory Rand formula provision is a violation of s. 2(d) of the *Charter*, we suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision.

The Board went on to declare that "the refusal by [Old Dutch Foods] to agree to a Rand formula is now considered by the Board to be a failure to bargain in good faith."[56]

The Attorney General of Alberta brought an application for judicial review of the Labour Board's decision on the basis that the tribunal exceeded its remedial jurisdiction by purporting to make a general declaration of invalidity.[57] The Union and Attorney General agreed to a form of Consent Order which would have quashed the Board's decision "to the extent (and only to the extent) that it includes or constitutes a declaration of general constitutional invalidity."[58] However, 29 employees of Old Dutch—not members of the Union—applied for intervenor status in the judicial review proceedings, with the object of having the Labour Board's decision quashed entirely, as they objected to paying union dues under the newly-bargained collective agreement; their application

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Shop" defined at 23. Justice Ivan Rand's seminal decision is *Ford Motor Co. of Canada v. U.A.W.-I.C.O.* (1946), 46 C.L.L.C. para. 18,001.

[55] *Labour Relations Code*, *supra* note 53, s 60.

[56] *Old Dutch, supra* note 52 at para 73.

[57] An implied result from its statement that it would "suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision."

[58] *Alberta (Attorney General) v. United Food and Commercial Workers Union, Local No. 401*, 2010 ABQB 455, [2010] A.J. No. 796 at para 5 (QL), reversed, 2011 ABCA 93, [2011] A.J. No. 317 (QL).

was granted by Lee J.[59] The Union appealed Lee J.'s order adding the Employees as parties.

Yamauchi J. heard the Attorney General's application and noted "The Employees agree that the ALRB's declaration should be vacated on the basis of the jurisdictional challenge advanced by the AG and on the basis that the ALRB erred in its constitutional analysis, which the Employees intend to argue at a later date."[60] Yamauchi J. held:

> **50** The ALRB did not have the jurisdiction to issue a general declaration of invalidity. To the extent that it purports to do so when paras. 67 and 69 of the November Decision are read together, that declaration is quashed. To be clear, the parties have not asked this Court to rule on whether the ALRB erred at para. 58 of the November Decision in deciding the question of whether "a Rand formula type of union security is included within the protection that [Charter] s. 2(d) provides to the members of... [this] Union to engage in the process of collective bargaining with... [this] Employer," and this Court makes no comment in relation to the ALRB's decision in that regard.

The Union's appeal of Lee J.'s decision granting intervenor status to the 29 minority employees was allowed.[61] In reaching its decision, the Alberta Labour Relations Board considered and relied on the Ontario Court of Appeal's judgment in *Fraser ONCA*.[62]

iv) Independent Electricity[63]

The unanimous Ontario Superior Court of Justice—Divisional Court allowed the judicial review application of the Independent Electricity System Operator seeking to quash the decision of the Ontario Labour Relations Board that had denied its application to be declared a "non-construction employer" under the Ontario *Labour Relations Act*, 1995. S.O. 1995, c. 1, Sched. A, s 127.2. The Labour Board had found *Labour Relations Act*, s 127.2 violated the *Charter* s 2(d) guarantee of freedom of association, and was not saved by s. 1. It held that "The effect of the challenged provisions is to terminate collective agreements negotiated by the Unions in respect of the IESO and to put an end to the

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[59] *Ibid*.
[60] *Alberta (Attorney General) v. United Food and Commercial Workers Union, Local No. 401*, 2010 ABQB 777, [2010] A.J. No. 1417 at para 18 (QL).
[61] *Alberta (Attorney General) v. United Food and Commercial Workers Union, Local No. 401*, 2011 ABCA 93, [2011] A.J. No. 317 (QL).
[62] *Fraser ONCA*, *supra* note 48; see *Old Dutch, supra* note 52 at paras 29, 50, 58, 65.
[63] *Independent Electricity System Operator v. Canadian Union of Skilled Workers*, 2011 ONSC 81, [2011] O.J. No. 941 (QL) ["*Independent Electricity*"].

Unions' existing right to engage in future processes of collective bargaining with the IESO."[64]

In allowing the judicial review application, the Superior Court of Justice wrote:

> **53** … The task for this Court is to determine whether s. 127.2, either in its purpose or effect, substantially interferes with the process of collective bargaining (*Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, at para. 60). …
>
> **62** … the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to "break the Unions". …
>
> **82** In the present case, there is a termination of collective agreements and bargaining rights acquired under the construction industry provisions, but, not because the Legislature seeks to prevent collective bargaining on certain issues. Rather, those rights are terminated because the employer is no longer a construction industry employer, and the Legislature has determined that those specialized provisions of the *LRA* are not appropriate for a non-construction industry employer. However, the employees of the employer are still free to seek certification or voluntary recognition under the general provisions of the *LRA*. There is no statutory restriction on their ability to bargain collectively on terms and conditions of employment with their employer in the future.
>
> **83** Again, the effect of the declaration is to terminate collective agreements and bargaining rights under a particular statutory regime. However, employees of the non-construction employer continue to have the right to organize and bargain with their employer under the general provisions of the *LRA*. While the IESO has no construction employees, in workplaces where construction employees are affected by a declaration, they continue to have the right to organize under the *LRA* and to bargain collectively (as in *Greater Essex*, for example). Therefore, I conclude that there has not been substantial interference with the process of collective bargaining.
>
> **84** However, even if there had been substantial interference with the collective bargaining. I would still not find a violation of s. 2(d). The Supreme Court in *Health Services* concluded that s. 2(d) would not be violated, despite a substantial interference with collective bargaining, if there were good faith negotiations or consultation with the unions before the legislation was enacted.[65] …
>
> **87** In my view, the present legislation does not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work. Therefore, I find there has been no violation of s. 2(d) of the *Charter*. …
>
> **91** If there has been a violation of s. 2(d) of the Charter, s. 127.2 of the LRA is nevertheless constitutional, as it is a reasonable limit within s. 1 of the Charter.

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[64] *Independent Electricity Market Operator*, [2009] O.L.R.D. No. 4330 at para 154 (QL).

[65] This proposition is incorrect. The majority in *Health Services* was clear that "Legislators are not bound to consult with affected parties before passing legislation…" (*Health Services, supra* note 6 at para 157); what the majority in *Health Services* wrote on the point raised by the Superior Court of Justice is: "If…the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation" (*Health Services, supra* note 6 at para 94)—it is the legislative changes that must preserve a process of consultation and good faith negotiation for those changes to pass the second "inquiry … into the manner in which the measure impacts on the collective right to good faith negotiation and consultation" (*Health Services, supra* note 6 at para 93).

Affected unions have applied for leave to appeal the Superior Court of Justice decision to the Ontario Court of Appeal.[66]

v) *AUPE v AHS*[67] – Alberta Health Regions Consolidation

The government of Alberta passed legislation to organize health care operations on a province-wide basis rather than a multiple region basis. The legislation created four province-wide bargaining units to be represented by one bargaining agent each, and with four provincial collective agreements. "One of the effects [was] to extinguish the bargaining rights of [various unions] without conducting representational votes of the affected employees";[68] others were cancellations of existing certifications and collective agreements. Negatively affected unions and individual members challenged provisions of the legislation to the Labour Board,[69] arguing they unjustifiably infringed s. 2(d) of the *Charter* and thus were of no force or effect and did not permit the Labour Board to cancel their certifications or collective agreements.[70] Applying the legal principles from *Health Services*, the Labour Board concluded:[71]

> 1) The Impugned Provisions do not nullify operative terms of collective agreements without meaningful consultation. The Regulation preserves existing collective agreements and binds AHS to their terms until receiving collective agreements come into force through good faith collective bargaining or an award by the Board.
>
> 2) The Impugned Provisions preserve the process of good faith consultation and negotiation. Section 11 of the Regulation imposes a duty to bargain in good faith to negotiate terms and conditions of employment for all employees in the bargaining unit.
>
> 3) Alberta was not under an obligation to consult with affected parties before introducing the Impugned Provisions. Labour relations are enhanced when significant developments are discussed among affected parties. However, the nature of the changes contained in the Impugned Provisions do not impose a duty on Alberta to engage in meaningful consultation before introducing the legislation.

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[66] Ogilvy Renault LLP, "Bargaining Rights of Unions Not Absolute" (19 April 2011), online: Publication <http://www.ogilvyrenault.com/en/resourceCentre_11174.htm#_edn1> at FN ii.
[67] *Re Alberta Health Services*, 176 C.L.R.B.R. (2d) 163, [2010] A.L.R.B.D. No. 9 (QL) ["*AUPE v AHS*"].
[68] *Ibid* at para 18.
[69] The Alberta Labour Relations Board is statutorily empowered to consider all questions of constitutional law: *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006, s 2 passed pursuant to the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3.
[70] *AUPE v AHS*, *supra* note 67 at para 19.
[71] *Ibid* at para 148.

> 4) If Alberta had a duty to engage in meaningful consultation before introducing the Impugned Provisions, the consultation process it engaged in satisfies the duty in this particular context.
> …

The Labour Board mentioned, but did not rely on the Ontario Court of Appeal's decision in *Fraser ONCA*.[72] Belzil J., of the Court of Queen's Bench of Alberta, dismissed a judicial review application of the decision of the Alberta Labour Relations Board, applying the correctness standard of review.[73]

vi) British Columbia Teachers Federation[74]

At the same time the British Columbia government passed the legislation that was held to infringe *Charter* s 2(d) in *Health Services*, it introduced legislation that represented a new agenda for dealing with public sector workers in the fields of education. The BCTF brought a court challenge similar to the challenge brought by the health services' workers. The legislation dealing with teachers was modelled on the same provincial government theory as in *Health Services*, namely, that the government had the right to impose legislation which unilaterally overrode provisions of existing collective agreements, and which prohibited collective bargaining on the same subject matters in the future. The legislation was enacted without any prior consultation with the teachers' union. S.A. Griffin J., of the B.C. Supreme Court, wrote: "sections of the legislation challenged in this case at least equally interfere with collective bargaining as did the legislation in *Health Services*."[75] Griffin J. held that "In enacting ss. 8, 9 and 15 of *PEFCA*, and s. 5 of the *Amendment Act,* the government infringed teachers' freedom of association guaranteed by s. 2 (d) of the *Charter.* This infringement was not a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*."[76] *BCTF* was released on 13 April 2011, two weeks before the Supreme Court of Canada released its judgment in *Fraser*[77] on 29 April 2011. Griffin J. did not rely on the Ontario

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[72] *Ibid* at para 159, citing, *Fraser ONCA*, *supra* note 48.
[73] *Alberta Union of Provincial Employees v. Alberta Health Services*, 2010 ABQB 344, [2010] A.J. No. 579 (QL).
[74] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, [2011] B.C.J. No. 675 (QL) ["*BCTF*"].
[75] *Ibid* at para 190.
[76] *Ibid* at para 381.
[77] *Fraser, supra* note 7.

Court of Appeal's decision in *Fraser ONCA*.[78] The British Columbia government elected not to appeal Griffin J.'s decision to the B.C. Court of Appeal.[79]

V. *Fraser*

This part begins with a brief review of the Ontario Court of Appeal's decision in *Fraser ONCA*[80] released on 17 November 2008, which all of the above-referenced decisions considered and/or relied upon, except *BCTF*.[81] It then considers the reasons of the Supreme Court of Canada in *Fraser*,[82] in allowing the appeal of the Court of Appeal's decision. The facts upon which *Fraser* was decided are a continuation of the facts underlying *Dunmore*.[83] The impugned legislation under consideration in *Dunmore* totally excluded agricultural workers from Ontario's statutory labour relations scheme. Historically, they had always been excluded except for the period when they were covered by the short-lived statute which the impugned legislation repealed. Writing for seven of the nine justices in the majority, Bastarache J. held that "the total exclusion of agricultural workers from the *LRA* violates s. 2(d) of the *Charter* and cannot be justified under s. 1."[84] In response to *Dunmore*, the Ontario government enacted the *AEPA*,[85] which still excludes agricultural workers from Ontario's general *Labour Relations Act*[86] but provides certain protections for organizing.[87] After failing to engage factory farm employers in collective bargaining on behalf of farm employees following passage of the *AEPA*, the United Food and Commercial Workers Union Canada ("UFCW") and individual agricultural workers brought an application disputing the constitutionality of the *AEPA*. The application judge dismissed the *Charter* challenge. After the decision of

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[78] *Fraser ONCA*, *supra* note 48.
[79] Rob Shaw, "B.C. government will not appeal teachers class-size judgment", Victoria Times-Columnist (5 May 2011) online: Victoria Times-Columnist <http://www.timescolonist.com/business/government+will+appeal+teachers+class+size+judgment/4733906/story.html>.
[80] *Fraser ONCA*, *supra* note 48.
[81] *BCTF, supra* note 74.
[82] *Fraser, supra* note 7.
[83] *Dunmore, supra* note 5.
[84] *Ibid.* at para. 2.
[85] *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 [the "*AEPA*"].
[86] *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A.
[87] *Fraser ONCA*, *supra* note 48 at para 5.

the application judge, but before the appeal was heard by the Ontario Court of Appeal, the Supreme Court issued its judgment in *Health Services*.

i) The Ontario Court of Appeal Decision

W.K. Winkler C.J.O., writing for the unanimous Ontario Court of Appeal, saw the central issues on appeal as being "whether the impugned legislation violates s. 2(d) of the *Charter* by failing to provide agricultural workers in Ontario with sufficient statutory protections to enable them to exercise (a) their freedom to organize and (b) their right to bargain collectively."[88] Winkler C.J.O. held "the application judge correctly found that the *AEPA* provides the minimum requirements necessary to protect the appellants' freedom to organize",[89] but that "[i]n light of the combined effect of *Dunmore* and *B.C. Health Services,* … the *AEPA* breaches s. 2(d)"[90] in relation to "the right to bargain collectively"[91] and that "the violation of s. 2(d) is not saved under s. 1 of the *Charter*."[92]

The *AEPA* "protects" the following "rights of agricultural employees":[93] "1. The right to form or join an employees' association; 2. The right to participate in the lawful activities of an employees' association; 3. The right to assemble; 4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment; 5. The right to protection against interference, coercion and discrimination in the exercise of their rights."[94] The *AEPA* mandates that "[t]he employer shall give an employees' association a reasonable opportunity to make representations [orally or in writing[95]] respecting the terms and conditions of employment of one or more of its members who are employed by that employer";[96] and that "[t]he employer shall listen to the representations if made orally, or read them if made in writing";[97] and if made in writing, "give the association a written acknowledgment that

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[88] *Ibid* at para 10.
[89] *Ibid* at paras 11, 36.
[90] *Ibid.*
[91] *Ibid* at paras 36, 108.
[92] *Ibid* at para 12.
[93] *AEPA, supra* note 85, s 1(1).
[94] *Ibid*, s 1(2).
[95] *Ibid*, s 5(5).
[96] *Ibid*, s 5(1).
[97] *Ibid*, s 5(6).

the employer has read them."[98] While the *AEPA* imposes a duty of fair representation on employees' associations,[99] it contains no express provision imposing a duty to bargain in good faith on either employees' associations or agricultural employers. However; intimidation or coercion to compel any person to become or refrain from becoming to be a member of an employees' association is prohibited,[100] and employers are prohibited from interfering with employees' associations[101] or interfering with employees' rights.[102] The *AEPA* establishes the Agriculture, Food and Rural Affairs Appeal Tribunal, the administrative tribunal empowered to adjudicate complaints alleging a contravention of the *AEPA*.[103]

The UFCW argued that by excluding agricultural workers from the *Labour Relations Act* and by subjecting them to the *AEPA*, the government violated *Charter* s. 2(d); specifically, it argued that the *AEPA*: failed to provide the necessary statutory protections to safeguard and facilitate agricultural workers' freedom to organize and their right to bargain collectively, including a statutory duty to bargain in good faith and provisions authorizing the selection of an exclusive bargaining agent on a majority basis; failed to provide sufficient protection against employer interference; and that it was enforced through a tribunal with no expertise in labour relations.[104]

Winkler C.J.O. reviewed the legal principles set out by the majorities in *Dunmore* and *Health Services*.[105] The Court held the effect of the *AEPA* was to substantially impair the ability of agricultural workers to exercise their right to bargain collectively.[106] The evidence showed that agricultural workers remain a vulnerable group with low skills, low education, low job mobility and low incomes,[107] and that given their vulnerability it has been virtually impossible for agricultural workers to organize and to bargain collectively

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[98] *Ibid*, s 5(7).
[99] *Ibid*, s 6.
[100] *Ibid*, s 10.
[101] *Ibid*, s 8.
[102] *Ibid*, s 9.
[103] *Ibid*, s 11.
[104] *Fraser ONCA*, *supra* note 48 at para 34.
[105] *Ibid* at paras 37-53.
[106] *Ibid* at para 66.
[107] *Ibid* at paras 67-69.

with their employers without statutory supports.[108] Winkler C.J.O. held that the *AEPA* fails to provide sufficient statutory supports to comply with *Charter* s. 2(d), and that:

> If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.[109]

Winkler C.J.O. wrote that "[w]ithout a statutory duty to bargain in good faith, there can be no meaningful collective bargaining process."[110] The Court allowed the appeal and declared that the *AEPA* was unconstitutional in that it substantially impaired the right of agricultural workers to bargain collectively because it provides no statutory protections for collective bargaining.[111] The Supreme Court of Canada granted leave to appeal the unanimous decision of Ontario Court of Appeal, which appeal was heard on 17 December 2009; the Supreme Court's judgment was released sixteen months later on 29 April 2011.[112]

ii) Majority – McLachlin C.J., and Binnie, LeBel, Fish and Cromwell JJ.

The majority saw the issue on appeal as being "whether the failure of the Ontario government to enact a positive statutory framework for agricultural workers modelled after the Ontario *Labour Relations Act* violates s. 2(*d*) of the *Charter* in a manner that cannot be justified by s. 1."[113] After reviewing the Court's early *Charter* s 2(d) jurisprudence, the majority noted that "the early cases affirmed that the core protection of s. 2(*d*) focusses on the right of individuals to act in association with others to pursue common objectives and goals",[114] but that:

> After *Dunmore*, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and

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[108] *Ibid* at para 70.
[109] *Ibid* at para 80.
[110] *Ibid* at para 81.
[111] *Ibid* at para 138.
[112] Note that after the Supreme Court heard the *Fraser* appeal, but before its judgment was released, the International Labour Organization's Governing Body approved the Committee on Freedom of Association's findings that the *AEPA* violates United Nations Conventions 87 and 98 relating to worker rights to freedom of association and collective bargaining; see ILO Governing Body, "358th Report of the Committee on Freedom of Association", 309th Session, Geneva, (November 2010), online: International Labour Office <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_146695.pdf> at 335-361.
[113] *Fraser, supra* note 7 at para 17.
[114] *Ibid* at para 25.

> that this right extends to realization of collective, as distinct from individual, goals. Nor … that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally … that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments.[115]

The majority purported to uphold and follow the majority decision in *Health Services*:[116]

> *Health Services* applied the principles developed in *Dunmore* and explained more fully what is required to avoid interfering with associational activity in pursuit of workplace goals and undermining the associational right protected by s. 2(d). Its suggestion that this requires a good faith process of consideration by the employer of employee representations and of discussion with their representatives is hardly radical. It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations. The protection for collective bargaining in the sense affirmed in *Health Services* is quite simply a necessary condition of meaningful association in the workplace context. …[117]
>
> By way of elaboration on what constitutes good faith negotiation, the majority of the Court stated:
>
> > Section 2(d) requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract (paras. 98, 100 and 101);
> >
> > Section 2(d) does not impose a particular process. Different situations may demand different processes and timelines (para. 107);
> >
> > Section 2(d) does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse (paras. 102-103);
> >
> > Section 2(d) protects only "the right ... to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method" (para. 91). …[118]

The majority was of the view that "*Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith."[119] On its reading of *Health Services*, the majority concluded that the Ontario Court of Appeal had "overstate[d] the ambit of the s. 2(*d*) right as described in *Health Services*"[120] in reading "*Health Services* as an affirmation of a particular type of

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[115] *Ibid* at para 32.
[116] *Ibid* at para 97.
[117] *Ibid* at para 43.
[118] *Ibid* at para 41.
[119] *Ibid* at para 51.
[120] *Ibid* at para 45.

collective bargaining, the Wagner model which is dominant in Canada."[121] According to the majority "*Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements."[122]

The majority set out the following legal test: "In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals";[123] "If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(*d*) right is established";[124] "The question here… is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(*d*) associational right."[125] Notably, the majority in *Fraser* did not refer to or apply the two-stage "substantial impairment" inquiry set out by the majority in *Health Services*,[126] rather it queried "whether the *AEPA* provides a process that satisfies this constitutional requirement", being "the right of an employees' association to make representations to the employer and have its views considered in good faith."[127]

While acknowledging that the *AEPA* does "not expressly refer to a requirement that the employer consider employee representations in good faith", the majority notes that the *AEPA* does not rule it out.[128] The majority holds that by "implication" the *AEPA* includes a requirement that the employer consider employee representations in good faith:[129] "… the *AEPA*, correctly interpreted, protects not only the right of employees to

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[121] *Ibid* at para 44.
[122] *Ibid* at para 47; see *supra* note 101 and accompanying text.
[123] *Ibid* at para 46.
[124] *Ibid* at para 47, 98.
[125] *Ibid* at para 48, 98.
[126] *Supra*, notes 33-38 and accompanying text.
[127] *Fraser, supra* note 7 at para 99.
[128] *Ibid* at para 101.
[129] *Ibid.*

make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. It follows that … the *AEPA* does not violate s. 2(*d*) of the *Charter*."[130]

iii) Minority, Concurring in Result – Rothstein and Charron JJ.

Rothstein J., writing for himself and Charron J., agreed with the majority on the outcome of the appeal, but on radically different grounds. Rothstein J. "reconsider[ed] the correctness of *Health Services* on his own motion, in the absence of a request from any of the parties that he do so, and without an opportunity for them to address the issue."[131] Rothstein J. held "the *AEPA* does not violate s. 2(*d*) of the *Charter*, but [because s]ection 2(*d*) does not confer a right of collective bargaining; nor does it impose a duty on employers to meet with employees and 'consider employee representations in good faith'."[132] Rothstein J. would have reversed *Health Services*. His lengthy reasons[133] culminated in the following "summary of the principles discussed":[134]

> 1. This Court may overrule its own precedents, but it should only do so where there are compelling reasons for doing so. In this case, such compelling reasons exist. Health Services involves Charter rights that are not susceptible to legislative correction, overruled a line of prior sound decisions, is unworkable and has been the subject of intense academic criticism.
>
> 2. *Health Services* erred for three reasons in concluding that s. 2(d) protects collective bargaining and obliges parties to bargain in good faith:
>
>   a. First, *Health Services* departed from sound principles established in this Court's precedents on the nature and scope of s. 2(d); specifically, it departed from the following five characteristics of s. 2(d):
>
>   i The purpose of s. 2(d) is to protect individuals rather than groups *per se*.
>   ii Section 2(d) protects freedoms not rights.
>   iii Section 2(d) does not empower the Court to privilege certain associations over others.
>   iv Section 2(d) does not afford constitutional protection to contracts.
>   v Section 2(d) is to be interpreted in such a way as to afford deference to the legislative branch in the field of labour relations.
>
>   b. Second, the reasons advanced in *Health Services* for protecting collective bargaining under s. 2(d) -- Canadian labour history, Canada's international obligations, and *Charter* values --

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[130] *Ibid* at para 107.
[131] *Ibid* at para 321, Abella J. (dissenting).
[132] *Ibid* at para 276.
[133] *Ibid* at paras 119 – 296.
[134] *Ibid* at para 275.

do not support conferring a constitutional right to collective bargaining and imposing a duty on employers to engage in collective bargaining.

c. Third, the majority's approach to collective bargaining in particular and s. 2(d) in general articulated in *Health Services* is unworkable. It extends constitutional protection to the duty to bargain in good faith without importing other aspects of the Wagner framework, and by purporting to protect the process of collective bargaining without also protecting its fruits, neither of which is tenable.

3. Section 2(d) protects the ability of individuals to form associations and to do in association what they can lawfully do alone. Because individuals are generally free to bargain with their employer individually, it follows that s. 2(d) must protect the decision of individuals to come together, to form a bargaining position and to present a common and united front to their employers. However, just as an employer is not obliged to bargain with an individual employee, s. 2(d) does not oblige an employer to bargain with a group of employees.[135]

The majority[136] and Abella J.[137] expressly rejected and rebutted Rothstein J.'s procedural approach, reasons for decision and his holding that *Health Services* is bad law and should be reversed.

iv) Minority, Concurring in Result – Deschamps J.

Deschamps J. agreed with the majority on the outcome of the appeal, but arrived there by reading down the majority ratio in *Health Services*. She noted that "in *Health Services*…the issue of an employer's duty to bargain in good faith was not even raised",[138] and that "the holding in *Health Services* does not have the broad scope being attributed to it by the majority in the case at bar and, in particular, does not extend to imposing a duty on employers to bargain in good faith."[139] She would have "restrict[ed] the *ratio* of *Health Services* to the questions actually raised and the answers actually given in that case,"[140] endorsing the following principles from the case:

1) the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment;
2) the right is to a process of collective bargaining—it does not guarantee a certain substantive or economic outcome or access to any particular statutory regime; and

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[135] *Ibid.*
[136] *Ibid* at paras 52-97.
[137] *Ibid* at para 321.
[138] *Ibid* at para 297.
[139] *Ibid* at para 299.
[140] *Ibid* at para 303.

3) the right places constraints on the exercise of legislative powers in respect of the collective bargaining process.[141]

Deschamps J. noted that "[a]lthough the right of employees to have their views considered in good faith may well flow from certain comments made in *Health Services*, they do not flow from the issues raised in that case."[142] She wrote:

> [In *Health Services*] it was in its legislative capacity—not as an employer -- that the government had interfered with the employee's rights. Therefore, the majority in *Health Services* did not need to comment on or make findings in respect of whether the government, as an employer, had a duty to negotiate in good faith. There was thus no need to impose a *Charter*-based duty to bargain on employers. *A fortiori*, there was no need to import, together with this duty, the good faith element that is one of the hallmarks of the Wagner model and that inevitably entails a number of statutory components. I cannot therefore agree with the majority in the case at bar that *Health Services* imposes constitutional duties "on governments as employers" (para. 73).

The majority expressly rejected Deschamps J.'s approach, writing she "adopts a narrow interpretation of the majority reasons in *Health Services*… In her view, it was unnecessary for the majority in that case to consider the duty to negotiate in good faith, and consequently argues that the passages of the majority judgment that discussed this duty were in *obiter*."[143] "…the majority decision in *Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith."[144]

v) Minority, Dissenting – Abella J.

Abella J. "fully endorse[d] the [majority's] discussion of *Health Services* [and] agree[d] with them that by including protection for the process of collective bargaining, *Health Services* enhanced the scope of 2(*d*) … beyond the formalism assigned to it by [the] Labour Trilogy…"[145] She did not agree that the *AEPA* met the new *Health Services* standard because she had "great difficulty with stretching the interpretive process in a way that converts clear statutory language and express legislative intention into a

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[141] *Ibid* at para 300.
[142] *Ibid* at para 306.
[143] *Ibid* at para 49.
[144] *Ibid* at para 51.
[145] *Ibid* at para 321, citing Labour Trilogy, *supra* note 1.

completely different scheme. The *AEPA* does not protect, and was never intended to protect, collective bargaining rights."[146] Abella J. wrote:

> In granting constitutional protection to the process of collective bargaining under s. 2(d), *Health Services* found the duty to consult and negotiate in good faith to be a "fundamental precept" (para. 97). This does not guarantee that a collective agreement will be achieved, but good faith bargaining does require that the parties meet, engage in a meaningful dialogue, and make reasonable efforts to arrive at a collective agreement (paras. 90 and 101). *Health Services* confirmed that this involves not only the employees' collective right, as confirmed in *Dunmore*, to organize and make representations, but also a corollary duty on the part of employers to meaningfully discuss, consult, and consider these representations…[147]
>
> …Since the applicable law for s. 2(d) is now found in *Health Services*, the *AEPA* must be scrutinized for compliance with its principles. And since, on its face, no bargaining or consultation is required by the *AEPA*, let alone the good faith bargaining *Health Services* set out as a minimal constitutional protection, the *AEPA* violates s. 2(d) of the *Charter*.[148]

vi) Comments on *Fraser*

a. Majority

The majority used the word "impossible" no less than 12 times in referring to the effect that must be shown of the impugned legislation (or absence thereof[149]) to prove a substantial interference with the freedom of association:

> [In *Dunmore*] Bastarache J. concluded that the absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible and therefore constituted a substantial interference with the right to associate guaranteed by s. 2(d) of the *Charter*.[150]
>
> …legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association.[151]
>
> …The *effect* of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association.[152]
>
> [In *Health Services* the] government employer passed legislation and took actions that rendered the meaningful pursuit of these goals impossible…[153]
>
> …Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters…[154]

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[146] *Fraser, supra* note 7 at para 322.
[147] *Ibid* at para 326.
[148] *Ibid* at para 331.
[149] *Ibid* at para 47.
[150] *Ibid* at para 31; emphasis added.
[151] *Ibid* at para 32; emphasis added.
[152] *Ibid* at para 33; emphasis added.
[153] *Ibid* at para 38; emphasis added.
[154] *Ibid* at para 42; emphasis added.

> …Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association. … the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals [155]
>
> …If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(*d*) right is established.[156]
>
> …The question here, as it was in [*Dunmore* and *Health Services*], is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(*d*) associational right…[157]
>
> ...*Dunmore*, as discussed above, established the proposition that legislative regimes that make meaningful pursuit of workplace goals impossible significantly impair…[158]
>
> …The essential question is whether the *AEPA* makes meaningful association to achieve workplace goals effectively impossible, as was the case in *Dunmore.* If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the right to meaningful association guaranteed by s. 2(*d*) of the *Charter* will have been limited.[159]

In fact, in *Dunmore* Bastarache J. for the majority wrote: "In my view, the evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity. …These dicta **do not require** that the exercise of a fundamental freedom be **impossible**, but they do require that the claimant seek more than a particular channel for exercising his or her fundamental freedoms."[160] Further, in reference to *Dunmore* the majority in *Health Services* wrote: "There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime"[161]—"next to impossible" is a high standard, but it is still lower than the "impossible" standard the majority in *Fraser* appears to have set out.

It appears that the *Fraser* majority has placed a higher—impossible—standard of proof on both positive and negative rights claimants alleging infringement of their *Charter* s 2(d) rights, which clearly was not the standard set out in *Dunmore* or *Health Services*. The effect of such an "impossibly" high standard is evident in the outcome of

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[155] *Ibid* at para 46; emphasis added.
[156] *Ibid* at para 47; emphasis added.
[157] *Ibid* at para 48; emphasis added.
[158] *Ibid* at para 62; emphasis added.
[159] *Ibid* at para 98; emphasis added.
[160] *Dunmore, supra* note 5 at para 25.
[161] *Health Services, supra* note 6 at para 34.

Fraser. The majority acknowledged that "[t]he the evidence shows that the [unions] attempted to engage employers in collective bargaining activities on a few occasions. On each occasion the employer ignored or rebuffed further engagement. The employers have refused to recognize their association and have either refused to meet and bargain with it or have not responded to the demands of the respondents."[162] The majority downplayed that evidence, calling it "scant",[163] and declared that "the union has not made a significant attempt to make [the *AEPA*] work."[164] Rather bizarrely, since it was only with the release of its judgment in *Fraser* that the unions, employers, employees and tribunal were made aware that the *AEPA* contains an "implied" requirement that the employer consider employee representations in good faith, the majority pointed out that the *AEPA* "provides a tribunal for the resolution of disputes",[165] and that "the *AEPA* specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention."[166] It stated that the employees and their unions had expended only "limited efforts to use the new protections of the *AEPA* [before they] mounted a constitutional challenge to its validity,"[167] and, surprisingly, that they "did not attempt to pursue remedies under the *AEPA*. Specifically, no recourse was made to the Tribunal set up under the Act to deal with complaints."[168] In other words, the majority chided the employees and their unions for failing to make a complaint to the Tribunal that the employers had breached the <u>implied</u> requirement that the employer consider employee representations in good faith <u>before</u> anyone knew there was such an implied requirement in the *AEPA*. As Abella J. points out: "[i]t strikes me as fundamentally contrary to our jurisprudence to invite the Tribunal to interpret its home statute in a way that contradicts the clear statutory language and legislative intent."[169]

The majority also wrote "the right of an employees' association to make representations to the employer and have its views considered in good faith is a <u>derivative</u> right under s. 2(d) of the *Charter*, necessary to meaningful exercise of the right to free

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[162] *Fraser, supra* note 7 at para 108.
[163] *Ibid* at para 109.
[164] *Ibid.*
[165] *Ibid.*
[166] *Ibid* at para 112.
[167] *Ibid* at para 6.
[168] *Ibid* at para 12.
[169] *Ibid* at para 342.

association."[170] The principle of employers' obligation to consider the views of employees' associations in good faith expressed as a "derivative" right under *Charter* s 2(d) is novel—such a proposition was not expressly discussed in either *Dunmore* or *Health Services*. The majority explained that "what s. 2(*d*) protects is *the right to associate to achieve collective goals*. Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(*d*) protects a right to collective bargaining."[171] "*Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion."[172] "[C]ollective bargaining is a derivative right, a 'necessary precondition' to the meaningful exercise of the constitutional guarantee of freedom of association."[173] Rothstein J. disagrees with the proposition of collective bargaining as a derivative right.[174]

The majority relied on *CLA*[175] for the "derivative right" proposition. In *CLA* the Court was considering the *Charter* s 2(b) freedom of expression:

> 30 The first question to be addressed is whether s. 2(b) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.
>
> 31 Determining whether s. 2(b) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(b) protection extends. …it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy* … The main question in this case is whether s. 2(b) is engaged at all. We conclude that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed more fully below, that in this case these requirements are not satisfied. As a result, s. 2(b) is not engaged.
>
> [Emphasis added].

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[170] *Ibid* at para 99; emphasis added.
[171] *Ibid* at para 46; emphasis added.
[172] *Ibid* at para 54.
[173] *Ibid* at para 66.
[174] *Ibid* at paras 194-201.
[175] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at para 30 (QL) ["*CLA*"].

If one attempts to reconcile the reasons in *CLA* with the majority in *Fraser*, the "derivative" right in the *Charter* s 2(d) context may include the following principles:

- ✓ *Charter* s. 2(d) protects is the right to associate to achieve collective goals; and
- ✓ Only where laws or government action make it impossible to associate to achieve collective goals by making such associations pointless, does the derivative right of an employees' association to make representations to the employer and have its views considered in good faith arise.

However, in *CLA* the Court held that since the derivative right (access to information in that case) did not arise, *Charter* s 2(b) freedom of expression was "not engaged." Query, then, whether this concept of collective bargaining in good faith as a derivative right may be unworkably circular. In other words, only where laws or government action are shown to make it impossible to associate to achieve collective goals by making such association pointless does the derivative right of good faith negotiations arise; but unless/until one can show that the derivative right of good faith negotiations arises, *Charter* s 2(d) is not engaged. "Where there is no reliance on freedom of association, there is no derivative right to require employers to bargain."[176] It will be interesting to see how future courts will deal with this concept of good faith collective bargaining being a right "derived" from the constitutional guarantee of freedom of association.

Finally, what may be the most surprising aspect of the majority's judgment is its implication of a requirement that the employer consider employee representations in good faith—the obligation to collectively bargain in good faith—into the *AEPA*. The majority's reading-in such a requirement appears to be outcome oriented decision-making. Recall that the issue, as the majority saw it, was "whether the *AEPA* provides a process that satisfies [the] constitutional requirement [necessary to meaningful exercise of the right to free association, being] the right of an employees' association to make representations to the employer and have its views considered in good faith."[177] On its

[176] *Fraser, supra* note 7 at para 66.
[177] *Ibid* at para 99.

face the *AEPA* contained no such requirement—the provisions of the *AEPA* "do not expressly refer to a requirement that the employer consider employee representations in good faith."[178] Therefore, the only way for the majority to uphold the *AEPA* according to its analysis of the law was to "imply" such a requirement into the statute—"[b]y implication, they include such a requirement."[179] The majority's reasons evidence a complete absence of principled statutory interpretation of the *AEPA* as has been previously mandated by the Court.

The Supreme Court of Canada "has repeatedly cited, and this across a wide range of interpretive settings, that the preferred approach to statutory interpretation is that set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'."[180] In fact, the Court has clearly stated that "[i]t is necessary, <u>in every case</u>, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if 'the words are ambiguous...'."[181] "Other principles of interpretation—such as … <u>the '*Charter* values' presumption—only receive application where there is ambiguity</u> as to the meaning of a provision."[182]

The majority does not cite or apply Driedger's modern approach to statutory interpretation. Rothstein J. notes: "to the extent this Court has recognized a '*Charter* values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations."[183] The majority makes no finding that the impugned provisions of the *AEPA* are ambiguous. All four Justices in the minority find that there is no ambiguity.[184] The majority writes: "<u>any ambiguity</u> in ss. 5(6) and (7) should be

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[178] *Ibid* at para 101.
[179] *Ibid*.
[180] *Marche v. Halifax Insurance Co*., 2005 SCC 6, [2005] S.C.J. No. 7 at para 54 (QL).
[181] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] S.C.J. No. 43 at para 30 (QL) ["*Bell ExpressVu*"]; emphasis added.
[182] *Ibid* at para 28; emphasis added.
[183] *Fraser, supra* note 7 at para 253, citing Iacobucci J. in *Bell ExpressVu*, *supra* note 181 at para 62; see also para 281.
[184] Rothstein J. for himself and Charron J. in *Fraser, supra* note 7 at paras 279-289 ("The words of s. 5 are unambiguous… These words could not be clearer": para 280); Deschamps J. in *Fraser, supra* note 7 at para

resolved by interpreting them as imposing a duty on agricultural employers to consider employee representations in good faith." The majority posits that if there is "any" ambiguity, such ambiguity should be resolved on certain interpretive principles;[185] however, the majority does not actually hold that there is any ambiguity. Yet the majority then goes on to apply "other principles of interpretation" that the Court has previously mandated "only receive application where there is ambiguity."[186] In the words of Rothstein J. the remedial approach of the majority is "entirely novel and unprecedented";[187] unprincipled and outcome-oriented could be added.

b. Rothstein and Charron JJ.

That Rothstein J. "reconsider[ed] the correctness of *Health Services* on his own motion, in the absence of a request from any of the parties that he do so, and without an opportunity for them to address the issue"[188] is "entirely novel and unprecedented" to use the words he directed at the majority; procedurally improper, disrespectful of the principle of *stare decisis*, and outcome-oriented could be added. This is particularly so in light of his own acknowledgment that "[i]t is not appropriate simply because of a change in the composition of the Court that precedent should be overturned, because of the views of newly appointed judges."[189]

Interestingly, if Rothstein J. had considered himself bound by the majority decision in *Health Services*—which he arguably was since *Health Services* was and remains the law—it appears from his reasons that he likely would have arrived at the same conclusions as Abella J. (dissenting). Rothstein J. acknowledged that "it is not possible to agree that there is no [obligation on agricultural employers to engage in compulsory collective bargaining] without overruling *Health Services*."[190] Rothstein J. wrote:

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308 (implicit in her reasons); Abella J. in *Fraser, supra* note 7 at para 322 ("Not only is there clarity of language, there is also clarity of purpose. The government's intentions to exclude collective bargaining were forthright": para 332).

[185] *Fraser, supra* note 7 at paras 101-107.

[186] *Bell ExpressVu, supra* note 181 at para 28; emphasis added.

[187] *Fraser, supra* note 7 at para 290.

[188] *Ibid* at para 321, Abella J. (dissenting).

[189] *Ibid* at para 130.

[190] *Ibid* at para 149.

> In the court below in this appeal, an experienced and eminent labour lawyer and now Chief Justice of Ontario, Winkler C.J.O., took the view that a constitutional right to meaningful collective bargaining must extend to two additional aspects: the principle of majoritarian exclusivity and a mechanism for resolving bargaining impasses and disputes regarding the interpretation and administration of collective agreements. Accordingly, he ordered legislation that would extend the missing protections to agricultural workers:
>
> > If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions to ensure that the right can be realized. At minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements. [Emphasis added; para. 80]
>
> Abella J. in her reasons finds that a right to collective bargaining for agricultural workers must include an enforcement and compliance mechanism to resolve bargaining disputes (at para. 339) and the statutory recognition of majoritarian exclusivity (at para. 343).[191] …
>
> …Winkler C.J.O.'s conclusion that a constitutional right to meaningful collective bargaining must include constitutionalizing elements of the Wagner model provides strong support for the proposition that, without these protections, compulsory collective bargaining is unworkable.[192]

If Rothstein J. had considered himself bound by the majority decision in *Health Services*, it appears he would have agreed with, and upheld the decision of Winkler C.J.O. for the Ontario Court of Appeal. It does not appear that he would have sided with the majority, because he rejected,[193] as did Abella J.,[194] the majority's interpretation of the *AEPA* as containing an *implied* obligation that employers consider employee associations' representations in good faith—the obligation to collectively bargain in good faith—in order to avoid finding a *Charter* breach.

c. Deschamps J.

Deschamps J.'s approach of reading-down *Health Services*—in light of the majority reasons in *Health Services*—seems as unprincipled and outcome-oriented as the majority's reading-in an implied obligation of good faith bargaining into the *AEPA*.

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[191] *Ibid* at para 257.
[192] *Ibid* at para 262.
[193] *Ibid* at paras 279-289 ("The words of s. 5 are unambiguous… These words could not be clearer": para 280).
[194] *Ibid* at para 322 ("Not only is there clarity of language, there is also clarity of purpose. The government's intentions to exclude collective bargaining were forthright": para 332)

d. Abella J.

Abella J.'s reasons adopts the majority's in relation to upholding *Health Services*—she respects the principle of *stare decisis*—but she correctly rejects the majority's unprincipled and outcome-oriented interpretation of the *AEPA*, and the dubious result following from it of finding the *AEPA* constitutional. As Rothstein J. noted, "it is not possible to agree that there is no [obligation on agricultural employers to engage in compulsory collective bargaining] without overruling *Health Services*. Abella J. also correctly rejects Rothstein J.'s unprincipled and outcome-oriented "overruling" of *Health Services* and the dubious result following from it of finding the *AEPA* constitutional. Abella J.'s reasons make the most sense in light of the facts and the law, which remains as set out in *Health Services*.

VI. Conclusion

In summary, the law in Canada as it stands after *Fraser* remains as it was set out in *Health Services* with the *Fraser* majority's added twists. The *Fraser* majority reaffirmed that *Charter* s 2(d) freedom of association protects employee associations' procedural right to collectively bargain. Such protection extends to "bargaining activities…in the labour relations context [including] good faith bargaining on important workplace issues."[195] Good faith bargaining on important workplace issues "is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer."[196] The *Charter* s 2(d) protection: "requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract"; "does not impose a particular process. Different situations may demand different processes and timelines"; "does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse"; and "protects only 'the right ... to a general process of collective bargaining, not to a particular model of labour relations, nor

[195] *Ibid* at para 40.
[196] *Ibid*.

to a specific bargaining method'."[197] The *Charter* s 2(d) protection applies to both positive and negative rights claims:

> One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the Charter to avoid unconstitutionality.[198]

However, the evidentiary burden on claimants pursuing *Charter* s 2(d) challenges appears to have been raised by the *Fraser* majority from a standard that does "not require that the exercise of a fundamental freedom be impossible"[199] or at most that it be "next to impossible"[200] to a standard that requires the claimant to prove that the government's measures (or lack of measures) make the exercise of the fundamental freedom of association "impossible."[201] The repercussions of this apparent change are unpredictable.

The *Fraser* majority's interpretative approach to the *AEPA* that ignores the Court's longstanding approach to statutory interpretation which, as it has previously written, is "necessary, in every case"[202] is a troubling precedent whose impact at the administrative tribunal and lower court levels is unpredictable. Similarly, the *Fraser* majority's conceptualization of "the right of an employees' association to make representations to the employer and have its views considered in good faith [as] a derivative right under s. 2(d) of the *Charter*"[203] and the fact that "[w]here there is no reliance on freedom of association, there is no derivative right to require employers to bargain"[204] is an aspect of the judgment that may have unpredictable effects in the future adjudication of *Charter* 2(d) litigation.

The fact that the Supreme Court of Canada reserved its decision for sixteen months following the hearing of the appeal, coupled with the apparent splits within the Court evident from the four divergent sets of reasons, in addition to the public (published) debate between the Justices as to process, law and outcome, all point to deep divisions within the Court in relation to the scope of *Charter* s 2(d). One might wonder if

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[197] *Ibid* at para 41.
[198] *Ibid* at para 42.
[199] *Dunmore, supra* note 5 at para 25.
[200] *Health Services, supra* note 6 at para 34.
[201] *Supra* notes 150-159 and accompanying text.
[202] *Supra* note 181 and accompanying text.
[203] *Fraser, supra* note 7 at para 99; emphasis added.
[204] *Ibid* at para 66.

such reasons for judgment portend a shift in the Supreme Court of Canada toward a more politicized and polarized court such as is seen within the United States Supreme Court, particularly with impending turnover of Justices within the former. While the procedural right to collectively bargain remains protected under the *Charter* s 2(d) freedom of association, its future as a constitutionally protected right is far from certain, but further litigation on the issue is.

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