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Revolution and Aftermath: *B.C. Health Services* and Its Implications

Robin K. Basu*

I. DISCLAIMER AND CONSTRAINTS

The thoughts presented in this paper are offered with a disclaimer and some limiting constraints that should be stated at the outset.

First, the disclaimer: the observations in this paper emerge from the crucible of defeat in litigation. The writer was counsel for an intervening provincial Attorney General in the *B.C. Health Services*¹ case. Although the province's intervention was agnostic about the wisdom of the British Columbia legislation at issue, it was opposed to the expansion of section 2(d) of the *Canadian Charter of Rights and Freedoms*² that was called for by the health care unions. The intervention focused on the implications for both public and private sector labour relations, section 2(d) and section 15(1) jurisprudence and Charter jurisprudence generally. The government side was successful in resisting the section 15(1) Charter claim in *B.C. Health Services*, but the decision on section 2(d) represents a set-back for government's ability to set public policy without the spectre of constitutional litigation and judicial intervention.

Second, the writer is a practising government counsel and his views are necessarily informed by the perspective of being "in government", and thus, of being aware of the challenges governments and their advisers confront as a result of constitutional uncertainty. The writer's

* Counsel, Constitutional Law Branch, Ontario Ministry of the Attorney General. The views and doubts expressed in this paper are the writer's own and are expressed in his personal capacity only. They are not to be taken as the views of the Government of Ontario. The writer is indebted to his very smart colleagues and friends, including in particular Robert Charney, with whom he has spent much time trying to tease out the meaning and implications of the brave new s. 2(d) world.

¹ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*B.C. Health Services*"].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

perspective is that of someone whose job it is to try to assist government achieve its public policy objectives within the ambit of constitutional limits. When constitutional limits cannot be delineated with a tolerable degree of certainty, governments and their advisers are naturally frustrated.

Third, governments face pressing labour issues, in both the public and private sectors, virtually every day. As counsel to government on these live issues, the writer cannot speak his mind freely on all the implications raised by *B.C. Health Services*. As a result, the writer may be somewhat more reserved here in elaborating the dangers of the *B.C. Health Services* revolution in labour and public policy than he is when discussing the matter with his colleagues.

II. AN UNSATISFACTORY REVOLUTION

It was immediately recognized that the decision in *B.C. Health Services* represents a revolution in the Supreme Court's thinking about section 2(d) and labour relations.

As with revolutions in general, however, after the initial euphoria — or panic — associated with dramatic and perhaps unexpected change, there are inevitable questions about what the future holds. In the case of *B.C. Health Services*, these questions come from all quarters: organized labour, management (both public and private sector) and government itself.

Like a revolution, *B.C. Health Services* appears to be more a rejection of the old order than an articulated vision of the future. It is hard to discern what comes next, where we are headed. The jurisprudential structure of the past has been swept away, with very little guidance as to what is expected to replace it. We do not know if the Court was unable to give us better guidance because the justices were unable to come to agreement on a direction forward and the judgment we have is the best achievable consensus. It is possible that they did not offer more as it was not necessary to do so to dispose of the case. Another possibility is that the judgment was crafted to create legal uncertainty for unions, employers and government, so as to encourage these parties to bargain their differences in lieu of litigating or legislating. If this latter possibility is in fact the case, only time will tell whether the gambit will succeed.

III. THE ROOT OF THE PROBLEM

We begin with what the writer believes to be at the root of the problems posed by the *B.C. Health Services* decision. It is a fundamental misconception that treats the activity of collective bargaining as an exercise of *freedom*. From this misconception the problems and unresolved questions of the decision arise.

With *B.C. Health Services* the Supreme Court has taken an activity, collective bargaining, that was thought to be part and parcel of a comprehensive statutory regime — with correlative rights and obligations, and a fair measure of statutory prescription (some would call it coercion) — and reinterpreted it as the exercise of a fundamental freedom under the Charter.

Yet if a formal amendment process had been undertaken to extend constitutional protection to the modern *statutory role* of organized labour in collective bargaining (or if the matter had been given thorough consideration when the Charter was enacted),³ this writer posits that such constitutional protection would most likely *not* have found expression as a fundamental freedom, *i.e.*, in section 2 of the Charter. The fundamental freedoms — of conscience, religion, expression, association, peaceful assembly — are quintessentially liberal protections.⁴ Protections for the modern statutory role of organized labour — at least as far as collective bargaining is concerned — are not. Collective bargaining is, to put it simply, a poor fit in section 2.

If a considered decision had been made to include collective bargaining rights under the Charter, they would likely have been included in a separate section, or group of sections, entitled Labour Rights, or Labour Protections or Collective Bargaining Rights. Such provisions would have specified with some degree of particularity: (a) who is the right holder (a union member, union, or some other collectivity); (b) to what extent do the labour rights impose correlative

³ That is, consideration beyond the motion before the Special Joint Parliamentary Committee to add to s. 2(d) the words “including the freedom to organize and bargain collectively”, which was defeated by a vote of 20-2. See Dianne Pothier, “Twenty Years of Labour Law and the Charter” (2002) 40 Osgoode Hall L.J. 369, at 371. It was in opposing this motion that the Acting Minister of Justice made a comment upon which the Court has now placed so much weight: *B.C. Health Services*, *supra*, note 1, at para. 67. See discussion below.

⁴ Despite some halting steps towards the recognition of “positive rights” within s. 2(b) and 2(d), s. 2 rights are still generally, and the writer would submit correctly, understood as restraints on government authority and action: *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.), *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter “*Dunmore*”].

obligations on governments and private sector actors; (c) what is the relationship between various labour rights holders — what are their mutual rights and obligations; (d) what is the relationship between collective agreements and democratically enacted laws; and (e) what limits, including the economic and budgetary constraints of private and public sector actors, may legitimately affect protected labour rights.

What we have instead, as a result of the Court's reinterpretation of collective bargaining as an exercise of fundamental freedom, is that the Charter has effectively been amended by judicial decision to add an entirely new breed of "fundamental freedom", constitutionally guaranteeing what was formerly only the statutory role of organized labour. Indeed, based on some of the Court's comments it is possible that what has been inserted in section 2(d) of the Charter is a nascent constitutional labour code — albeit one whose terms, rather than being spelled out clearly in the manner of the *Labour Relations Act*,⁵ must be discerned by a mix of extrapolation, inference and conjecture.

In the writer's respectful view, the nine operative words of section 2(d) — "Everyone has the following fundamental freedoms: ... (d) freedom of association" — cannot do this much work. Neither is section 1, certainly as it has been interpreted to date, a well-crafted tool for delineating the circumstances in which the public interest or even balanced labour policy can take priority over collective bargaining rights.

IV. SOME UNION ACTIVITIES ARE AN EXERCISE OF FREEDOM OF ASSOCIATION

The misconception about collective bargaining begins by mixing up those activities of labour unions that truly are exercises of freedom of association with those that unions undertake pursuant to a statutorily assigned role.

No one doubts that organizing efforts by a labour union to grow its membership are associational. Unions attempt to persuade individuals to join them in common cause to achieve a variety of goals. Where an individual has a choice as to whether or not he or she wishes to establish, join, or remain in, a union, this is clearly an exercise of freedom of association, and this is no different in respect of any voluntary association, whether it be a political party, a trade association, a lobby group or a social

⁵ In Ontario: *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A.

or other club. State interference with such organizing activities (“the freedom to establish and maintain an association”) engages section 2(d). This is not controversial, and was easily recognized by the Court from the early days of its section 2(d) jurisprudence.⁶

Similarly, if the group pursuit of an activity is prohibited or restricted, whereas the individual pursuit of the same activity is not, this also engages section 2(d), and this again has long been recognized in the Court’s section 2(d) jurisprudence.⁷

V. PROBLEMS WITH THE INDIVIDUAL ANALOGUE TEST: *DUNMORE*

Where the Court may arguably have taken a wrong turn in its early section 2(d) jurisprudence was in treating these two categories of section 2(d) protection as virtually exhaustive.⁸ In particular, it was thought that

⁶ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 363, *per* Dickson C.J.C., 391, *per* LeDain J. and 407, *per* McIntyre J. (S.C.C.) [hereinafter “*Alberta Reference*”]; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367, at 401-402 (S.C.C.), *per* Sopinka J. [hereinafter “*Professional Institute*”].

⁷ *Alberta Reference, id.*, at 407-409, *per* McIntyre J., and *Professional Institute, id.*, at 401-402. The controversy that often arises in relation to this category of s. 2(d) protection is not with respect to its inclusion within the scope of s. 2(d), but in its application in particular cases. It may be contended, for example, that a state prohibition on certain forms of business or trade association is aimed at preventing a group from doing what is lawful for individuals. For example, it is said that preventing or restricting a multi-disciplinary partnership between different groups of professionals, such as lawyers and accountants, engages s. 2(d), because the practice of law and accountancy are lawful activities permitted to qualified individuals. The answer to this contention is that law and accountancy are also lawful for groups. What is restricted is the practice of law and accountancy *together* in one business entity, and this is prohibited both for individual lawyers and accountants, as well as for groups of those respective professionals. In other words, the activity of engaging in a “joint law-accountancy practice” is prohibited for all, and not merely for groups. Similarly, restricting the ability of a group of willing farmers to sell their products outside a marketing regime to a group of willing buyers does not engage s. 2(d) because the relevant prohibition is of the association, by contract, of buyer with seller, not of sellers with each other. In the marketing scheme individual sellers (and buyers) are treated the same as group sellers (and buyers). It is the activity of contracting between buyer and seller that is restricted for both individuals and groups. (Unfortunately, the Supreme Court’s decision on this very fact pattern in *Canadian Egg Marketing Agency v. Richardson*, [1998] S.C.J. No. 78, [1998] 3 S.C.R. 157 (S.C.C.), does not articulate this analysis fully, but rather rests on proposition that while s. 2(d) may protect a trading association it does not protect the activity of trading, and the somewhat bald, albeit undoubtedly accurate, proposition that s. 2(d) is not intended to protect all economic associations.) The characterization of what activity is in fact lawful in such cases will determine whether s. 2(d) is engaged. Some may regard this as an artificial or arbitrary dependence on categories, but the reality is that the delineation of all legal rights, even those protected as Charter rights, depends to some extent on such characterizations.

⁸ The Court’s recognition in its early jurisprudence, *e.g.*, *Alberta Reference, supra*, note 6, at 391, *per* LeDain J., at 407, *per* McIntyre J. and *Professional Institute, supra*, note 6, at 401-402,

unless a given activity could be pursued lawfully by an individual, that mere fact (the absence of a so-called “individual analogue”) disentitled the activity from section 2(d) protection. It was not until 2001, in the Court’s decision in *Dunmore*,⁹ that this situation was corrected.

Dunmore advanced the theoretical understanding of section 2(d) by explaining (in a passage that was in fact *obiter*)¹⁰ that the demonstration by a claimant that the state has prohibited an activity pursued in association but not the individual analogue of that activity is not the only circumstance where a section 2(d) breach may be found. To put it another way, a showing that the state has interfered with an association’s activities, but has not restricted the same activity when pursued by an individual, is a most useful *indicium* of a section 2(d) infringement, but it is not the *sine qua non*. The impairment of an activity that lacks an individual analogue thus can constitute an infringement of section 2(d), although it is neither a necessary nor a sufficient condition for finding a breach.¹¹

As *Dunmore* pointed out (drawing upon Dickson C.J.C.’s dissent in the *Alberta Reference*),¹² not every human endeavour that is pursued in association has an individual analogue. *Dunmore* recognized that some associational activities (such as the formation of a majority platform) do not or cannot have an individual analogue since they are, by their nature, interpersonal or social.¹³

Some associational activities that *necessarily* do not have an individual analogue include (and here the writer is expanding and generalizing upon some of the examples cited in *Dunmore*):

per Sopinka J., of a category in addition to the two mentioned here, extending s. 2(d)’s protection to the constitutional rights of individuals when pursued in association is clearly redundant or as Dickson C.J.C. put it “derivative”: *Alberta Reference, id.*, at 364, *per* Dickson C.J.C. The constitutional rights are protected in any event; and the protection of activities pursued by a group which an individual may lawfully pursue clearly encompasses the constitutionally protected activities of individuals.

⁹ *Supra*, note 4.

¹⁰ What was found to be an infringement of s. 2(d) in *Dunmore, id.*, was an impairment of the ability of farm workers to *establish and maintain* workers’ associations to assert their interests against private farm employers, which falls well within the scope of the Court’s earlier jurisprudence on what s. 2(d) protects. What was controversial in *Dunmore* was not the finding on this point, but rather the Court’s attribution of responsibility to the state for the inability of farm workers to organize, thus justifying the Court’s order that the state had to enact legislation protecting organizing efforts.

¹¹ *Dunmore, id.*, at paras. 16-18.

¹² *Alberta Reference, supra*, note 6, at 367, *per* Dickson C.J.C.

¹³ *Dunmore, supra*, note 4, at paras. 16-17.

- adopting a model for group decision-making (such as consensus decision-making, majoritarian decision-making, or decision-making based on the support of a plurality of a group's members; open balloting or secret balloting);
- choosing a leader or spokesperson;
- developing a platform or shared vision;
- adopting or amending a constitution;
- establishing criteria for membership in a group, or criteria for exclusion;
- expelling dissenters, or welcoming or readmitting dissenters;
- federating, or sub-dividing or splitting;
- debating;
- team-building;
- engaging in competition amongst members of a group;
- pooling resources.

Many of these embrace union activities of a centrally associational nature, and *Dunmore* removed the barrier to their being protected by section 2(d).

This does not mean, of course, that to impair an activity that lacks an individual analogue is to breach section 2(d). *Dunmore* explicitly recognized this:

... the law must recognize that certain union activities — making collective representations to an employer, adopting a majority political platform, federating with other unions — may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d) nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d).¹⁴

Some human activities that lack an individual analogue are the scourge of humanity. Engaging in warfare, excluding individuals or minorities from group participation on racial or other invidious grounds, suppressing the views or goals of dissenters, assimilating minorities, plotting conspiracies, establishing trade cartels: these are human endeavours that can really only be pursued in association, and yet that mere fact would not favour their protection under the Charter.

¹⁴ *Dunmore, id.*, at para. 17.

VI. PROTECTION FOR AN ASSOCIATION'S OBJECTS

Dunmore, by rejecting the individual analogue test for a section 2(d) claim, was taken by some to herald an “opening of the door” to the protection of the objects of associations, including what was said to be a key object of trade unions — collective bargaining.¹⁵

However, the rejection in *Dunmore* of the individual analogue requirement does not in principle extend section 2(d) protection to one particular class of association's objects or activities, even if it is claimed that the object or activity is essential or foundational to the association. It merely removes an obstacle that, before *Dunmore*, would have been fatal to the claim for section 2(d) protection of those union activities that lack individual analogues.

Dunmore did not reject the concept that section 2(d) protects only the association *not* its objects, even if the objects are the reason for the association's existence. This point had been made in the *Alberta Reference*¹⁶ by reference to the example of a gun club, which does not by its existence as an association extend section 2(d) protection to gun ownership, possession or use simply by virtue of the fact that these are the foundational objects of the club. That a ban on guns would frustrate the very objects of the association, undermining the meaningfulness of its existence as an association, does not render the gun ban vulnerable to attack under section 2(d). The legislation does not, in banning guns, attack the association *qua* association. Justice Sopinka adopted this form of argument in the *Professional Institute* case to reject the claim that without constitutional protection for the activity of collective bargaining the freedom of association of trade unions is meaningless.¹⁷ Similarly, in *Canadian Egg Marketing Agency v. Richardson*, in a non-labour context, the Court repeated that a prohibition on marketing of farm products outside a regulatory scheme does not impair the freedom of association of a farm marketing association.¹⁸ Only the association's activity of marketing is affected by the legislation, not the association itself. This is

¹⁵ See *e.g.*, the references to union counsel's arguments in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2003] B.C.J. No. 2107, 19 B.C.L.R. (4th) 37, at para. 96 (B.C.S.C.) [hereinafter “*B.C. Health Services, BCSC*”], affd [2004] B.C.J. No. 1354, 243 D.L.R. (4th) 175, at paras. 31-32, 67-68 [hereinafter “*B.C. Health Services, BCCA*”].

¹⁶ *Alberta Reference*, *supra*, note 6, at 404-405.

¹⁷ *Professional Institute*, *supra*, note 6, at 402, *per* Sopinka J.

¹⁸ *Canadian Egg Marketing Agency v. Richardson*, *supra*, note 7, at paras. 108-12.

so, even though marketing was the *raison d'être* of the association and its prohibition would render the association “meaningless”.

Dunmore stated, “the purpose of s. 2(d) commands a single inquiry: has the state precluded activity *because of its associational nature*, thereby discouraging the *collective pursuit* of common goals?”¹⁹ It also quoted Dickson C.J.C.’s *Alberta Reference* dissent on the same point: “The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct *because of its concerted or associational nature*.”²⁰ In the same vein, Dickson C.J.C. had also stated:

What freedom of association seeks to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.²¹

Dunmore concluded on this point by stating that, “a purposive approach to s. 2(d) demands that we ‘distinguish between the associational aspect of the activity and the activity itself’”.²²

All of this is more consistent with the view that section 2(d) does *not* protect activities just because they are the foundational objects of an association²³ than the proposition advanced by the dissenters in the 1990

¹⁹ *Dunmore, supra*, note 4, at para. 16 (emphasis added).

²⁰ *Dunmore, id.*, at para. 16, quoting *Alberta Reference, supra*, note 6, at 367, *per* Dickson C.J.C. (emphasis added).

²¹ *Alberta Reference, id.*, at 366, *per* Dickson C.J.C.

²² *Dunmore, supra*, note 4, at para. 18.

²³ Chief Justice Dickson was prepared to extend protection to collective bargaining and the right to strike, partly because he thought, “If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid”: *Alberta Reference, supra*, note 6, at 362-63, *per* Dickson C.J.C. But his comment quoted in the text above (cited *supra*, note 21) that s. 2(d) should not protect an activity merely because it is carried on in association implies that s. 2(d) also does not protect an activity merely because it is the foundational object or *raison d'être* of an association. It would not make sense if it were held that s. 2(d) *does not* protect activities merely because they could be carried on in association, but *does* in fact protect activities that are foundational to an association. A given activity, not otherwise protected, would acquire protection simply by becoming an activity foundational to a particular association. Bringing a given activity within the scope of s. 2(d)’s protection would be a matter of limiting the association’s objects to the activity in question. Unlike a tax shelter, constitutional protection should not be achievable merely by the craft of a clever solicitor.

Professional Institute case that collective bargaining attracts section 2(d) protection because it is the *raison d'être* of a union.²⁴

With *Dunmore* the terms of section 2(d) debate had not fundamentally changed, and the Court continued to work within the basic principled framework established in the *Alberta Reference* and *Professional Institute* cases, albeit with an important, and probably valid limitation on the significance of the individual analogue test.

VII. THE UNIONS' CLAIMS IN *B.C. HEALTH SERVICES* — ARTICULATION AND CRITIQUE

1. The “Freedom” Claim

In *B.C. Health Services*, the unions presented their claims in the form of a classical section 2 claim: that of government interference in a *freedom* protected by the Charter. Unlike the situation in, for example, *Dunmore* or *Delisle v. Canada*,²⁵ which involved exclusions from a whole collective bargaining regime, the legislation at issue in *B.C. Health Services* lent itself to the union's characterization of their claims, since it constrained an activity — collective bargaining — that formerly, it was claimed, the unions had been “free” to engage in unencumbered by legislative restrictions on what could be bargained.

The unions claimed that by setting aside terms in previously “freely” negotiated collective agreements and precluding “free” negotiations over certain terms in future collective agreements (substituting legislated terms instead), the B.C. legislation was interfering in three “core labour freedoms”:

- (1) the freedom to make collective representations to one's employers;
- (2) the freedom to negotiate and agree on the terms and conditions of employment in a collective manner; and,
- (3) the ability to rely on and enforce those agreements which are collectively concluded.²⁶

The first of these enumerated freedoms — the freedom to make collective representations — is not controversial. It is a freedom

²⁴ *Professional Institute*, *supra*, note 6, at 381-83, *per* Cory J.

²⁵ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.).

²⁶ *B.C. Health Services*, BCCA, *supra*, note 15, at paras. 30 and 70. See also Appellants' Factum in the Supreme Court of Canada, paras. 27, 33-36, 74, 88-114, 125.

specifically mentioned in *Dunmore*.²⁷ Quite apart from *Dunmore*, this freedom is protected in the public sector context by the operation of section 2(b) and (d) of the Charter, and the principle that section 2(d) protects the exercise in association of the constitutional rights or freedoms of individuals.²⁸ This freedom does not, however, encompass collective bargaining, as collective bargaining involves much more than the presentation of collective representations to an employer.

The second and third of these claimed freedoms are controversial. The third, “the ability to rely upon and enforce” agreements, is not a claim for freedom at all, but a demand for the legal enforcement by the state of bargains concluded collectively. Such enforceability is essential to give effect to the second claimed freedom, the freedom to bargain collectively. As such, the second and third claimed freedoms may be read together as “the freedom to collectively bargain and conclude binding agreements without state interference”.

Interestingly this claimed freedom has a readily recognizable, and in some quarters notorious, individual analogue: *laissez-faire* freedom of contract.²⁹

Naturally, the unions in *B.C. Health Services* did not put their claim forward as starkly as a claim for *laissez-faire* freedom of contract. The B.C. Court of Appeal encapsulated the claimants’ position on the second and third claimed freedoms by quoting from their submissions:

The appellants’ ultimate position is that ... “Regardless of what labour relations scheme a province may choose to enact regarding collective bargaining, *it cannot prohibit the collective negotiation and enforcement of employment agreements*. While there may not be a right to any particular labour relations framework, *there is at least a right to remain free from state interference in carrying out this type of collective activity*.”³⁰

A look at the individual analogue to this claimed collective freedom — individual freedom of contract — sheds light on the problems with the unions’ claim.

²⁷ *Dunmore*, *supra*, note 4, at para. 17.

²⁸ *Alberta Reference*, *supra*, note 6, at 391, *per* Le Dain J., at 407, *per* McIntyre J.; *Professional Institute*, *supra*, note 6, at 401-402, *per* Sopinka J.

²⁹ See Robert E. Charney, “The Contract Clause Comes to Canada: The British Columbia *Health Services* Case and the Sanctity of Collective Agreements” (2007-2008) 23 N.J.C.L. 65.

³⁰ *B.C. Health Services*, BCCA, *supra*, note 15, at para. 33 (emphasis added). See also Appellants’ Factum in the Supreme Court, paras. 27, 33-36, 74, 88-114, 125.

First, it is trite that, especially in the sphere of employment, there is no unrestrained freedom of contract. The unions contended that the state, having established a scheme that leaves certain prescribed parties free to settle the terms of a contract, cannot withdraw that freedom and impose contractual terms. Such an argument is not materially different from a claim that having permitted individual employees and employers to agree to terms of employment above the minimum standards prescribed by the *Employment Standards Act*, the state cannot by legislation set aside agreed-upon terms or impose new terms of employment. We know that that is not true. The unions' argument is also not materially different from a claim that having adopted a *laissez-faire* posture to the labour market in the 19th century the state was then precluded from legislating employment standards or adopting labour relations codes in the 20th and 21st centuries. Yet we know that state regulation of employment relationships has been a hallmark of post-19th century labour relations policy, and it is indisputable that organized labour has been a primary beneficiary of such state intervention. We have a situation where the unions cannot claim that an activity lawfully open to individuals is not open when carried on collectively by associations. Unrestrained freedom of contract is lawfully prohibited for both individuals and collectivities.

Second, and more significantly, the unions' claimed "freedom of collective bargaining" is quite inseparable from a complex and prescriptive statutory regime that establishes a process for the fixing of terms and conditions of employment at certain workplaces. The unions' recharacterization of but one aspect of that prescriptive statutory scheme as a "freedom" may have some rhetorical value, but it hardly reflects what the statutory scheme provides and how it actually works.

The statutory regime in question, like the labour relations model prevalent in North America, prescribes that all workers in a given bargaining unit (as defined by law) are to be represented exclusively by a bargaining agent certified by a board³¹ established by legislation. Workers who dissent from the majority's choice of bargaining agent are nonetheless bound to representation by that agent. The employer is compelled by the statute to bargain terms and conditions of employment

³¹ Exclusive bargaining agents may also be designated by statute or regulation, rather than certification (e.g., public service and teacher bargaining agents are often statutory agents: *Professional Institute*, *supra*, note 6, and *Ontario Teachers' Federation v. Ontario (Attorney General)*, [2000] O.J. No. 2094, 49 O.R. (3d) 257 (Ont. C.A.) [hereinafter "*O.T.F. v. Ontario*"]). Exclusive bargaining agents may also be voluntarily recognized by the employer without a certification process: *Labour Relations Act, 1995*, *supra*, note 5.

with the bargaining agent, and is prohibited from bargaining with anyone else, thus ensuring that the bargaining agent has a statutory monopoly on the labour available to the employer. Both employer and bargaining agent have a “duty to bargain”, enforced by the state. The statute prescribes sanctions, in the event of a breach of the duty to bargain, and regulates resort to economic remedies (such as strikes and lock-outs) available to the parties in the event of a failure of negotiations.³²

The unions’ real claim in *B.C. Health Services*, therefore, was a claim that the state, having set up a regime which gives certified bargaining agents exclusive representation on behalf of labour at the workplace, having imposed a statutory duty to bargain on the bargaining agents and the employers, and having prescribed remedies and sanctions in the event of default, was: (1) in some cases, “interfering” with the “freely contracted” terms that the bargaining agents and employers reached, and (2) in other cases, precluding negotiations over certain terms and conditions of employment.

The unions in *B.C. Health Services* certainly did not want a bare freedom, unhindered and unassisted by the state, to bargain and conclude agreements collectively. They wanted the rest of the state-imposed collective bargaining regime as well, including, most particularly, the exclusive representation provisions, the ability to compel an employer to bargain with them and the remedies and sanctions prescribed for default or a failure of negotiations.

In the writer’s respectful view, one cannot take from the fact that the B.C. statutory regime includes a measure of “freedom to negotiate” between certified bargaining agent and employer that this “freedom” is a constitutionally protected freedom, whether under section 2(d) or otherwise. The correlative statutory rights of bargaining agent and employer established by the typical North American labour relations model can equally be seen to be prescriptive rather than permissive in nature: it is not that the freedom to bargain is protected, but rather that a duty to bargain is imposed. The regime, therefore, cannot be conceived of as an instantiation of a fundamental freedom. Rather, it is a labour code that reflects complex industrial relations, economic and social policy choices.³³

³² *Labour Relations Act, 1995, id.*, ss. 7-10, 15-17, 53, 55-57, 63, 79, 96, 98-99 and 104; George W. Adams, *Canadian Labour Law*, 2d ed., loose-leaf (Aurora: Canada Law Book, 2005), at 2-16 to 2-32.2, 2-54.1 to 2-72.10 and 2-98 to 2-106.

³³ *Alberta Reference, supra*, note 6, at 391, *per* Le Dain J.

Voluntary, freely formed associations play a role in the statutory scheme only in the sense that trade unions (which are typically voluntary, non-statutory associations) can organize workers in a bargaining unit and then obtain statutory certification as the exclusive bargaining agent for that bargaining unit if supported by majority vote of the workers in the bargaining unit. But in their statutory role they are engaged in a highly regulated activity that has no resemblance to the exercise of a freedom. What happened over the course of time in the last century is that, like other voluntary private associations such as law societies in the 19th century, trade unions acquired a statutory role. That trade unions enjoy and exercise freedom of association *qua* voluntary associations does not mean that the statutory role that they also play is itself an exercise of that freedom.

This writer submits that the relevant association for an analysis of the freedom under section 2(d) is that represented by the voluntary coming together of individuals. The fact that freely formed associations can acquire a role as bargaining agents by statute does not mean that the bargaining unit — the very group of workers for whom collective bargaining is undertaken — is itself a freely formed association. *Qua* exclusive bargaining agent a trade union does not represent the coming together or association of workers under section 2(d). The typical labour statute does not provide for “freedom of association” for the bargaining unit. While it is true that a majority vote of the bargaining unit members generally determines whether a given trade union is certified as bargaining agent, the composition of the bargaining unit is not determined by free choice. In the typical North American model, the bargaining unit is workplace based — *i.e.*, statutorily confined to a category of workers at a given employer’s workplace. Garment-workers in a province can voluntarily band together to form a garment-worker’s union, and the union can federate with other unions, or sub-divide into smaller entities, as the membership may freely choose, all without state interference. Yet a bargaining unit of garment-workers at one employer cannot decide to merge with another unit of garment-workers at some other employer, or with some or all garment-workers city- or province-wide. Similarly, it is not left to the unfettered choice of workers in a bargaining unit whether they wish to sub-divide the unit in a manner that reflects their preferences or interests. That matter is often left to labour boards to determine in accordance with labour policy criteria that serve many more goals than are reflected in the free choice of a class or sub-class of employees. Indeed, it is frequently the case that a specialized sub-class of employees with greater relative bargaining power would

prefer not to be associated with other employees in their bargaining unit. There may be labour policy reasons to leave them in despite their wishes, because, for example, the fragmentation of the bargaining unit would reduce the bargaining leverage of the less-skilled workers.³⁴ Further, bargaining unit members cannot choose to leave a bargaining unit (except by quitting their employment) nor can they choose not to be represented by the certified bargaining agent, unless they secure, through a statutorily prescribed process, the decertification of the bargaining agent: this typically depends on obtaining a majority vote of bargaining unit members, and is an option available only periodically.³⁵

In summary, in the typical statutory labour relations model, bargaining unit members' freedom to negotiate employment terms, whether individually or in collectivities of their own choosing and design, is replaced with a system by which the terms and conditions of employment are fixed by negotiation between the employer and a statutorily empowered bargaining agent. In the statutory model, the bargaining unit membership is afforded a measure of choice — whether to join or support a trade union that seeks certification as bargaining agent, whether to support decertification of the bargaining agent, whether to support a collective agreement that has been reached between bargaining agent and the employer, whether to strike. But those choices are highly regulated and circumscribed by the legislation, and all the choices of individuals and dissenting groups are subordinated to the will of the majority. This is said to be in the best interests of the collectivity of employees as a whole, as it is intended to improve their over-all bargaining power, and if that in turn improves bargaining outcomes for the collectivity, this is said to improve their overall welfare. Paul Weiler put it thus:

Only if the employees can be *welded into a single cohesive group presenting a unified format* to the employer can they exercise sufficient countervailing power to influence significantly their overall terms of employment.³⁶

Some may claim that the prescriptive or compulsory elements of the statutory scheme — its subordination of free choice to other goals — are themselves in the service of some wider concept of “freedom of

³⁴ Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), at 126 [hereinafter “*Reconcilable Differences*”].

³⁵ *Labour Relations Act, 1995*, *supra*, note 5, ss. 7-10, 15-17, 63.

³⁶ *Reconcilable Differences*, *supra*, note 34, at 126 (emphasis added).

association”. The evidence of expert witnesses called in support of a constitutional challenge to the exclusion of principals and vice-principals from a teachers’ bargaining unit ran along these lines.³⁷ The witnesses were of the view that membership of the principals and vice-principals in the teachers’ unit should be compulsory because it served the freedom of association of teachers as a whole. Moreover, in contrast to mandatory membership, it was freedom of choice that was truly “coercive”:

Witness 1:

Q. Do you think that by making principals and vice-principals who would rather not be part of the federation, by making them be members of the federation, that it enhances their ability to provide collegial leadership?

A. Yes, whether they like it or not it does.

Q. It’s good for them?

A. Yes.

Q. That is because the teachers perceive them to have the same values even though they may not?

A. Yes.

Witness 2:

Q. So your position is that mandatory membership gives principals choice but voluntary membership doesn’t give them choice?

A. Yes.

.....

Q. What if we abolish statutory membership in the Ontario Teachers’ Federation altogether and we just said everybody, teacher, principal, join it or don’t join it as you choose, what would you think of that as a policy?

A. I would find that very coercive.

Unlike these witnesses, among others, this writer confesses skepticism about an approach to freedom and choice that interprets the prescriptive or compulsory elements of a statutory regime as the instantiation of freedom. Whether or not the statute legitimately furthers valid policy objectives, it is a fundamental error in principle to say that its prescriptive elements in fact foster freedom. We are better to acknowledge plainly that sometimes we

³⁷ *O.T.F. v. Ontario*, *supra*, note 31, affg [1998] O.J. No. 1104, 37 C.C.E.L. (2d) 56 (Ont. Gen. Div.).

legitimately subordinate free choice (whether it be individual or collective choice, and whether it be constitutionally protected in a given context or not) to policies pursued for broader ends. It is a disservice to legal reasoning, not to mention reason in general, to do otherwise.

Notwithstanding Rousseauian notions of being “forced to be free” and Marxist ideas of “false consciousness”, this writer suggests that Isaiah Berlin held the preferable view on this issue:

[N]othing is gained by a confusion of terms. To avoid glaring inequality, or widespread misery I am ready to sacrifice some, or all, of my freedom: I may do so willingly and freely; but it is freedom that I am giving up for the sake of justice or equality or the love of my fellow men. ... [A] sacrifice is not an increase in what is being sacrificed, namely freedom, however great the moral need or the compensation for it. Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. ... [I]t is a confusion of values to say that although my ‘liberal’, individual freedom may go by the board, some other kind of freedom — ‘social’ or ‘economic’ — is increased.³⁸

2. The Claim for “Meaningful” Protection

Returning now to the claimants in *B.C. Health Services*, having presented their claims as claims to freedom from state interference, they proceeded to argue that the collective aspect of free collective bargaining attracts the protection of section 2(d) on the basis that bargaining and concluding enforceable collective agreements is one of the main objects — in fact the foundational object — of their associations. They asserted that constitutionally guaranteeing their freedom to bargain collectively was the only way to ensure that their freedom of association was “meaningful”. The legislature’s interference in, and in some cases preclusion of, collective bargaining, the unions claimed, rendered their very associations pointless or “meaningless”.

“Meaningful” was the word chosen by the Court in *Dunmore* to explain the extent to which the legislature had to go to protect the organizing rights of farm workers in the face of a proven inability to organize without statutory assistance.³⁹ The adoption of a posture of restraint on the part of the legislature meant, according to the Court, that

³⁸ Isaiah Berlin, “Two Concepts of Liberty”, reproduced in *The Proper Study of Mankind: An Anthology of Essays* (London: Pimlico, 1998) 191, at 197.

³⁹ *Dunmore*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, at paras. 20, 23, 67 (S.C.C.).

the workers' freedom to organize — and hence their freedom of association — was not “meaningful”. The Court stated the question as follows:

In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(d) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups.⁴⁰

It made the following factual finding:

... the evidentiary burden has been met in this case: the appellants have brought this litigation because there is no possibility for association as such without minimum statutory protection.⁴¹

And it granted a remedy in the following language:

... at minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.⁴²

As noted above, up to and including *Dunmore*, the Court remained committed to distinguishing between an association and its objects. The use by the Court of the word “meaningful” to describe a minimum constitutional standard of associational ability that, in the context at issue in *Dunmore*, required statutory support, does not imply that the objects of an association gain constitutional protection on the ground that the failure to protect the objects means that the association's freedom is not “meaningful”.

The complaint in *B.C. Health Services* that the unions' objective of collective bargaining was interfered with, and therefore their freedom of association was rendered “meaningless”, misinterprets *Dunmore*'s protection of “*meaningful* freedom of association” as a guarantee of a “freedom of *meaningful* association”, *i.e.*, a guarantee of the essential objects of an association. *Dunmore*'s use of the word “meaningful” in the context of its discussion of section 2(d) consistently emphasizes the importance of making the *freedom* guaranteed by section 2(d) meaningful.

⁴⁰ *Id.*, at para. 20.

⁴¹ *Id.*, at para. 42.

⁴² *Id.*, at para. 67.

Section 2(d) does not guarantee that *associations* themselves will be meaningful by guaranteeing their objects.

3. Special Status versus Neutrality

As clearly recognized in the Court's earlier section 2(d) jurisprudence, the extension of section 2(d) protection to the objects of an association, would be tantamount to a general constitutional guarantee of the liberty to pursue any object, provided it was pursued in concert.⁴³ Guaranteeing the foundational or essential objects of an association, or its *raison d'être*, would have the same result, since bringing a given activity within the scope of section 2(d)'s protection would be a matter of limiting the association's objects to the activity in question. This would also require the section 1 justification of any limitation or regulation of an activity that could be pursued in concert.

To read into section 2(d) a guarantee of collective bargaining because it is a main object of a trade union would mean that the main object of any association would have to be recognized by section 2(d), unless, for some reason, a trade union should receive *special status*, within section 2(d), entitling *it* to the protection of its objects even though the objects of other associations are not so entitled. Prior to *B.C. Health Services* the Court had repeatedly stressed that section 2(d) should be interpreted in a manner that is mindful of its potentially broad application.⁴⁴

A neutral approach to section 2(d), one that does not privilege some kinds of associations, such as trade unions, over other kinds of associations, has its virtues. Giving the judiciary the role of deciding which associations are worthy of having their objects and activities protected, and which are not, is really just asking the judiciary to select among a range of objects and activities as meriting constitutional protection, under the rubric of protecting freedom of association. It also moves the *locus* of decision-making over which associations' activities

⁴³ *Alberta Reference*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.), at 404-405, *per* McIntyre J.; at 366, *per* Dickson C.J.C.; *Professional Institute*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367 (S.C.C.), at 401-402, *per* Sopinka J.; at 392-93, *per* L'Heureux-Dubé J.; *Canadian Egg Marketing Agency v. Richardson*, [1998] S.C.J. No. 78, [1998] 3 S.C.R. 157, at paras. 104-105, 108, 110-112 (S.C.C.).

⁴⁴ *Alberta Reference*, *id.*, at 390-91, *per* Le Dain J.; *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209, at paras. 179-181 (S.C.C.), *per* LeBel J.; *Professional Institute*, *id.*, at 401-402, *per* Sopinka J. and 393-94, *per* L'Heureux-Dubé J.

are worthy, and which unworthy, from the legislatures to the judiciary. It is hard to discern in section 2(d) an intention to license the judiciary to substitute its value judgments for the legislature's in relation to the worthiness of different associations and/or their objects. One would have thought that the purpose of section 2(d) was to protect *associating* generally from these kinds of value judgments, whether they be made by the legislature, the executive or the judiciary.

The neutral approach is the one taken to the other section 2 rights, notably section 2(a)'s protection of freedom of religion and section 2(b)'s protection of freedom of expression. When considering the scope of section 2(a) or (b) the Court does not adjudicate the value of a religion or its tenets, or the value or content of a given exercise of freedom of expression. Section 2(a) and (b) contain no judicially created hierarchy of religions or speech. Rather religion and speech enjoy a categorical and abstract scope of protection under section 2 of the Charter. The question of whether the freedom to engage in a *given* religious practice or to engage in *certain* speech should yield to the public interest in a particular context is addressed in section 1, when the state seeks to justify specific legislative limits on the particular religious practice or speech.⁴⁵ Section 1 allows for the kind of context-specific, evidence-based inquiry (where the burden of justification is on the state) that is appropriate to assessing whether a broad freedom ought to yield to the public interest in a particular situation.

Applied to section 2(d), the neutral approach, as the earlier jurisprudence recognized, restricts itself to the protection of associating itself, not the objects pursued in association. This, the writer submits, enables section 2(d) to have a broad and liberal scope.

⁴⁵ With respect to s. 2(b) consider: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232, esp. at 246-47 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at 330-31 (S.C.C.), per McLachlin J. (as she then was); *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.); *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610 (S.C.C.); Robin K. Basu, "Selected Issues on Evidence in Charter Cases: The *RJR – JTI* Saga, Lessons Learned and Unresolved Issues" (2007-2008) 23 N.J.C.L. 107. With respect to s. 2(a), see *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.).

VIII. THE MAKING OF THE REVOLUTION: HOW THE COURT DEALT WITH THE CLAIMS IN *B.C. HEALTH SERVICES*

At the hearing of the appeal in *B.C. Health Services* in February 2006 the seven members of the Supreme Court who sat gave no indication of the dramatic change that was in the offing. In fact, Bastarache J., the author of the *Dunmore* majority opinion, specifically rejected the suggestion made to the Court by union counsel that *Dunmore* opened the door to Charter protection of collective bargaining: the Court, he retorted, would have to go “well beyond” *Dunmore* for the claim to be accepted. Conversely, it was also obvious that certain members of the Court were singularly unimpressed with the B.C. legislation before them.

The parties had to wait 16 months for a decision.

The decision that came in June 2008 shattered the previously accepted understanding of section 2(d). The conceptual architecture of the Court’s section 2(d) jurisprudence laid down from 1987’s *Alberta Reference* through to and including *Dunmore* seemed to be swept away, with no coherent theory of section 2(d) to replace it. It seemed to be a revolution without a program.

The Court identified what it called a “procedural right collective bargaining”, also referred to several times as a “collective right to good faith negotiation and consultation”, and, based on four disparate “propositions”, granted that right constitutional protection under section 2(d).

1. Rejection of the Earlier Jurisprudence

At the outset, as the “first proposition”, the Court dismantled the foundations for its earlier jurisprudence that had rejected section 2(d) protection for collective bargaining. Most significantly, the Court attacked the validity of what this writer has described above as the neutral approach to section 2(d) rights. The Court claimed that that the “overarching” problem with the earlier jurisprudence, particularly the *Alberta Reference* and the *Professional Institute* case, was that they took a “decontextualized” or “generic” approach to freedom of association, which treated all associations as having the same associational rights. This was said to be inconsistent with the purposive approach to Charter rights:

... the majority judgments in the *Alberta Reference* and *PIPSC* [the *Professional Institute* case] adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The result was to forestall inquiry into the purpose of that *Charter* guarantee. The generic approach of the earlier decisions to s. 2(d) ignored differences between organizations. Whatever the organization — be it trade union or book club — its freedoms were treated as identical.⁴⁶

The Court did not elaborate on why the approach taken in the *Alberta Reference* and subsequent cases was not “purposive” in the sense that it sought to ground the interpretation of section 2(d) in the purposes and values underlying the right. A review of the early section 2(d) jurisprudence shows considerable judicial attention being paid by both the majority judges and dissenters to an examination of what values were sought to be reflected in the constitutional guarantee of freedom of association.⁴⁷ Whatever one’s quarrels with the conclusions reached by the justices in the early cases, it cannot seriously be contended that their approach was not purposive. As pointed out above, the “decontextualized”, or neutral, approach, in refraining from privileging certain associations and their activities over others, bears considerable similarity to the approach taken to section 2(a) and (b).

The main point made by the Court in *B.C. Health Services* to demonstrate that the early jurisprudence was not “purposive” was to say that all associations were treated as having identical rights under freedom of association, and as a result the “unfortunate effect was to overlook the importance of collective bargaining — both historically and currently — to the exercise of freedom of association in labour relations”.⁴⁸ What this seems to be saying is that the relevant purposive inquiry is to inquire into the *purpose of a given activity* to see if it merits constitutional protection, not to inquire into the purposes and values underlying the constitutional guarantee to determine its meaning and scope. If this is indeed what the Court is saying, it seems that the Court has moved more towards the role of constitutional legislator (at least with respect to section 2(d)), assessing whether as a matter of constitutional policy a given activity merits constitutional protection under section 2(d), rather than constitutional interpreter seeking to

⁴⁶ *B.C. Health Services*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 30 (S.C.C.).

⁴⁷ *Alberta Reference*, *supra*, note 43, at 334, 361-68, *per* Dickson C.J.C.; 390-91, *per* LeDain J.; 393-99, 403-409, *per* McIntyre J.

⁴⁸ *B.C. Health Services*, *supra*, note 46, at para. 30.

discern, though a purposive and contextual analysis, the meaning and scope of section 2(d).

This presents the very danger, discussed above, that departing from a neutral approach to freedom of association simply lets the judiciary decide, using context-dependent criteria developed case by case, which activities, when pursued in association, merit constitutional protection and which do not. This is not as drastic an outcome (feared by both majority and dissent in the *Alberta Reference*) as automatically extending section 2(d) protection to activities merely because they are pursued in association, but it nonetheless invites questions about the legitimacy of the judiciary's role in undertaking such a task.

One clear consequence of the approach adopted in *B.C. Health Services* is to sanction the “balkanization” of the section 2(d) jurisprudence in a way that has not occurred with the other section 2 freedoms. The extent of freedom of association to be accorded to different organizations will vary, in accordance with an analysis of context and the application of criteria developed by the Court case by case. Another consequence is considerable legal uncertainty for the foreseeable future, as different types of associations bring claims for section 2(d) protection that can only be assessed by reference to the particular context and criteria deemed relevant at the time.

The Court explicitly acknowledged the concern found in the earlier jurisprudence that section 2(d) was not intended to automatically protect the innumerable varied activities that might be pursued in association: “the underlying concern — that the *Charter* not be used to protect the substantive outcomes of any and all associations — is a valid one”.⁴⁹ This concern, the Court stated, had given rise to the stance (notably consistent in the jurisprudence from the *Alberta Reference* through to and including *Dunmore*) that section 2(d) does not protect the objects of an association, necessitating that a distinction be drawn between “the associational aspect of the activity”, which is protected, and “the activity itself”, which is not.

Yet the Court also explicitly rejected the idea that the distinction between the associational aspect of an activity and the activity itself can in fact be drawn:

... it will always be possible to characterize the pursuit of a particular activity in concert with others as the “object” of that association.

⁴⁹ *Id.*, at para. 29.

Recasting collective bargaining as an “object” begs the question of whether or not the activity is worthy of constitutional protection.⁵⁰

Thus, it seems that the problem the Court sees as a legitimate concern is the risk of extending constitutional protection to all activities pursued by all associations, and not the idea, expressed repeatedly in the earlier jurisprudence, that the purpose of section 2(d) is to protect associating itself, *i.e.*, the coming together in pursuit of common goals, not the goals that may be pursued by way of coming together. But if the purpose of section 2(d) is not to protect just associating itself, as opposed to the myriad of ends achievable by associating, then what *is* its purpose? The Court seems to offer no answer.

Despite the Court’s apparent confidence in disposing of the distinction between an association and its objects, it was impelled to draw a distinction between the “process” of collective bargaining and its “outcomes”:

... “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).

... 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. Thus, the characterization of collective bargaining as an association’s “object” does not provide a principled reason to deny it constitutional protection.⁵¹

This distinction, between the process and outcomes of collective bargaining is new to section 2(d) (and section 2 in general),⁵² and really does not answer in a meaningful way the concern that section 2(d) is intended to protect the associational aspect of an activity as opposed to the activity itself. The distinction seems to be aimed at separating associational means (the process of collective bargaining — protected by section 2(d)) from associational ends (collective agreements — not protected by section 2(d)). Yet, to return to the example of the gun club, pooling resources for the purchase of firearms is clearly only the *means* or “*process*”, pursued associationally, by which the club seeks to achieve its goal of gun possession, ownership and use. And, of course, gun

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Jamie Cameron, “Due Process, Collective Bargaining and Section 2(d) of the Charter: A Comment on *B.C. Health Services*” (2008) 42 S.C.L.R. (2d) 131 [hereinafter “Due Process, Collective Bargaining and Section 2(d)”].

possession, ownership and use could either be ends in themselves, or merely the means to further ends, such as self-defence or enjoyment of the sport of marksmanship. The distinction, therefore, between process or means, on the one hand, and outcomes or ends, on the other hand, does no work to meet the challenge of establishing an appropriate scope for the section 2(d) right.

Curiously, though, later in the judgment a great deal of reliance seems to be placed by the Court on the process/outcome distinction in the collective bargaining context. This will be discussed further below.

The Court also rejected the earlier jurisprudence on a number of other grounds. It noted that, as held in *Dunmore*, the individual analogue test for a section 2(d) infringement was not sound. This issue has been discussed at some length above.

The Court also stated that the early cases wrongly advocated an approach that was too deferential of government in labour relations matters. Yet little was offered in the judgment to address the very extensive reasoning in the earlier cases in favour of judicial restraint in the policy-laden and highly political arena of labour relations regulation. For example, in the *Alberta Reference*, McIntyre J. stressed the grave difficulties that would face the judiciary in conducting a section 1 review of the legislature's myriad of labour relations policy choices if a constitutional right to collective bargaining (or its incidents, such as the right to strike), were to be included in section 2(d):

... There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day.

.....

If collective bargaining were constitutionalized under section 2(d), my worry is that judges might be flooded with arguments from litigants who are unhappy with the current tilt in the balance of power between unions, employers, and individual employees in collective bargaining legislation. These litigants will challenge a particular aspect of collective bargaining law, citing vague arguments of democratic, associational, economic, or political rights that will only serve to confuse the judge. Other parties whose interests will be affected by the decision may not receive intervenor status or

may not even be aware of the case. It is unlikely that the necessary evidential base to decide the policy issue will be provided. When we consider that collective bargaining law is polycentric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another.

The lessons of the evolution of our labour law regime in the past 50 years display very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public. ... The courtroom is not the place to be developing collective bargaining policy.

... The section 1 inquiry involves the reconsideration by a court of the balance struck by the Legislature in the development of labour policy. ... There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature.⁵³

The institutional inappropriateness of having the judiciary rebalance labour relations policy in the context of a section 1 analysis remains as much a concern today as it did when that case was decided, and has been reflected in the Court's labour jurisprudence ever since.⁵⁴ In a passage reminiscent of Justice Oliver Wendell Holmes' famous dissent in *Lochner v. New York*,⁵⁵ the Court in *Dunmore* echoed the need for

⁵³ *Alberta Reference*, *supra*, note 43, at 414, 418, 419, *per* McIntyre J., quoting Joseph M. Weiler, "The Regulation of Strikes and Picketing under the Charter" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, Joseph M. Weiler & Robin M. Elliot, eds. (Toronto: Carswell, 1986), at 226-27.

⁵⁴ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at paras. 28, 33 (S.C.C.); *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209, at paras. 156-62, 239 (S.C.C.), *per* LeBel J.

⁵⁵ *Lochner v. People of the State of New York*, 198 U.S. 45, at 75-76, *per* Holmes J. dissenting (1905). Justice Holmes recognized the dangers inherent in granting constitutional protection to a particular economic, labour or employment relations policy, such as, in that case, *laissez-faire* approaches to contracts of employment:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. ... [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural

significant judicial deference in the assessment of legislative choices in the field of labour relations policy:

[T]o exclude a given occupation from the *LRA* “involves a weighing of complex values and policy considerations that are often difficult to balance” and ... this balancing “will in large part depend upon the particular perspective, priorities, views, and assumptions of the policy makers, as well as the political and economic theory to which they subscribe”. Similar statements have been made about labour relations generally, which have been described as “an extremely sensitive subject” premised on “a political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand and the employers of labour — an equally powerful socio-economic force — on the other (*Alberta Reference, supra, per McIntyre J.*, at p. 414). Policy choices are based on value judgments. This Court will only interfere with such choices where a more fundamental value is at stake and where it is apparent that a free and democratic society cannot permit the policy to interfere with the right in the circumstances of the case.⁵⁶

Instead of confronting the justifications advanced in this jurisprudence, the Court in *B.C. Health Services* simply declared that judicial restraint had been carried too far.⁵⁷ The baldness of the Court’s claim offers no answer to the legitimate concern that section 1 of the Charter, in particular, is not a fit tool to enable the courts to undertake the task of balancing the multifaceted policy concerns involved in government regulation of labour relations.

Most significantly, the Court rejected the earlier jurisprudence’s understanding of collective bargaining in its modern incarnation as not a “fundamental freedom” but rather a statutory right that is but one strand in the fabric of a prescriptive labour relations regime. In the view of the Court in *B.C. Health Services* the modern statutory form of collective bargaining does not prevent collective bargaining from meriting constitutional status:

... the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute. Legislatures throughout Canada have historically viewed collective bargaining rights as sufficiently important to immunize them from

and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

⁵⁶ *Dunmore, supra*, note 39, at para. 57.

⁵⁷ *B.C. Health Services, supra*, note 46, at para. 26.

potential interference. The statutes they passed did not create the right to bargain collectively. Rather, they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature.⁵⁸

Notably, this passage stresses the “fundamental” nature of collective bargaining, without attempting to describe it as a freedom. Nor is there any acknowledgment, either here or in the Court’s later examination of Canadian labour history,⁵⁹ of the relevant distinctions that might exist between *pre-statutory* collective bargaining, undertaken freely by workers in association,⁶⁰ on the one hand, and, on the other hand, *statutory* collective bargaining which operates by way of a prescriptive regime mandating exclusivity and the duty to bargain, as discussed at length above. Herein lies the root problem of the *B.C. Health Services* decision.

After dismantling the earlier jurisprudence, the Court proceeded to outline three remaining “propositions” which it said support a finding that collective bargaining — specifically a “procedural right to collective bargaining” — is protected by section 2(d). The propositions are, first, that the history of collective bargaining shows its fundamental nature, second, that international instruments protect collective bargaining and third, that collective bargaining furthers certain values that find expression in other parts of the Charter.

Consistent, it seems, with the “contextualized” approach, none of these three propositions are statements about the nature of section 2(d); rather they are observations about collective bargaining. The Court does not attempt to replace the principles it rejected with any theory of section 2(d)’s nature or scope. It is in fact, somewhat unclear which, if any, of the principles of the previous jurisprudence remain valid. It may be that all of the earlier section 2(d) claims in all contexts are subject to being revisited under the new contextualized approach.

As will be seen, however, the contextualized approach and its application in the *B.C. Health Services* case offers very little guidance as to how section 2(d) claims should be handled in the future. Neither the three propositions deployed in *B.C. Health Services* to support section 2(d) extension to collective bargaining, nor the contextualized approach

⁵⁸ *Id.*, at para. 25.

⁵⁹ *Id.*, at paras. 40-68.

⁶⁰ Accompanied by other non-statutory measures such as recognition strikes intended to induce employers to bargain.

itself, offer assistance in predicting whether a given activity of a given association will receive section 2(d) protection. In fact, it is submitted, the three propositions and the contextual approach seem to be largely devoid of normative force. It is unclear why the propositions, taken together, lead to the conclusion that collective bargaining ought to receive section 2(d) protection.

2. Labour History

The Court's proposition that the history of collective bargaining and its treatment in Canadian law before the Charter show its fundamental importance is supported by a lengthy dissertation on labour history.⁶¹ The accuracy of the Court's treatment of this history is beyond the scope of this paper. However, it is in elaborating this history that the Court introduces the fundamental misconception in its judgment: that the collective bargaining right in its modern form can be likened to a fundamental freedom. The Court asserts that collective bargaining long pre-dates its statutory incarnation. That is undoubtedly true: in fact, it is likely that workers exercised freedom to come together in groups, or trade guilds, or associations, to bargain for better terms or working conditions for as long as humans have been bargaining. But this offers no reason to regard the collective bargaining features of the modern statutory regime as the same species of activity.

The Court points out that the long history and importance of collective bargaining was the reason that legislatures enacted collective bargaining statutes, thus creating the modern collective bargaining regime:

... As society entered into the industrialized era, "workers began to join unions and to engage in collective bargaining with their employers. Although employers resisted this development with all the resources at their command, it eventually became apparent that unions and collective bargaining were natural concomitants of a mixed enterprise economy. The state then assumed the task of establishing a framework of rights and responsibilities within which management and organized labour were to conduct their relations."⁶²

While this may explain why collective bargaining statutes themselves are important to "a mixed enterprise economy", it does not offer a reason

⁶¹ *B.C. Health Services*, *supra*, note 46, at paras. 40-68.

⁶² *Id.*, at para. 42.

why constitutional protection for collective bargaining is required in addition to the incorporation of collective bargaining features in the modern statutes. There is no real explanation here of a normative or policy rationale to bring collective bargaining within *constitutional* as opposed to *statutory* protection.

All the while, the Court fails to acknowledge that with the enactment of collective bargaining regimes, collective bargaining was transformed from an activity with a voluntary associational aspect into something with a compulsory character. It remained associational, but the relevant association for purposes of statutory collective bargaining — the bargaining unit — was not itself a free association; and the activity of statutory collective bargaining became in fact compulsory for both bargaining agents and employers.

The Court's quotation from Professors Fudge and Glasbeek's description of the transformation wrought to collective bargaining by its statutory incorporation is telling, once emphasis is added to the relevant words:

For the first time in Canada's history, the government *compelled employers to recognize and to bargain* with duly elected representatives and/or trade unions. From the workers' perspective, this constituted a movement from having a right to state their interest in being represented by a union to having enforceable legal right to have their chosen representative treated as a union by their employer. *There was no longer any need to use collective economic muscle — always seriously limited by the common law — to obtain the right to bargain collectively with employers.*⁶³

The picture is completed when it is also noted that *the trade unions themselves are compelled to bargain collectively* under the statute, *not merely for their own members, but also for those workers who, as Professor Weiler put it, "belong to other unions and even those who want nothing to do with any union"*.⁶⁴

To be fair, the Court does not remain completely silent in response to the B.C. government's argument that modern collective bargaining is a statutory right:

The respondent argues that the right to collective bargaining is of recent origin and is merely a creature of statute. This assertion may be true if collective bargaining is equated solely to the framework of

⁶³ *Id.*, at para. 59 (emphasis added).

⁶⁴ *Reconcilable Differences, supra*, note 34, at 125 (emphasis added).

rights of representation and collective bargaining now recognized under federal and provincial labour codes. However, the origin of a right to collective bargaining in the sense given to it in the present case (i.e., a procedural right to bargain collectively on conditions of employment), precedes the adoption of the present system of labour relations in the 1940s.⁶⁵

This passage suggests that the Court does acknowledge that there is a material difference between non-statutory collective bargaining and the inclusion of collective bargaining in modern labour statutes. But what the Court fails to acknowledge is that the essential difference between the statutory and pre-statutory forms of collective bargaining is the introduction of compulsion to replace voluntariness, and that this is fundamental to the consideration of whether collective bargaining in its modern form is constitutionally protected as a freedom.

One may be led to conclude from this passage that the Court is not purporting to constitutionalize the modern form of collective bargaining, but only its voluntary, pre-statutory progenitor. This possibility is belied by the Court's insistence, later in the judgment, that the constitutional right to collective bargaining implies a corresponding duty to bargain on the part of the employer⁶⁶ — a duty foreign to any non-statutory, voluntary model of collective bargaining. It is also belied by the outcome in the case, namely the invalidation of legislation that sought to interfere with the product and scope of *statutory* collective bargaining.

As part of its recitation of history, the Court discusses the comments on collective bargaining of the Acting Minister of Justice before the Special Joint Committee of the Senate and House of Commons that was formed to consider the draft constitutional resolution at the federal level. The Court does not note that the comments were made in opposition to a motion to amend the draft text of section 2(d) to read “freedom of association including the freedom to organize and collective bargaining”, which was defeated 20-2.⁶⁷ The defeat of the motion suggests a legislative intention to exclude rather than include the claimed right, assuming that the intentions of a federal legislative committee are even relevant when considering an instrument that was the product of

⁶⁵ *B.C. Health Services*, *supra*, note 46, at para. 41.

⁶⁶ *Id.*, at paras. 90, 99-107.

⁶⁷ Dianne Pothier, “Twenty Years of Labour Law and the *Charter*” (2002) 40 *Osgoode Hall L.J.* 369, at 371.

negotiations among multiple governments and enacted by the Parliament at Westminster, not Ottawa.

The Acting Minister's comments are quoted by the Court as follows:

Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that that is already covered in the freedom of association that is provided already in the Declaration or in the *Charter*; and that by singling out association for bargaining one might tend to d[i]minish all the other forms of association which are contemplated — church associations; associations of fraternal organizations or community organizations.⁶⁸

In the writer's view, the Acting Minister's comments do not disclose an understanding that the modern form of collective bargaining (with its compulsory features including the duty to bargain) is intended to be included in freedom of association. Rather, it suggests something much less than that, for the comments clearly explain that other associations, such as religious, fraternal and community organizations, should not be "diminished" relative to trade unions in regard to the protections offered by section 2(d). Yet it can hardly be contemplated that the *objects* of religious organizations, such as, for example, the conversion of non-adherents, were intended to receive section 2(d) protection. The interpretation of the Acting Minister's comments that makes sense of them as a whole is that freedom of association would protect the freedom to organize (which it clearly does) and to collectively bargain, should it ever come to pass that a legislature was minded to introduce the kinds of legal disabilities on union organizing and voluntary collective bargaining that characterized the 19th century. The writer ventures to add that the Acting Minister would never have assented to the theses that a "procedural right to collective bargaining" enshrined in the Charter would mean that the state could not by legislation set aside the terms of a negotiated collective agreement. Yet that was the outcome of the *B.C. Health Services* case.

Regardless of the details of labour and legislative history, an important question arises as to the significance of this historical factor for future cases involving section 2(d) rights. The kind of prominence that collective bargaining has in the historical record recited by the Supreme Court may or may not be shared by other associational activities for which section 2(d) protection is sought. A given activity's

⁶⁸ *B.C. Health Services*, *supra*, note 46, at para. 67.

(or association's) place in the pre-Charter historical record is an entirely contingent matter. Some kinds of associations may be able to point to a long and important history; others perhaps not. It is unclear whether the emphasis placed on history in *B.C. Health Services* disentitles an associational activity from consideration for section 2(d) protection if it lacks the requisite pedigree. If that is the case, then section 2(d) would be plagued by the "frozen concepts" approach that undermined the efficacy of the federal *Bill of Rights*⁶⁹ in the 20 years leading up to the Charter. This also raises the question as to whether the contingencies of history should be relevant at all to what should be a normative inquiry on whether constitutional protection extends to a given associational activity.

3. International Law

The Court's next "proposition" supporting the inclusion of collective bargaining in section 2(d) is the existence of international instruments dealing with labour rights. The accuracy of the Court's treatment of international labour law is a matter for others to examine.⁷⁰

What cannot go without comment, however, is the Court's adoption of Dickson C.J.C.'s statement in the *Alberta Reference* that, "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".⁷¹ This proposition represents a dramatic shift from the conventional understanding that the federal government's execution on behalf of Canada of an international instrument represents at its highest a commitment to enact such domestic legislation as may be required to give effect to the international instrument. (It certainly does not create enforceable domestic law.⁷²) Because an international human rights obligation can be, and generally is intended to be, fully implemented simply by the enactment of domestic legislation, it should not be the case that an international law obligation can give rise to a *presumption* of incorporation in the domestic *constitution*. Further, the government is usually at liberty to withdraw from an international instrument in

⁶⁹ *Canadian Bill of Rights*, S.C. 1960, c. 44.

⁷⁰ See, e.g., Brian Langille, "Can We Rely on the ILO?" (2007) 13 C.L.E.L.J. 363.

⁷¹ *B.C. Health Services*, *supra*, note 46, at para. 70, citing *Alberta Reference*, *supra*, note 43, at 349, *per* Dickson C.J.C.

⁷² *B.C. Health Services*, *id.*, at para. 69.

accordance with prescribed terms. It would be odd if shifting international commitments altered the content of the Canadian Constitution.

It is also necessary to observe that there will be a strong disincentive for the federal government to agree to new international human rights obligations in emerging or hitherto neglected fields if to do so creates a presumption of constitutional interpretation that the obligations are also contained in the Charter.⁷³ Conversely, a federal government with an agenda that seeks to further the constitutionalization of a controversial right or interest (*e.g.*, a right to bear arms, property rights, or the absolute right to an abortion) could very well enter into a treaty on the subject with similarly minded foreign governments in the hope of creating a presumption of Charter protection.

In addition, there are problems faced by the provinces in this regard. The provinces may or may not be consulted with respect to the federal government's treaty-making plans. It would be odd if the federal government's treaty making could, by operation of the resulting constitutional presumption, undermine both Canadian federalism and the amending formula in the Constitution.

Lastly, recourse to international law, like reliance on history, is something that is not necessarily available in any given case to show whether a given associational activity warrants inclusion in section 2(d). Some associational activities may find expression in international law, others may not. It is unclear whether Charter protection will depend upon finding an "international analogue".

4. Charter Values

The Court's final proposition in favour of section 2(d) protection for collective bargaining is that it furthers certain values reflected elsewhere in the Charter. The Court cites the values of democracy, liberty, autonomy, dignity and equality. The Court's recitation of values found in other sections of the Charter is particularly interesting given the absence, noted above, of any real discussion of how the values underlying section 2(d) in particular actually favour the inclusion of collective bargaining.

⁷³ In the period after *B.C. Health Services* was released the federal government has declined to sign a United Nations Declaration on the Rights of Indigenous Peoples, as well as a proposal to recognize water as a human right, online: <<http://www.cbc.ca/canada/montreal/story/2007/07/13/aboriginal-march.html>>; <<http://www.thestar.com/News/Canada/article/409003>>.

In considering Charter values, the Court makes no effort to determine whether any Charter values run counter to the inclusion of collective bargaining in section 2(d). The values of individual liberty, personal autonomy and dignity, reflected in the fundamental freedoms themselves and in section 7, would seem to be at best only equivocally served by those features of collective bargaining that necessitate the subordination of individual choice to the needs and wishes of the collectivity. The democratic principles of majoritarianism reflected in collective bargaining regimes could be seen to be somewhat at odds with the Charter's anti-majoritarian features, particularly its protections for dissenting individuals and groups. "Solidarity", the traditional union value which justifies the subordination of the individual to the collectivity, is not itself a discernible Charter value. Even the values that the Court has found underlying the section 15 equality guarantee — human dignity and the assessment of individuals on their actual needs, capacities and circumstances rather than presumed and stereotypical group characteristics⁷⁴ — do not seem to accord fully with such typical features of collective bargaining as the seniority system.⁷⁵

Left undiscussed in the Court's decision is whether the promotion of Charter values is necessary for an activity to merit inclusion in section 2(d). If it is, it would seem that a great many organizations and associational activities would be excluded from consideration, as they are dedicated to values that do not find expression in the Charter. Organizations dedicated to or celebrating the values of charity, thrift, productivity, magnanimity, humility, sporting prowess or military sacrifice, among others, would not seem to be fostering specifically "Charter values". A neutral analysis would focus on the values underlying freedom of association itself, rather than attempt to find a match between an association's values and those in other parts of the Charter.

⁷⁴ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.).

⁷⁵ The Court in fact notes the importance of such features as seniority and bumping rights (under which more senior employees can avoid lay-off by "bumping" junior employees from their jobs): *Health Services*, *supra*, note 46, at para. 130: "... bumping rights are an integral part of the seniority system usually established under collective agreements, which is a protection of significant importance to the union. 'Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process'".

5. Conclusion on the Court's Section 2(d) Analysis of Whether Collective Bargaining is Protected

In the writer's respectful view, the Court's section 2(d) analysis in *B.C. Health Services* suffers from an absence of principle and excess of context.⁷⁶ Even if the Court is asserting that it is entitled to make constitutional policy without reference to the interpretation or development and application of principles of general application, we are left without any real articulation of (i) how the policy factors taken into consideration by the Court (the three propositions just discussed) are related to the values and purposes underlying section 2(d), (ii) why the factors carry the normative weight that the Court seems to ascribe to them, (iii) whether they are necessary conditions for section 2(d) protection in other contexts, and (iv) what other factors, or kinds of factors, could be relevant to section 2(d) protection.

IX. CHARACTERISTICS OF THE RIGHT TO COLLECTIVE BARGAINING

1. Process versus Outcome

After deciding that a procedural right to collective bargaining is covered by section 2(d), the Court went on to discuss its characteristics. As mentioned above, the Court confined section 2(d) protection to the *process* of collective bargaining as opposed to its *outcomes*. It also stated that the right was general in nature and did not protect a particular model of labour relations.

... the 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.

.....

... as the right is to a process, it does not guarantee a certain substantive or economic outcome ... the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method.⁷⁷

⁷⁶ See, on this same issue, "Due Process, Collective Bargaining and Section 2(d)", *supra*, note 52.

⁷⁷ *B.C. Health Services*, *supra*, note 46, at paras. 89 and 91.

Due to the nature of the Court's section 2(d) analysis, we do not have a ready explanation for the process/outcome distinction. As we have seen, the distinction seems to distinguish means from ends, but this does not forestall the risk of section 2(d) protecting a wide range of associational activities that can be characterized as means to an association's ends. If only the ultimate objective (the substantive outcome) is excluded from associational protection, but the intermediate ends that are *means* to the ultimate end *do* enjoy section 2(d) protection, the distinction has not done much work.

In the writer's view, the distinction does very little work at all in the case of collective bargaining. For it is necessary to consider what the distinction is actually excluding from the ambit of section 2(d)'s protection in the labour relations context. The Court explains in the passage quoted above that what the distinction excludes from protection is "a certain substantive or economic outcome". This is not saying much. For it is quite inconceivable how section 2(d) could possibly guarantee a particular economic outcome. The notion that freedom of association somehow guarantees a particular wage or wage increase is absurd. If so, then it is hard to discern what part of collective bargaining has actually been excluded from the ambit of section 2(d). It would seem that *all* of collective bargaining is protected, and certainly anything that can be characterized as a means or a process.

There is a further difficulty. The Court's claim that only process and not substance is protected is belied by the actual result in *B.C. Health Services*. On finding that the procedural right to collective bargaining had been infringed without justification under section 1, the Court invalidated the B.C. legislation that had altered past collective bargaining outcomes. In the result, the bargaining *outcomes* of past negotiations were protected from legislative interference. One would have thought that in the face of an infringement of the *procedural* right to collective bargaining, the remedy would have been an order that the parties comply with the required *procedure* — namely to go back to the bargaining table. What we have instead is a remedy that effectively restores the previously achieved bargaining outcome. In a wry comment in the *Canadian Western Bank* case released just a week before *B.C. Health Services*, Binnie J. noted that, "it is wise to look at what the courts do as distinguished from what they say".⁷⁸ This wisdom suggests

⁷⁸ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 52 (S.C.C.).

that contrary to the claim of a process/outcome distinction, at the very least *past* bargaining outcomes really are protected by section 2(d).

2. Duty to Bargain in Good Faith

The Court held that the duty to bargain in good faith is part and parcel of the procedural right to collective bargaining. The duty rests on both the employer and the employees:

... 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.*⁷⁹

This, the writer submits, is indicative that notions of freedom of association have been mixed up in *B.C. Health Services* with the modern, statutory form of collective bargaining, in which the parties are compelled to negotiate with each other. Constitutional protection appears to be extended not to voluntary, free collective bargaining, but rather to a compulsory process. In fact, unlike the situation with other section 2 freedoms, the right-holders do not appear even to have a choice as to whether to exercise their right, for they, like their employers, are required to bargain.

Another anomaly here is that a duty to bargain is imposed on employers under the fundamental freedom of freedom of association. Yet under freedom of speech under section 2(b) there is no duty (even upon the government) to listen to speech uttered by the right-holder. This is so, even though imposing a constitutional duty to listen would certainly make the section 2(b) right more “meaningful”.

B.C. Health Services addresses only the public sector employer's duty to bargain. It further suggests that private sector employees do not enjoy a constitutional right, similar to that of their colleagues in the public sector, that compels their private employers to bargain with them. The Court states:

⁷⁹ *B.C. Health Services*, *supra*, note 46, at para. 90 (emphasis added).

... The Charter applies only to state action. One form of state action is the passage of legislation. In this case, the legislature of British Columbia has passed legislation applying to relations between health care sector employers and the unions accredited to those employers. That legislation must conform to s. 2(d) of the Charter ... A second form of state action is the situation where the government is an employer. While a private employer is not bound by s. 2(d), the government as employer must abide by the Charter, under s. 32 ...⁸⁰

Generally, of course, private employees are covered by the *Labour Relations Act* or its equivalent in other jurisdictions, and those regimes impose a statutory duty to bargain upon private employers. There are certain classes of employees, such as Ontario farm workers, who are not covered by collective bargaining legislation that imposes a duty to bargain. It is contended in the farm worker litigation in Ontario⁸¹ that the legislature is obliged under section 2(d) to enact a collective bargaining regime for farm workers that would require private farm employers to bargain with the exclusive bargaining agent selected by majority vote at the farm workplace. If this contention is accepted it would have the effect of requiring the state, pursuant to the Charter guarantee of *freedom* of association, to *compel* a private employer to deal exclusively with the majority-supported employee association, and to *refuse to recognize and freely bargain with* a minority-supported association of workers at that workplace. While such a requirement from a labour policy perspective may be seen as unremarkable, that it could be mandated by the constitutional guarantee of freedom of association is astonishing. It remains to be seen what the courts will do with this claim in light of *B.C. Health Services*.

3. Substantial Interference

The Court, drawing from the *Dunmore* case, held that only a “substantial interference”, by government conduct or legislation, with the procedural right to collective bargaining would infringe section 2(d).⁸² It is not necessary for the interference to be intentional; substantially interfering effects are sufficient.⁸³ The Court elaborated that

⁸⁰ *Id.*, at para. 88.

⁸¹ *Fraser v. Ontario (Attorney General)*, [2006] O.J. No. 45, 79 O.R. (3d) 219 (Ont. S.C.J.), appeal to the Court of Appeal under reserve. The writer is counsel for Ontario in the case.

⁸² *B.C. Health Services*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at para. 90 (S.C.C.).

⁸³ *Id.*, at para. 91.

“[t]o 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”.⁸⁴

Although the Court indicated that each case would be fact specific, examples of substantial interference could include: “union breaking” legislation, acts of bad faith (presumably in negotiations), and “unilateral nullification [through legislation] of negotiated terms, without any process of meaningful discussion and consultation”.⁸⁵

The last cited example, the voiding of negotiated terms and the substitution of legislative terms was what was found to be constitutionally offensive in the *B.C. Health Services* case.⁸⁶ In addition, the Court held on the facts of *B.C. Health Services* that legislative prescription of terms so as to preclude future negotiations was also a breach of section 2(d). This covers terms that not only *were* the subject of negotiations (whether or not they made their way into an actual agreement), but also those that *could have been* negotiated.⁸⁷

It is hard to overstate implications of this proposition, which effectively grants constitutional protection to the content of collective agreements, subject only to the state justifying legislative interference under section 1 of the Charter. As Robert Charney has noted, it appears that the Court has imported into the Charter discredited American constitutional notions protecting the inviolability of contracts.⁸⁸ With *B.C. Health Services*, though, contracts seem to be inviolable only if they are collective agreements concluded between trade unions and employers. *B.C. Health Services* goes even further by precluding legislative interference with *potential* collective agreements, not merely actual ones.

What this means is that the hierarchy of laws in this country has apparently been turned topsy-turvy: contracts had formerly been treated as a source of law for the relations between the parties, and entirely subject to democratically enacted statute law and judge-made common

⁸⁴ *Id.*, at para. 92 (emphasis in original).

⁸⁵ *Id.*

⁸⁶ *Id.*, at paras. 113-136.

⁸⁷ *Id.*, at paras. 96, 119, 128.

⁸⁸ Robert E. Charney, “The Contract Clause Comes to Canada: The British Columbia *Health Services* Case and the Sanctity of Collective Agreements” (2007-2008) 23 N.J.C.L. 65 [hereinafter “The Contract Clause Comes to Canada”].

law. Now, the species of contract known as the collective agreement has been elevated to a status above statute law, subject only, it seems, to limits under section 1 of the Charter.⁸⁹

The procedural right to collective bargaining seems to indicate that, subject perhaps only to section 1, governments are constitutionally restricted in effecting change and making law in areas covered by *actual or potential* collective agreements: instead of legislating they must negotiate in good faith with trade unions. And, as discussed further below, based on the section 1 analysis applied in *B.C. Health Services*, it appears that a failure to negotiate or consult in advance of legislating will be fatal to any section 1 justification that might be offered by government.⁹⁰

The implications of this transformation of the legal order are all the more astounding when it is realized that the areas covered by actual or potential collective bargaining and collective agreements has grown over the last few decades to embrace far more than traditional terms of employment.⁹¹ Unions, particularly in the public sector, have asserted a greater desire to deal in negotiations, under the auspices of addressing “working conditions”, with what are not merely of concern to employees but are also fundamental issues of public policy. Examples range from the provision of weapons to police officers, border officials and even transit workers, to the content and delivery of the public school curriculum and school testing, to the accommodation of persons with disabilities. The operation, closure, relocation or reorganization of public facilities, such as hospitals, prisons, universities and electrical generating stations, directly implicate the broader public interest, and yet the government’s ability to pursue the public interest through legislative or regulatory measures is now subject to the vagaries of the collective bargaining process.

For the first time in Canadian history, the permissible ambit of a legislative initiative seems to be governed by the past negotiating history, and present and future negotiating intentions, of trade unions with employers. Consider, for a moment, the position of a government policymaker or adviser seeking to develop a legislative initiative to address a pressing issue or implement a newly elected government’s

⁸⁹ Peter Hogg, *Constitutional Law of Canada*, 5th ed., vol. 2, loose-leaf supplemented (Scarborough, ON: Carswell, 2007), at 44-9.

⁹⁰ *B.C. Health Services*, *supra*, note 82, at paras. 154, 156-161.

⁹¹ The points made here are from Charney, “The Contract Clause Comes to Canada”, *supra*, note 88.

platform. In order to determine whether the government can act free of constitutional risk — and whether the government can proceed without first engaging in good faith negotiations or consultations with trade unions to address the issue — the policymaker or adviser must determine whether any collective agreement will be affected by the proposed legislation. He or she must further consider (how, it is not clear) what the confidential negotiating history has been with trade unions on issues that could be affected by the legislation. It must also be determined whether the legislation might preclude negotiations over some aspect of an area that a trade union might possibly want to deal with in future negotiations. On the logic of *B.C. Health Services* this would appear to be the case not merely with public sector unions, but also with private sector unions and employers. *B.C. Health Services* states that section 2(d) not only binds government employers, it also prevents the legislator from displacing or precluding collective bargaining, and this presumably includes collective bargaining in the private sector.⁹² The result of this is what the writer submits is an intolerable degree of constitutional uncertainty with respect to broad swathes of public policy.

Further, it offers the prospect of the patchwork constitutionality of legislation. In the case of some sectors, institutions or companies, there will be no history, intention or hope of collectively bargaining a particular issue that stands to be affected by a legislative measure. Yet in relation to another sector, institution or company, the existence of such a history, intention or hope on the part of a trade union will mean that the legislative measure would be at constitutional risk on section 2(d) grounds.

With all of this, we are left to wonder how it is that the past or future bargaining conduct of certain parties can possibly determine the content and application of a constitutional norm.

Some consideration might also be given to the implications of the transformation brought about by *B.C. Health Services* from the perspective of parties engaged in collective bargaining (whether it be in the public or private sector). Prior to *B.C. Health Services* it was understood by the parties that legislation governing certain terms and conditions (*e.g.*, pension legislation, or occupational health and safety rules, or other regulations that affect the workplace) established a frame of reference within which negotiations might take place. With *B.C.*

⁹² *B.C. Health Services*, *supra*, note 82, at para. 88. It is notable that the legislation in *B.C. Health Services* applied to some private sector employers: *Id.*, at para. 8.

Health Services one wonders whether parties to collective bargaining can simply ignore legislated terms affecting terms and conditions of employment on the basis that they were enacted unilaterally and thus unconstitutionally preclude bargaining the issue. The frame of reference for bargaining appears to have been lost. Without it, where does bargaining start? What are the ground rules?

B.C. Health Services offers very little to resolve these quandaries. The Court, seemingly in an effort to introduce a limiting principle to the scope of the section 2(d) right, averred that “if [a] subject matter is of lesser importance to the union, then it is less likely that the section 2(d) right to bargain collectively is infringed”.⁹³ Yet the Court’s offer of nothing but trivial examples of matters that might be considered of “lesser importance” suggests that virtually anything of substance can be treated as of sufficient importance to trigger the section 2(d) right:

... measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(d) right of freedom of association.⁹⁴

When applying the principles it has developed to the legislative provisions at issue in *B.C. Health Services*, the Court seems to be inconsistent in its approach to determining whether a legislative prescription impermissibly removes a subject matter from the scope of potential collective bargaining. For the most part, the Court treats the legislative imposition of terms so as to preclude future negotiations over those terms as an infringement of section 2(d).⁹⁵ However, in the case of B.C.’s repeal of a job retraining and financial support program for laid off employees, the Court held that because the program did not originally emerge from a past process of collective bargaining and depended on the authority of the government for its existence (rather than being within the control of employer and employees), the repeal did not offend section 2(d):

The ESLA did not arise out of collective bargaining but, rather, was imposed by the government on health sector employers pursuant to the recommendations of an inquiry committee. Since neither the ESLA nor

⁹³ *Id.*, at para. 95.

⁹⁴ *Id.*, at para. 96.

⁹⁵ *Id.*, at paras. 113, 128, 149.

the HLAA was the outcome of a collective bargaining process, modifying them cannot constitute an interference with past bargaining processes. Further, since the ESLA and HLAA rely heavily on the authority of the government for their existence, and are outside of the power of health sector employees and employers, there is no potential for future collective bargaining over matters relating to either the ESLA and HLAA. Since there can be no future collective bargaining relating to the ESLA or the HLAA, there can be no interference with future collective bargaining over these matters either. It follows that neither s. 7 nor s. 8 has the purpose or effect of interfering with collective bargaining, past or future.⁹⁶

We may take some comfort from the Court's affirmation that the legislative repeal of a program that had its genesis outside collective bargaining does not engage section 2(d) right. But it is hard to understand how the fact that the legislation was not the subject matter of *past* collective bargaining can be determinative, when its existence may very well have been taken into account in past bargaining. The program was presumably part of the frame of reference in which bargaining took place.

What this tells us, though, is that the law (particularly statute law) must provide the frame of reference for collective bargaining, and that collective bargaining must be subordinate to the law, not the other way around.

X. SECTION 1

In *B.C. Health Services* the relationship between section 1 and the protected collective bargaining right under section 2(d) is not clear. It is stated in the exposition of section 2(d) that if the government wishes to effect change on matters of importance it should negotiate them in lieu of proceeding unilaterally by way of legislation.⁹⁷ One takes from this that following a process of good faith consultation and negotiation prior to legislating complies with section 2(d).

On the facts of *B.C. Health Services* the B.C. government did not engage in consultations or negotiations prior to legislating. In the Court's section 1 analysis the Court seems to treat the government's failure to consult as going to the issue of whether the legislation in question was

⁹⁶ *Id.*, at para. 125.

⁹⁷ *Id.*, at para. 109.

minimally impairing of a Charter right. The B.C. government's failure to consult was held not to be minimally impairing.⁹⁸

Yet it would seem that the failure to consult and negotiate is what gave rise to the section 2(d) breach in the first place. The failure to consult thus appears both to determine the breach of section 2(d) and also to disentitle the government from relying on section 1 because it cannot pass the minimal impairment test when it fails to consult.

If this is so, it is hard to see how section 1 can come to the assistance of the government at all, except perhaps in the situation of, "essential services, vital state administration, clear deadlocks and national crisis", in which the Court suggests that the state may be able to justify limits on the collective bargaining process on an "exceptional and typically temporary basis".⁹⁹

Given that the facts in *B.C. Health Services* involved a government that did not consult, the judgment does not tell us whether a process of good faith but unsuccessful consultation and negotiation followed by unilateral government action in light of the failure of negotiations will be analyzed under section 2(d) or section 1. This will need to be worked out in future cases.

An important section 1 issue arising from the inclusion in section 2(d) of a right to collective bargaining received only scant attention in the majority decision in *B.C. Health Services*. It is the question of whether the right to collective bargaining — a right to a process designed to improve predominately *economic outcomes* for workers — is subject to limits under section 1 of an economic or budgetary nature. In principle, rights of an economic nature should be subject to limits of an economic nature.

Only the partial dissent of Deschamps J. acknowledged the importance of the economic context in the approach to section 1.¹⁰⁰ Justice Deschamps noted the legitimacy of the government's concern with the unsustainable growth of public health care costs, of which labour costs were the primary component. She also noted, in particular, that the B.C. legislation was a response, in part, to the fact that under previous B.C. governments, the wages paid to the workers represented

⁹⁸ *Id.*, at paras. 156-161.

⁹⁹ *Id.*, at para. 108.

¹⁰⁰ *Id.*, at paras. 200, 202-205, 220-222, 230-233, 239-240, *per* Deschamps J.

by the claimant unions had risen to a level where they were approximately 30 per cent higher than in other provinces.¹⁰¹

By contrast, the majority in *B.C. Health Services* dismissed as “suspect” the significance of budgetary concerns in its section 1 analysis.¹⁰² Yet this ignores the fact that in the case of public sector labour relations, budgetary concerns impinge directly on important public interests relating to the availability, quality and sustainability of public services such as health care, education, policing, the administration of criminal justice, correctional services and so on.

XI. IMPLICATIONS FOR SECTION 2(d) LITIGATION

It can reasonably be anticipated that litigation of legislative initiatives which are claimed to infringe the section 2(d) right to collective bargaining will involve an inquiry — under section 2(d) or section 1 — into the good faith of government and trade union negotiations. Thus, rather than strictly adjudicating the objective purposes and effects of legislation, the courts will be hearing evidence and argument on the subjective intentions of the parties to negotiations as well as the trade unions’ subjective view as to what was of “importance” to them for potential future negotiations. It is unclear whether this will adversely affect the negotiating climate in public sector collective bargaining, if negotiations are conducted with one eye on potential constitutional litigation.

XII. ADDITIONAL LABOUR RELATIONS IMPLICATIONS AND UNCERTAINTIES

There are many other uncertainties arising from the *B.C. Health Services* decision beyond those discussed above.

A number of the uncertainties are theoretical and the reasoning in *B.C. Health Services* does not provide any satisfactory guidance:

¹⁰¹ *Id.*, at paras. 204, 220-222, 230-233, 239-240, *per* Deschamps J. As noted by Deschamps J., and according to B.C.’s submissions to the Court at the hearing, instead of simply rolling back wages the B.C. government chose to develop the legislation at issue so as to introduce a structural readjustment on wage settlements on a going forward basis (in part by way of the introduction of a measure of market discipline which had been lacking in the public sector context). See also *Factum* of the Respondent in the Supreme Court of Canada, para. 8.

¹⁰² *Id.*, at para. 147.

- Who is the right-holder? The collectivity of employees in the bargaining unit, the individual employees, or the bargaining agent?
- What is the relevant association for consideration of the section 2(d) right to collective bargaining? The bargaining unit that exists by statute, the trade union that exists by voluntary membership, or the trade union *qua* bargaining agent?
- Are section 2(d) rights alienable? Can an individual, union, or other relevant association waive section 2(d) rights in exchange for economic or other considerations?
- What is the status of a dissenting collectivity of workers? Are dissenters' section 2(d) rights subsumed in the rights of the collectivity of workers as a whole? Or can they assert their own section 2(d) rights?

Many practical uncertainties also arise, but their resolution will depend in part on the answers to the above theoretical questions —

- Is the statutory prescription of bargaining units in the typical labour relations regime constitutionally permissible, or should the determination of bargaining units be a strictly voluntary matter?
- Can a statute re-order or restructure statutory bargaining units without running afoul of section 2(d)?¹⁰³
- Are the exclusive representation provisions of the typical labour relations model permitted, not permitted or mandatory under section 2(d)?
- What is encompassed by the procedural right to collective bargaining? Are remedies for bargaining impasse (including the right to strike) part of the procedural right?
- What are the implications of the section 2(d) right for parity and balance between labour and management?

At present, as we ponder the aftermath of the *B.C. Health Services* revolution, the only certainty is that all of us — government, labour, management, the public and the judiciary — now inhabit a novel legal and policy environment, the shape of which will only become clear as we continue to live, work, negotiate and litigate in it.

¹⁰³ A decision from the Quebec Superior Court has declared the legislative rationalization of the more than 3,500 bargaining units in Quebec's health care sector to be unconstitutional, relying on an interpretation of *B.C. Health Services: Confédération des syndicats nationaux v. Québec (Procureur général)*, [2007] J.Q. no 13421, 2007 QCCS 5513 (Que. C.S.). The case is under appeal.

