B.C. Health Services: The Legacy After 18 Months

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One hundred and thirty-five years after Parliament, in 1872, ended the legal characterization of registered unions as illegal combinations in restraint of trade; sixty-nine years after the New Brunswick Legislature enacted the *Labour Act* as the forerunner of contemporary provincial collective bargaining legislation; and a scant thirty-five years after Canada ratified the ILO's *Freedom of Association and Protection of the Right to Organise Convention, 1948*, the Supreme Court of Canada released its reasons for decision in *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia.*[1] Other contributors to this Forum will undoubtedly explore and explain the significance of *B.C. Health Services* both in terms of its reversal of position in relation to collective bargaining as an aspect of the *Charter* right to freedom of association and in terms of its broader implications for understanding the scope of that right in other contexts. My contribution is far more modest—it is to examine the impact of *B.C. Health Services* since its release (8 June 2007 to 31 December 2008).

Like all Supreme Court of Canada decisions, *B.C. Health Services* has had both direct and derivative impacts: direct in the sense that it resolved a legal point of contention between the parties to the litigation—so there is an aftermath to report—and derivative in the sense that the decision has impacted on our understanding of freedom of association and thus on the rights of persons asserting *Charter* associational rights in other contexts.

AFTERMATH: DIRECT IMPACT

B.C. Health Services has proven costly to the government and taxpayers of British Columbia. In January 2008, the provincial government, through the Health Employers Association of British Columbia (HEABC) which represents over 300 health care employers in the province, and the various union sectoral bargaining associations completed negotiations to give effect to the Supreme Court of Canada decision.[2] These negotiations focussed on issues pertaining to bumping, contracting out and layoff (the subjects of the provisions of the provincial legislation held invalid in *B.C. Health Services*) as well as compensation for employees

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1 *Trade Unions Act*, S.C. 1872, c. 30; S.N.B. 1938, c. 68; International Labour Organization, Convention C87 (adopted 9 July 1948); 2007 SCC 27, [2007] 2 S.C.R. 391.

2 The settlement agreements are available at the HEABC website: www.heabc.bc.ca (accessed 26 January 2009).

negatively affected by the invalid provisions and new consultation mechanisms.[3]

The four settlement agreements apply to the sectoral associations of unions created for bargaining purposes pursuant to the *Health Authorities Act*.[4] The four sectoral associations are: 1) the Community Bargaining Association (CBA) representing approximately 14,000 community health care and community health care support workers as well as assisted living and resident care workers; 2) the Facilities Bargaining Association (FBA) representing approximately 43,000 employees in a variety of classifications such as licensed practical nurses, food service workers and lab assistants; 3) the Health Science Professional Bargaining Association (HSPBA) representing approximately 14,000 employees such as residents and paramedics providing diagnostic, clinical and rehabilitation services and who apparently did not join in the constitutional litigation which became *B.C. Health Services*; and 4) the Nurses Bargaining Association (NBA) representing approximately 30,000 nurses (predominately registered nurses). Rather than detail each settlement agreement, I will present an overview and use the NBA agreement to illustrate specific points.

The public announcements of the four settlement agreements each declared that the "employers retain the option to contract out certain services, ensuring both flexibility and sustainability for healthcare." For example, the NBA agreement states "the Employer may contract out non-clinical services, including when such contracting out results in the lay off of employees."[5] Both the CBA and FBA agreements provide for employer consultation sixty days before the employer exercises its right to contract out work. The HSPBA and the NBA in contrast provide for potentially more extensive consultation reminiscent of the institutions of industrial democracy intended to enhance the voice of labour in the workplace. The NBA agreement provides for two types of consultation: 1) annual meetings of the leadership of the NBA with the deputy minister of health, senior health executives and the chief executive officers of the six regional health authorities and 2) biannual meetings of the NBA leadership with the administrators of the six regional health authorities. These meetings are to address "on a confidential basis, developments and potential initiatives" which, in relation to annual meetings, "*significantly affect* the health sector and which may have an impact" on NBA members and, in relation to the biannual meetings, "which may arise within the Health Authority and which may have a *significant impact*" on NBA members.[6] This latter phrasing should clearly include the impact of contracting out. The NBA settlement agreement also addressed other matters pertaining to seniority, salary on promotion, long term disability, a three year B.S.N. program, tuition costs and professional qualifications assessment services for internationally educated nurses (IEN).[7]

3 *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2 (a.k.a. Bill 29).

4 R.S.B.C. 1996, c. 180, s. 19.4 identifying the following health employment subsectors: "(a) residents; (b) nurses; (c) paramedical professionals; (d) health services and support — facilities subsector; (e) health services and support — communities subsector."

5 NBA Settlement Agreement 2008, article 2.1 and Appendix A, *supra*, note 5.

6 *Ibid.*, article 3.1 and 3.2 (emphasis added).

7 *Ibid.*, articles 6, 7, 8, and 9.

All four settlement agreements provide compensation for employees adversely affected by the provisions of the unconstitutional provincial statute limiting collective bargaining rights and retraining support for individuals laid off by application of the impugned provisions. In exchange, each bargaining association agreed to deem resolved all individual and policy grievances related to the implementation of the statute by health employers. The combined amounts total approximately $84 million *viz.* CBA, $1.5 million in compensation and $2.5 million for retraining; FBA, $68 million and $2 million, respectively with an additional $5 million set aside for employees impacted by future contracting out of services; HSPBA, $3 million for both compensation and retraining; and NBA, $1.8 million and $200,000, respectively. The compensation and retraining support will benefit the approximately 9,000 health care workers laid off by employers who exercised the impugned statutory management rights to contract out services at long term care facilities and closed other health care facilities or services.[8]

Final closure for the *B.C. Health Services* litigants came in late May 2008 when the B.C. Legislature enacted Bill 26, the *Health Statutes Amendment Act, 2008*.[9] Sections 6 and 7 of this *Act* simply repealed the provisions of the *Health and Social Services Delivery Improvements Act* held invalid by the Supreme Court of Canada in *B.C. Health Services*.

AFTERMATH: DERIVATIVE IMPACT

In *B.C. Health Services*, the Supreme Court of Canada revisited the scope of the *Charter*, section 2(d) right to freedom of association. Putting aside past decisions which excluded the process of collective bargaining from the scope of the right, the Court held, in the words of McLachlin CJC and LeBel J:

> ...s. 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining....
>
> ...the constitutional right to collective bargaining concerns *the protection of the ability of workers to engage in associational activities, and their capacity to act in common* to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as *employees banding together to achieve particular work-related objectives.* Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions

8 See "B.C. and health care unions settle 6-year dispute", CBA News (28 January 2008) at online: <http://www.cbc.ca/canada/british-columbia/story/2008/01/28/bc-bill29dealreached.html> (accessed 27 January 2009) and "BCNU wants to hear from members negatively affected by Bill 29", B.C. Nurses' Union (13 March 2008) at <http://www.bcnu.org/whats_new_media/bulletins/2008/03-13.htm> (Accessed 26 January 2009).

9 S.B.C. 2008, c. 34 (third reading and royal assent on 29 May 2008).

> in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining... [emphasis added][10]

As expressed in this excerpt, freedom of association supports the freedom of expression of employees in relation to workplace issues and, as the Court develops in its reasons for decision, is supported by a corresponding duty on the employer to hear (meet) and to bargain in good faith.[11] This explanation 'sounds' of the US approach to freedom of association as a penumbra or derivative right inextricably linked to and supporting the freedoms of religion, expression, and peaceful assembly. As further noted by the Court, freedom of association is triggered only by state action and is subject to an internal limitation that interference with the freedom be "substantial".[12] One may be forgiven for thinking immediately of the *Quebec Secession Reference* as the model for this view of expression and association—that opinion also requiring good faith bargaining in response to the positive expression by a clear majority to a clear question favouring international sovereignty and secession from Canada.[13] The duty to consult in matters of Aboriginal law also comes to mind.

Differently stated, freedom of association is perceived as a process of free discussion to achieve a goal but not the goal itself. In making this determination, the Court applied a contextual approach which drew upon the historical, social, and international law contexts in which the pivotal significance of collective bargaining is affirmed. It should not necessarily follow, however, that *B.C Health Services* should be limited to the collective bargaining context. Surely, the procedural aspect of the freedom extends to other non-workplace situations and interests. Thus, it is helpful to examine the jurisprudence to learn if *B.C. Health Services* has been interpreted broadly or narrowly.

To prepare this forum contribution, I arbitrarily decided to rely on the "note up" feature on CanLII to identify court and tribunal decisions referencing *B.C. Health Services* and I did this three times. As of 8 November 2008, the list of decisions stood at twenty-three; as of 6 January 2009, at thirty-six; and as of 17 January 2009, at thirty-eight. As these statistics indicate, there seems to have been a clearance of reserved decisions as the end of the year approached—and, I hasten to add, not by CanLII but by the courts and other tribunals. The thirty-eight relevant decisions during the eighteen months period between the release of *B.C. Health Services* in June 2007 and the end of Dember 2008 are geographically spread over six of the thirteen Canadian jurisdictions: federal Canada - three; British Columbia - nine; Alberta - four; Ontario - six; Quebec - fifteen; and Newfoundland and Labrador - one. In hierarchical terms, *B.C. Health Services* is referenced nine times by three courts of appeal; ten times by four

10 *Supra*, note 1, at paras. 87 and 89.

11 *Ibid.*, at para. 90.

12 *Ibid.*

13 [1998] 2 S.C.R. 217, the *Quebec Secession Reference* is neither discussed nor cited in *B.C. Health Services*.

superior courts; and nineteen times by six labour boards or, in the case of Quebec, the labour court.

Of the thirty-eight relevant decisions, *B.C. Health Services* is given only a passing reference in thirty-four decisions. Four Quebec decisions can be immediately put aside because *B.C. Health Services* is merely mentioned in a footnote or included in a list of authorities.[14] One of these decisions, before the Commission de la function publique, presented a challenge by an association of crown attorneys to an employer's decision to deny the association permission to continue as priority user of a specific room in the courthouse for association activities.[15] The Commission did not find it necessary to address the *Charter* section 2(d) nor the Québec *Charter* section 3. It considered the separate agreement by which the association gained priority access to the room not to be within the Commission's jurisdiction because the issue as presented did not involve the interpretation, application or breach of the association's agreement in relation to the terms and conditions of employment of the attorneys; it was a privilege created by a separate agreement much as any user might acquire. Had the Commission concluded that it had jurisdiction, the question to be decided would have been whether freedom of association includes an obligation on the employer to support associational activities by providing meeting space. While the history of labour relations in Canada and elsewhere confirms the importance to the exercise of associational activities that a space be available for such purposes, the Commission might have decided that freedom of association protects only the right *to ask* for meeting space.

Eight decisions in the passing reference category mentioned *B.C. Health Services* with or without a brief quotation and definitely without analysis. Six of these decisions are by specialist labour tribunals; one by a provincial superior court (Alberta); and one by the Quebec Court of Appeal. In seven of these decisions, freedom of association and *B.C. Health Services* were mentioned as part of the background to the procedural issue for determination (i.e. deciding whether to grant standing to an intervenor or whether to bifurcate the hearing into two stages addressing first the substantive merits and then the constitutional issue); the case is included in a list of authorities without further comment; or the matter is decided without considering the constitutional issue.[16] The eighth deserves special mention if only for its notoriety.

14 In a footnote: *Associations des substituts du Procureur général du Québec c. Québec (Justice)* 2007 CanLII 47799 (Québec - Commission de la fonction publique) and *Poissant et CH Le Gardeur*, 2008 QCCLP (CanLII) (Québec - Commission des lésions professionnelles du Québec); in a list of authorities: *Commission des droits de la personne et des droits de la jeunesse c. Centre à la petite enfance Gros Bec*, 2008 QCTDP 14 (Québec Human Rights Tribunal) and *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.*, 2008 QCTDP 24 (CanLII) (Québec Human Rights Tribunal).

15 *Associations des substituts du Procureur général du Québec c. Québec (Justice), ibid.*

16 *Independent Electricity Market Operator v. Canadian Union of Skilled Workers*, 2007 CanLII 26275 (ON L.R.B.); *International Brotherhood of Electrical Workers, Local Union 424 v. Basilian Industrial Services Ltd.*, 2008 CanLII 51099 (AB L.R.B.); *Alliance du personnel professionnel et technique de la santé et des services sociaux (CPS et APTMQ) c. Syndicat des professionnelles et professionnels de la santé publique du Québec (CSQ)*, 2008 QCCRT 228 (CanLII); *Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 222 v. Alberta (Human Resources and Employment)*, 2008 ABQB 225 (CanLII); *Health Employers Association of British Columbia on Behalf of Renfrew Care Centre Partnership (Renfrew Care Centre) v. British Columbia Nurses' Union*, 2007 CanLII

Plourde c. Compagnie Wal-Mart du Canada inc. is the rather infamous case concerning Wal-Mart's decision to close its store in Jonquière, Quebec after a union had been certified as bargaining agent on behalf of its non-management employees.[17] The Commission des relations du travail found in favour of the employer on a complaint by a former employee, and the Court of Appeal, per Rochon JA, refused leave to appeal that decision. The Commission had found that closing the store constituted a "good and sufficient reason" within the meaning of the provincial labour code to relieve the employer of the presumption that it acted to interfere with its employees' union activity.[18] Rochon JA referred to *B.C. Health Services* to support his rejection of the 'syllogism' argued on behalf of the employee: the statutory presumption applies to activities protected by the labour code; these activities are expressions of freedom of association; therefore, these activities are protected by freedom of association. The Supreme Court of Canada granted leave to appeal and heard oral argument on 21 January 2009. Interestingly, the following sentence appears in the summary of the case as published in the Supreme Court of Canada Bulletin: "Whether employer may close its business or part thereof for clearly anti-union reasons without suffering any consequences despite infringement of freedom of association of employees concerned."[19]

Six decisions in this category identify *B.C. Health Services* as informing the analytical approach to the bargaining unit certification or collective bargaining issue under consideration.[20] These are three decisions of the B.C. Labour Relations Board, two of the Ontario Superior Court of Justice and one of the Ontario Court of Appeal. A further eight decisions refer to *B.C. Health Services* in relation to a non-2(d) aspect of the *Charter*: section 1 justification analysis, section 15 equality rights, and the burden

48186 (BC L.R.B.); *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78 (CanLII); and *Western Regional Integrated Health Authority v. Newfoundland and Labrador Association of Public and Private Employees*, 2008 CanLII 68037 (NL L.R.B.).

17 2007 QCCA 1210 (CanLII).

18 *Labour Code*, R.S.Q., c. C-27, art. 17: "If it is shown to the satisfaction of the Commission that the employee exercised a right arising from this Code, there is a simple presumption in his favour that the sanction was imposed on him or the action was taken against him because he exercised such right, and the burden of proof is upon the employer that he resorted to the sanction or action against the employee for good and sufficient reason."

19 Supreme Court of Canada, *Bulletin of Proceedings* (23 January 2009) at 90-91.

20 *NGN Triple Productions Inc. v. British Columbia and Yukon Council of Film Unions*, 2008 CanLII 53036 (BC L.R.B.) (employer application to delay certification hearing pending other proceedings); *Great Pacific Industries Inc. v. United Food and Commercial Workers International Union, Local 1518*, 2008 CanLII 21703 (BC L.R.B.) (determining membership of bargaining unit for purposes of strike vote); *C.K. Fibres Corp. v. Construction and Specialized Workers' Union Local 1611*, 2008 CanLII 66083 (BC L.R.B.) (alleged anti-union activity by employer between date of application for certification and date of certification vote); *Collins & Aikman Automotive Canada Inc. (Re)*, 2007 CanLII 45908 (ON S.C.) (insolvent employer and contributions to employee pension plan); *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809 (CanLII) (jurisdiction of court to enforce fines levied by union against members - majority hold unenforceable as a penalty clause; Juriansz J.A. in dissent at para. 101, cites *B.C. Health Services* to support conclusion that common law rule against penalty clause not applicable in union setting giving constitutional recognition of value of collective bargaining); and *Association of Justices of the Peace of Ontario v. Ontario (Attorney General)*, 2008 CanLII 26258 (ON S.C.) (mandatory retirement and justices of the peace).

of proof.[21] Two other decisions make passing reference to *Health Services* in relation to the scope of freedom of association and to the history of collective bargaining in Canada, respectively.[22]

The six decisions to be accounted for in the 'passing reference' category all address in some manner a group of persons or a series of issues excluded from the exercise of associational rights related to collective bargaining. Among the groups are prostitutes, lawyers, non-bargaining administrative and professional staff, members of a cooperative, and persons claiming Métis status. The excluded issues are "appointment, appraisal, promotion and classification" of federal public service employees.

In *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, an association of sex workers were denied the opportunity to challenge the criminalization of prostitution activities when the Supreme Court of British Columbia granted an application by crown counsel to dismiss the proceedings for want of standing.[23] The association brought its application for a declaration that the prostitution provisions of the *Criminal Code* (sections 210 to 213) are unconstitutional limitations on their, *inter alia*, *Charter* section 2(d) rights. They asserted that the *Criminal Code* provisions "prevent and/or limit sex workers from joining together in furtherance of a common goal, namely the goal of improving and controlling working conditions, including safety and security... from engaging

21 *Morrow v. Zhang*, 2008 ABQB 98 (CanLII) (section 1 analysis is contextual) [without referring to *B.C. Health Services* on this point, this decision divined that a cap on non-pecuniary damages for soft tissue injuries demeans human dignity within the meaning of the *Charter*, section 15 equality rights]; *H.N. c. Québec (Ministre de l'Éducation)*, 2007 QCCA 1111 (CanLII) (section 1 rational connection step referring to *B.C. Health Services* at para. 148 that the step is 'not particularly onerous') and *Withler v. Canada (Attorney General)*, 2008 BCCA 539 (CanLII) (re statement of legislative objective referring to *B.C. Health Services*, para. 146);

Three judgments of the Quebec Court of Appeal released on 9 August 2007: *Association des policiers provinciaux du Québec c. Sûreté du Québec*, 2007 QCCA 1087 (CanLII); *Fraternité des policières et policiers de Montréal c. Sûreté du Québec*, 2007 QCCA 1086 (CanLII); and *Fédération des policières et policiers municipaux du Québec c. Sûreté du Québec*, 2007 QCCA 1088 (CanLII). The issue in the first appeal decision concerned equality rights in the context of the dismissal of a police officer following conviction for a criminal offence. The Court of Appeal addressed the equality rights argument by referring to *B.C. Health Services* at para. 165 where McLachlin C.J.C. and LeBel J. state "The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are ... the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.";

British Columbia Teachers' Federation v. Attorney General of British Columbia, 2008 BCSC 1699 (CanLII) (scope of relevant background documents to identify legislative purpose) and *Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency*, 2008 PSLRB 13 (CanLII) (alleged breach of *Charter* section 2(d) not supported by complainant analysis or argument).

22 *Allied Hydro Council v. Construction, Maintenance and Allied Workers Bargaining Council, Local 2300*, 2008 BCSC 1660 (CanLII) (no evidence that ability to engage in good faith bargaining substantially impaired by legislated reorganization of trade union council) and *Blair c. Syndicat des cols bleus regroupés de Montréal (SCFP, 301)*, 2007 QCCRT 439 (CanLII) (expulsion of bargaining unit employees from union membership because of conduct during election of union officers is internal matter not involving state action).

23 2008 BCSC 1726 (CanLII).

in associational activities and from doing collectively what they may otherwise legitimately do individually." In granting the Crown's application to dismiss, the Court held that even accepting the existence of a serious issue as to constitutional validity and that the association demonstrated a genuine interest in the matter, there were other reasonable and effective means to bring a constitutional challenge before the courts. The Court noted that, unlike the instant matter in which no one acknowledged actually being a sex worker, litigation was pending in other provinces in which standing was not in issue because at least one of the applicants had direct standing because she asserted that she was "currently engaged in prostitution".[24]

In an interlocutory matter, the Quebec Commission des relations du Travail dismissed a motion by counsel for the treasury board to suspend proceedings brought by lawyers and other professional employees claiming that provisions of the provincial public sector labour relations legislation infringed their associational rights and that their employer had not negotiated in good faith. The Commission, in brief reasons for decision in *Association des juristes de l'État c. Québec (Conseil du Trésor)*, quoted from *B.C. Health Services* regarding the nature and scope of freedom of association in relation to collective bargaining.[25] It then concluded in favour of continuing the proceedings notwithstanding that parallel proceedings had been commenced before the superior court challenging the constitutional validity of the legislation.

Perhaps the two most significant decisions in the "passing reference" category are *Association of Administrative and Professional Staff v. University of British Columbia* and *Coopérative des travailleurs(euses) de Sacré-Cœur c. Syndicat canadien des communications, de l'énergie et du papier, section locale 1229* decided in September 2008 by the B.C. Court of Appeal and in November 2008 by the Quebec Tribunal du Travail, respectively.[26] The *UBC* case concerned a voluntary recognition agreement between the employer university and its non-bargaining employees. On the basis that agreement described these employees as members of a 'bargaining unit' and addressed terms and conditions of employment, the Association characterized it as a 'collective agreement'. The instant case arose when two managers, members of the Association, were held by an adjudicator to have been terminated without just cause but were subject to a cap on severance pay established under provincial public sector employment legislation—an amount less than that provided by the voluntary recognition agreement.[27] The legislated cap did not apply to employees covered by a collective agreement. Hence, the question in issue was essentially one of statutory interpretation—did the Association represent a 'bargaining unit' within the meaning of

24 *Ibid.*, at para. 75. I fail to see why pending litigation elsewhere should be such a controlling factor to defeat standing for these applicants or the applicant association. They applied to the B.C. court for its adjudication of the issue and should not be left to rely on the analysis of an Ontario court. Surely federalism does not mandate such a limitation on access to judicial resources.

25 2007 QCCRT 553 (CanLII).

26 2008 BCCA 337 (CanLII); 2008 CanLII 59474 (QC T.T.).

27 *Public Sector Employers Act*, R.S.B.C. 1996, c. 384 and the *Employment Termination Standards Regulation*, B.C. Reg. 379/97.

the provincial legislation? The adjudicator had found that the meaning of 'bargaining unit' was the same under the public sector legislation as under the provincial labour code. Though the appeal to the Court of Appeal technically turned on the exercise of discretion by the superior court justice not to grant leave to appeal, the adjudicator's decision, which was adverse to the Association, nonethless addressed the relevance of *B.C. Health Services* as follows:

> The Supreme Court of Canada traced the history of collective bargaining in Canada as now protected by labour legislation and the modern system of labour relations. That system has as its primary vehicle a *recognized bargaining agent—a union or association—with the statutory right to bargain collectively for employees*. Here, the parties agreed these two managers did not come within the definition of employee in British Columbia's *Labour Relations Code*. That is, they do not derive the benefit of that statutory labour relations scheme. I do not consider the *Health Services* case advances the cause of the employees in this case. [emphasis added]

Thus, the Court advanced a narrow approach to *B.C. Health Services*, restricting its application to the statutory collective bargaining process. This was a fatal determination because the Association was not certified under provincial labour relations legislation as a 'bargaining agent' and the adjudication proceedings had taken place under the *Commercial Arbitration Act* rather than labour relations legislation.[28] That the Association had exercised the associational rights of its members to achieve a higher level of severance pay did not seem to bother the Court of Appeal because of the legislated public sector cap. But is that not exactly what occurred in *B.C. Health Services* itself—provincial legislation overrode negotiated provisions of negotiated labour agreements? The only difference seems to be that *B.C. Health Services* arose within the statutory collective bargaining regime and the *UBC* case concerned a voluntary recognition agreement.

In *Coopérative*, the Labour Court referred to and relied on the *UBC* appeal decision and extensively on *B.C. Health Services*. The cooperative, which owned a one third interest in a wood processing plant, entered into an agreement by which members of the cooperative could work at the plant. They would work under conditions established by an agreement between the plant owners and the cooperative which the cooperative adopted as a bylaw governing its members for the purposes of the provincial cooperatives legislation. Approximately fifteen years later, a union sought to be certified as bargaining agent for the plant workers and took the position that the cooperative and plant owner were in fact co-employers. The Labour Tribunal granted the certification application with the employer identified as the plant owner alone. The plant owner and cooperative successfully appealed to the Labour Court which held the cooperative members not to be employees within the meaning of the provincial labour code. The superior court granted judicial review and reversed that decision, holding

28 R.S.B.C. 1996, c. 55.

the cooperative members to be employees, and the Court of Appeal dismissed an appeal, as did the Supreme Court of Canada.[29] When the matter came again on appeal to the Labour Court, the Judge interpreted *B.C. Health Services* to support the following proposition:

> [83] La garantie de liberté d'association n'implique pas le droit de revendiquer un modèle particulier de relations de travail à l'extérieur des législations provinciales en vigueur ou encore une méthode particulière de négociation collective. Enfin, seule une atteinte substantielle à la liberté d'association peut justifier l'examen judiciaire des dispositions législatives attaquées.

Thus, the cooperative, not being a certified bargaining agent under provincial labour legislation, was not the proper legal vehicle to represent the cooperative members for the purposes of collective bargaining. As a cooperative under provincial legislation, the cooperative "a pour objet de fournir du travail à ses membres dans le domaine de la transformation du bois d'œuvre et tous autres domaines connexes et de pourvoir à l'éducation coopérative sociale et économique de ses membres." The significance to be drawn from *Coopérative*, in combination with *UBC*, is that, as the quotation above reflects, freedom of association does not necessarily include the form of the associational vehicle. This is consistent with the majority opinion expressed by Bastarache J in *Delisle v. Canada (Deputy Attorney General)*:

> Freedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly limit the ability of Parliament or a provincial legislature to regulate labour relations in the public service and would subject employers, without their consent, to greater obligations toward the association than toward their employees individually.[30]

This last quotation proved decisive in the Métis membership case, *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern Development)*.[31] Eight individuals who had been registered members of the Peavine Métis community were removed from the membership list, at the request of the community council, when they were registered as status Indians for the purposes of the *Indian Act*.[32] Approximately four years later, the council reversed its position and requested that the individuals be re-registered as members of the Peavine Métis community for the purposes of the *Métis*

29 *Boisaco Inc. c. Section locale 1229 du Syndicat canadien des communications, de l'énergie et du papier, Procureur général du Québec - et - Coopérative des travailleurs(euses) de Sacré-Coeur (UNISACO) et tribunal du travail* - ET ENTRE - *Coopérative des travailleurs(euses) de Sacré-Coeur (UNISACO) c. Section locale 1229 du Syndicat canadien des communications, de l'énergie et du papier et Procureur général du Québec - et - Tribunal du Travail et Boisaco Inc.*, Supreme Court of Canada, *Bulletin of Proceedings* (5 October 2007) (date of decision on leave application: 4 October 2007) per Bastarache, LeBel et Fish JJ.

30 [1999] 2 S.C.R. 989, at para. 33.

31 2007 ABQB 517, 81 Alta. L.R. (4th) 28.

32 R.S.C. 1985, c. I-5.

Settlement Act.[33] When the registrar refused the request—because of the membership rules excluding status Indians from Métis community membership—the council joined with the individuals to seek a declaration, *inter alia*, that their *Charter* right to freedom of association had been infringed by the statutory membership rules. The reasons for decision of the Queen's Bench justice rely primarily on a *Dunmore* claim and analysis.[34] *B.C. Health Services* is discussed for the purpose of distinguishing the case rather than applying it. Having referred to the quotation above from *Delisle*, Shelley J stated:

> Similarly, freedom of association does not include the right to belong to a particular type of association created by statute and which defines specific criteria for membership.[35]

She then distinguished *B.C. Health Services* by observing that it concerned a right to collective bargaining which had been *recognized* but not created by the legislative scheme in contrast to a claim to Métis membership which, she found, does not exist apart from the legislative scheme. The Court found no breach of freedom of association or of any other right and dismissed the application.

The sole decision remaining in the 'passing reference' category is *Professional Institute of the Public Service of Canada v. Treasury Board* which concerned delimitation of the terms of reference to an arbitration board.[36] The employer objected to a union request to include in the terms of reference consideration of a proposed pay plan study because such a study strayed into areas excluded by the governing legislation from the determination of an arbitration board. The legislation, the federal *Public Service Labour Relations Act* (like its provincial counterparts) directs that an arbitral award is not to "alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if...(c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees".[37] The union invoked *B.C. Health Services* to support its position regarding the proposed pay study but the labour board agreed with the employer that the statutory provision applied to limit the scope of the reference to arbitration. The labour board, however, found that referring the pay plan study would not *per se* infringe the statutory prohibitions—a study is merely a study—and it would be for the arbitration board itself to determine whether to include elements of the study in its award being always mindful of its governing legislation.

Of the thirty-eight decisions in the set of relevant decisions, only four remain; those in which *B.C. Health Services* is given more than 'passing reference'. These decisions emanate from an arbitrator in Ontario, the Ontario Court of Appeal

33 R.S.A. 2000, c. M-14, as amended.

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

35 *Supra* note 34, at para. 80.

36 2008 PSLRB 72 (CanLII).

37 S.C. 2003, c. 22, section 150(1)(c).

and the Superior Court of Quebec, twice.

The earliest is that of the arbitrator and involved an argument that the Supreme Court of Canada erred in *B.C. Health Services* because the analysis focussed on ILO Convention 87 on *Freedom of Association* to the exclusion of ILO Convention 98, the *Right to Organise and Collective Bargaining Convention, 1949*, a convention not ratified by Canada. *Durham Regional Police Association v. Regional Municipality of Durham Police Services Board* concerned a preliminary motion to determine, under the Ontario *Police Services Act* ("*PSA*"), the arbitrability of levels of deployment of police officers during day and night shifts.[38] The issue concerned the proper characterization of the subject of deployment—was it inarbitrable because the *Act* restricted the employer police board from directing a police chief in relation to operational decisions, or was it arbitrable as a "working condition'? Ontario police boards, per the *PSA* section 119(3), are authorized to negotiate with the association representing members of the police force on questions of "remuneration, pensions, sick leave credit gratuities and grievance procedures... and [with some exceptions] their working conditions." The Durham police board had negotiated and reached agreement with the police association on the numbers of officers to be deployed during day and night shifts. When the renewal negotiations reached an impasse and the matter was referred to interest arbitration, the police board and the intervenor chief of police argued that the deployment provisions were invalid as contrary to the *PSA* exclusion of operational decisions. In this context, the police association relied on *B.C. Health Services* to support its position that collective bargaining is protected by freedom of association and that staffing is a core subject of collective bargaining in relation to working conditions. It was in response to this position that the police chief argued that police are excluded from the right to collective bargaining by ILO Contention 98, article 5, paragraph 1:

> The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Recognizing the effect of the *PSA* in permitting bargaining, the chief argued that the association and its members enjoyed no right to collective bargaining other than that provided by statute i.e. it had no constitutional basis and could be limited or removed by statute without infringing the *Charter* right.[39] The arbitrator responded to these arguments by noting:

> I am mindful of the suggestions in the Chief's submissions to the effect that the Supreme Court may have misapplied the principles of the ILO conventions in upholding certain rights to collective bargaining, particularly in the policing sector. In the best of circumstances I would be reluctant to pronounce that the Supreme Court of Canada was mistaken or misguided.

38 International Labour Organization, C98 *Right to Organise and Collective Bargaining Convention, 1949;* 2007 CanLII 27333 (ON L.A.), 164 L.A.C. (4th) 225; R.S.O. 1990, c. P. 15.

39 *Supra*, note 38 at para. 62.

> However, in this particular case, I am not convinced that the authority cited by the Chief supports that conclusion... while the right to collective bargaining should be recognized in the private and public sectors, that right is excluded from police and armed forces under ILO Convention 98. *This does not mean that where there is a right to collective bargaining recognized in the police sector by the legislative scheme of a province, the general principles concerning collective bargaining do not apply. It was those general principles that the Supreme Court of Canada was applying and that provide an interpretive guide in this case.* [emphasis added]

The interest arbitrator ultimately concluded that staffing issues relating to personnel deployment are covered by the phrase "working conditions" and are properly subject to bargaining.

The three remaining decisions all relate to constitutional challenges to legislation enacted before *B.C. Health Services* clarified the scope of freedom of association in relation to collective bargaining. All three decisions—one from the Ontario Court of Appeal and two from the Quebec Superior Court—rely extensively on the reasons for decision in *B.C. Health Services* and all declare the challenged legislation in breach of the right to freedom of association and not justified by *Charter* section 1 analysis. None of these decisions is surprising. The decisions concern workers in the fields of health care, agriculture, and child care.

Chronologically, the first is the November 2007 Quebec Superior Court decision in *Confédération des syndicats nationaux c. Québec (Procureur général)* (hereafter *CSN 1*).[40] By legislation enacted in 2003, the government sought to rationalize collective bargaining in the provincial health and social sectors by replacing a system with 3,542 bargaining units representing more than 200,000 employees at 425 institutions with a new structure involving four sectoral bargaining units within each institution resulting in a relatively modest 782 individual bargaining units.[41] This legislative initiative was in response to a recommendation of a provincial commission on health and social services delivery which drew attention to the problems presented by, *inter alia*, multiple bargaining units represented by different bargaining agents within the same institution, representing similar employees, and using different job classifications in relation to similar job functions. At the same time, the government promoted further rationalization by legislation reorganizing the regional health authorities.

The challenged *Act* substituted the four statutory bargaining units for the bargaining units certified by the Commission des relations du travail using the familiar criteria developed in the labour jurisprudence. The four legislated bargaining units were: 1) nursing and cardio-respiratory care; 2) paratechnical, auxiliary services and trades;

40 2007 QCCS 5513 (CanLII).

41 *An Act respecting Bargaining Units in the Social Affairs Sector and Amending the Act respecting the Process of Negotiation of the Collective Agreements in the Public and Parapublic Sectors*, S.Q. 2003, c. 25 (Bill 30); *Supra*, note 40, at para. 21.

3) office, administrative and related professionals; and 4) health and social services technicians, including nurses and nursing assistants.[42] In addition, to decentralize elements of collective bargaining, the *Act* also declared twenty-six matters to be subject to obligatory local or regional negotiation resolved, if necessary, by compulsory mediation-arbitration if the parties do not reach agreement within twenty-four months.[43]

The Commission des relations du travail rejected the union position that the *Act* infringed freedom of association based on the state of the law pre-*B.C. Health Services* but, with *B.C. Health Services*, the Superior Court had no difficulty in declaring the statutory provisions of no force and effect. The statutory reorganization of the bargaining units had occurred without consultation—in fact, the Bill had been amended to reduce the number of bargaining units from the originally proposed five to the final four. In so doing, the legislature had substituted its decision for the free exercise by employees of the right to freedom of association. The Court illustrated some adverse effects of the statutory reorganization. The Syndicat professionnel des diététistes et nutritionnistes du Québec, as a stand alone union represented 90 percent of dietitians and nutritionists, but under the reorganization found themselves swamped in the larger fourth bargaining unit with only 0.03 percent of the new bargaining unit membership.[44] At the same time, nurses, a group with a long history of their own union, were joined into a common bargaining unit with nursing assistants and forced to associate with "des personnes avec qui elles ont des différends sérieux." While recognizing that freedom of association in relation to the right to form and join trade unions implicitly involves freedom to determine the structure and composition of unions, the Court also recognized that mere reduction in the number of bargaining units does not *per se* infringe freedom of association. The defects amounting to substantial interference with the right, however, were that the legislature had negated the free association of employees with common goals and aspirations by combining apparently mutually antagonistic groups of employees and had, without consultation, interfered with the procedural aspects of collective bargaining by requiring bargaining units and employers to negotiate specific subjects at the local or regional level, including such items as the length of probationary periods, the schedule of working hours, and the definition of a temporary vacancy.

The Court accepted the legislative goal of improving performance, quality, and access to health care as pressing and substantial and found the goal and the means rationally connected for the purposes of the *Oakes* justification analysis but held the *Act* did not minimally impair the right in issue and did not pass the overall proportionality test. The evidence did not support a finding that the government had considered other more minimally impairing alternatives such as achieving rationality by promoting common job classifications across bargaining units. The Court suspended its declaration of invalidity for eighteen months

42 *Supra*, note 41, section 4.
43 *Ibid.*, section sections 35 *et seq*, section 67 and Schedule A.1.
44 *Supra*, note 40, at para. 293.

to permit the legislature to amend the legislation consistent with the *Charter*.

It is helpful to observe that the Court relied on the reasoning in *B.C. Health Services* but supported its approach by repeated references to and quotations from the opinions and recommendations of the ILO Committee on Freedom of Association, the first of the decisions discussed so far to do so.

A second *Confédération des syndicats nationaux c. Québec (Procureur général)* (hereafter *CSN 2*) arrived on the scene in late October 2008.[45] In December 2003, the same month the legislation was held invalid in *CSN 1*, the legislature enacted amendments to existing legislative regimes governing 1) workers, who in their own home, provide accommodation, care and support to at least nine persons, and 2) workers who provide child care in a private residence. The amendments, *inter alia*, declared such workers not to be "employees" of any public institution using their services or of the childcare centre permit holder, respectively, and declared, in relation to the former group, that any agreement regarding "terms and conditions" re "activities and services" is "*deemed* not to constitute a contract of employment".[46]

The important contextual feature to this *Charter* challenge is these amendments came at a time when the CSN had successfully conducted a unionization campaign in relation to both groups of workers, had successfully certified certain bargaining units, and had commenced negotiations towards realizing collective agreements. Needless to say, both groups are predominantly female, minimally paid, and without pension or other benefits normally seen as routine. As noted by the Court, the work performed by these valuable members of society was historically treated as a form of volunteerism before its eventual integration into the public sphere by legislation establishing government subsidies and mandated standards, including professionalization of specific classes of workers.

Again, the Court relied heavily on *B.C. Health Services* to support its analysis. But, it had the additional benefit of the views of the ILO Committee on Freedom of Association on the impugned legislation. Following analysis of union complaints, the ILO Committee had declared the legislation in breach of freedom of association.[47] The Committee expressed the opinion that, like other workers, these workers should

45 2008 QCCS 5076 (CanLII).

46 *An Act to amend the Act respecting Health Services and Social Services*, S.Q. 2003, c. 12, section 1 and *An Act to amend the Act respecting Childcare Centres and Childcare Services*, S.Q. 2003, c. 13, section 1 (emphasis added).

47 "Cases Nos. 2314 and 2333 (Canada/Quebec): Report in which the Committee requests to be kept informed of developments Complaints against the Government of Canada concerning the Province of Quebec presented by the Confederation of National Trade Unions (CSN), supported by Public Services International (PSI) (Case No. 2314), the Centre of Democratic Trade Unions (CSD), the Quebec Trade Union Centre (CSQ) and the Quebec Workers' Federation (FTQ) (Case No. 2333)" in ILO, Reports of the Committee on Freedom of Association, 340th Report of the Committee on Freedom of Association (Geneva: ILO, March 2006) at paras. 373-432.

have access to the normal collective bargaining regime of the provincial Labour Code; that such workers are not within excluded categories such as the armed forces and police as provided by ILO Convention No. 87 (discussed above); that cancellation of certification as bargaining agent is contrary to freedom of association; and that the forms of consultation provided by the legislation did not constitute 'genuine' collective bargaining.[48] The Court easily rebuffed the government's argument that the workers were seeking access to a specific legislative regime of collective bargaining under the *Labour Code*. The effect of the statutory deeming provisions was to remove existing certifications and effectively terminate negotiations for collective agreements. The Court declared that these otherwise vulnerable workers were not seeking access to a specific statutory regime but simply access to a regime of collective bargaining. The deeming provision had the further negative impact of removing these workers from the protection of other employment-related legislation.[49] Finally, the Court concluded that, in the absence of any evidence of disruption of service delivery after union organizing and certification, the government's objective of promoting effective health, safety, and child development did not constitute a pressing and substantial objective because the children were always safe and their health and development continued as before. Even assuming such an objective, the Court was not satisfied that any of the rational connection, minimal impairment or overall proportionality steps of the *Oakes* justification analysis had been satisfied. Indeed, in relation to rational connection, the Court considered that denial of access to collective bargaining could, for this group of vulnerable workers, have a negative impact on the quality of services provided.

The third decision in this category is that of the Ontario Court of Appeal in *Fraser v. Attorney General of Ontario,* a challenge to the validity of the legislative response to the Supreme Court of Canada's decision in *Dunmore*.[50] The Ontario government and legislature apparently took a literal approach to the statement of Bastarache J in *Dunmore* regarding the minimum requirements to respect the right of freedom of association of vulnerable agricultural workers in that province: "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."[51] Thus, the legislative response, the *Agricultural Employees Protection Act, 2002*, section 1(2) listed the rights protected:

1. The right to form or join an employees' association.
2. The right to participate in the lawful activities of an employees' association.
3. The right to assemble.
4. The right to make representations to their employers, through an employ-

48 *Supra*, note 45, at paras. 303-309.
49 For example, employment standards and occupational health and safety legislation.
50 2008 ONCA 760 (CanLII) (17 November 2008).
51 *Dunmore*, *supra*, note 34 at para. 67.

ees' association, respecting the terms and conditions of their employment.

5. The right to protection against interference, coercion and discrimination in the exercise of their rights.[52]

The *Act*, per section 5, also required employers to "give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment" and obliged the employer to "listen to the representations if made orally, or read them if made in writing." The *Act*, per section 11, conferred jurisdiction on the Agriculture, Food, and Rural Affairs Appeal Tribunal to inquire into complaints that an employer had breached the Act and conferred authority on the Tribunal "determine what, if anything, the... employer... shall do or refrain from doing with respect to the contravention" supported with the authority to order remedial action.

Winkler CJO, for the Court, applied *B.C. Health Services* to justify the conclusion that the *Act* unjustifiably infringed the right of agricultural workers to bargain collectively and quoted the Minister of Agriculture's statement in the legislature that the *Act* "does not extend collective bargaining to agricultural workers".[53] In brief, Winkler CJO concluded that the *Act* failed to protect the associational right to bargain collectively because it failed to impose an obligation on employers to bargain in good faith and because of the weakness of the "enforcement mechanism" in terms of the Tribunal, a body without expertise in labour relations and no requirement of such expertise. Significantly, the Court rejected the argument of government counsel that freedom of association does not require employee representation to be "based on the principles of majoritarianism and exclusivity".[54] Considering the history of Canadian labour relations, Winkler C.J.O. found that exclusivity ensures workers a unified voice which "is essential to ensure... balance of power" between employer and workers.[55] Thus, the Court confirmed the value of majority support in the selection of the workers' representative association combined with the ability of that representative association to be the exclusive voice on their behalf with respect to serious workplace issues. As in *Dunmore*, the wholesale exclusion of agricultural workers from access to collective bargaining did not satisfy the rational connection step of the *Oakes* justification analysis in relation to the pressing and substantial legislative goal of protecting the family farm and promoting farm productivity and certainly did not satisfy minimal impairment. As had the Supreme Court of Canada in *Dunmore*, Winkler CJO noted that agricultural workers in other provinces, like New Brunswick, enjoyed collective bargaining protection essentially 'where numbers warrant'.

The Ontario Court of Appeal granted the requested declaration of invalidity with costs but suspended its declaration for twelve months

52 S.O. 2002, c. 16.

53 Winkler CJO first applied the *Dunmore* criteria discussed in *Baier v. Alberta*, 2007 SCC 31 , [2007] 2 S.C.R. 673 to determine that the agricultural workers were asserting a positive claim to government action to protect their associational right to access collective bargaining in general and not to access a specific legislative scheme; *Supra*, note 50 at para. 62 quoting Ontario Hansard.

54 *Ibid.*, at para. 86 et seq.

55 *Ibid.*, at para. 91.

to permit the government and legislature to attempt yet again to protect the right of these workers to engage in "meaningful collective bargaining".[56]

CONCLUSION

This comment began with references to anniversaries of particular significance to organized labour in Canada and now this conclusion begins with mention of another. Seventy-two years after the U.S. Congress enacted the *Wagner Act* to protect the right of private sector workers to organize unions and to collective bargaining; the Supreme Court of Canada in *B.C. Health Services* reversed its prior jurisprudence and recognized good faith collective bargaining as also protected by freedom of association in the labour context. *B.C. Health Services* concerned public sector collective bargaining and the Court was conscious of this specific context.[57]

Public sector collective bargaining involves government as the employer and, therefore, triggers application of the *Charter* because of section 32, the application provision of the *Charter*. The question logically arises whether this new constitutional protection of collective bargaining is also protected by the freedom of association enjoyed by private sector workers. In other words, does good faith collective bargaining in the private sector exist as a statutory right under federal and provincial labour codes or is it constitutionally mandated? If constitutionally mandated, is it direct in the sense that the requisite "government action" is found in the enactment of such legislation or is it indirect in the sense of application of informing *Charter* values in the *Dolphin Delivery*[58] sense (though recognizing that the *Dolphin Delivery* analysis applied to development of the common law)? Expressed still another way, does the *Charter* impose a constitutionally mandated obligation of good faith bargaining on private sector employers? The answer to these questions—which are really the same—is found in *B.C. Health Services* itself. McLachlin CJC and LeBel J carefully distinguished the two *Charter* section 32 situations of government-as-employer and government-as-legislator. They concluded that *B.C. Health Services* presented not the government-as-employer situation (because of the lack of any such allegation relating to the breach of the right) but a situation of government-as-legislator. Thus, by enacting legislation protective of the freedom of association in the labour context, the legislature was bound to protect the procedural aspects of good faith collective bargaining.

Of the decisions recounted above, only three concerned private sector workers: the challenge to the prostitution provisions of the *Criminal Code*, the Wal-Mart situation, and the attempted use of a cooperative as the representative vehicle for mill workers. Thus, the now reserved Wal-Mart appeal to the Supreme Court of Canada is anxiously awaited for what it will indicate about freedom of association in the private sector—assuming it even gets to that point.

56 *Ibid.*, at para. 139.
57 *National Labor Relations Act*, 29 U.S. Code § 151 et seq (5 July 1935); 1937; Consider *B.C. Health Services*, *supra*, note 1, para. 87 *et seq.*
58 *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573.

At the same time, *Delisle* deserves reconsideration. The oft-repeated statement from *Delisle* that freedom of association does not protect a preferred form of association is used perfunctorily in the decisions to justify dismissal of a claim to a specific form of association. Yet, that form may also indicate substance is reflected in *Fraser* wherein the Ontario Court of Appeal accepted that majority support results in exclusive representation. The proposition that freedom of association does not protect access to a specific legislative scheme of association appears self-evident but any limitation on the claim to a specific form or vehicle of association should be justified under the *Charter*, section 1. To date, court and tribunal decisions appear to accept labour relations legislation as *per se* justified per the *Charter*, section 1 and seek to protect the internal integrity of that regime. It should not be so. If a group seeks to associate in a particular form of association—even with the characteristics but not the legality of a formally certified association—surely, the state should justify why that choice as to the form of associational vehicle is not to be respected in a free and democratic society.

Doubtless, Canadians have entered an era of renewed appreciation for freedom of association. How far that takes us as a free and democratic society awaits the future and the persuasiveness of the legal community.