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## The Stubborn Persistence of the Lawyer Exemption in Canadian Collective Bargaining Legislation

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David J. Doorey\*

The Stubborn Persistence of the Lawyer  
Exemption in Canadian Collective  
Bargaining Legislation

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*In 1948, the Canadian government introduced transformative collective bargaining legislation that would serve as a template for provincial labour law in the postwar period. However, some employees were excluded entirely from this legislation, including employees in five professions, law among them. By the 1970s, the federal government and most provinces had repealed the professional exclusion from the primary collective bargaining legislation. However, four jurisdictions—Ontario, Alberta, Nova Scotia, and Prince Edward Island (Exclusionary Provinces)—have stubbornly preserved the exclusion. This essay traces the history and justifications proffered for the lawyer exclusion from Canadian collective bargaining legislation from the 1940s to present day. It examines lawyer collective bargaining in practice and concludes with an assessment of the lawyer exclusion considering recent decisions by the Supreme Court of Canada expanding the scope of section 2(d) freedom of association under the Canadian Charter of Rights and Freedoms.*

*En 1948, le gouvernement canadien a introduit une loi transformatrice sur la négociation collective qui allait servir de modèle au droit du travail provincial durant la période d'après-guerre. Cependant, certains employés étaient entièrement exclus de cette législation, notamment les employés de cinq professions, dont les avocats. Dans les années 1970, le gouvernement fédéral et la plupart des provinces ont abrogé l'exclusion des professionnels prévue dans la loi initiale sur la négociation collective. Cependant, quatre juridictions—l'Ontario, l'Alberta, la Nouvelle-Écosse et l'Île-du-Prince-Édouard—ont obstinément conservé l'exclusion. Dans le présent article, nous retraçons l'histoire et les justifications avancées pour l'exclusion des avocats de la législation canadienne sur la négociation collective, des années 1940 à aujourd'hui. Nous examinons la négociation collective des avocats dans la pratique et concluons par une évaluation de l'exclusion des avocats en tenant compte des décisions récentes de la Cour suprême du Canada qui élargissent la portée de la liberté d'association prévue à l'alinéa 2d) de la Charte canadienne des droits et libertés.*

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*Introduction*

- I. *The source of the lawyer exemption: the Federal Industrial Relations Disputes Investigation Act, 1948*
  - II. *The Woods Task Force, ILO Convention 87, and the dismantling of the lawyer exemption in most Canadian jurisdictions*
  - III. *The practice of lawyer collective bargaining in the inclusionary provinces*
  - IV. *Still, they persisted: the continued lawyer exclusion in Alberta, Ontario, Nova Scotia, and PEI*
  - V. *The treatment of the lawyer exclusion in academic and policy literature*
  - VI. *The constitutional landscape: the lawyer exclusion and section 2(d)*
- Conclusion*

*Introduction*

In 1948, the federal government introduced a novel provision into its primary post War collective bargaining legislation, the *Industrial Relations and Disputes Investigation Act (IRDIA)*.<sup>1</sup> Practicing lawyers were excluded, along with members of the medical, dental, architectural, and engineering professions. Several opposition members of Parliament objected to the exclusion on principle, arguing that the selection of the five professions was random and that in any event there was no rationale for treating employed professionals differently than other employees concerning the right to collective bargaining. However, the federal Minister of Labour, Humphrey Mitchell, persisted with the exclusion not because he believed that for some valid policy reason the professionals ought not

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1. *Industrial Relations and Disputes Investigation Act*, Missing Vol Abbrev 1948, c 54, s 2(1)(i) [IRDIA].

to be permitted to unionize and engage in collective bargaining. Rather, Mitchell excluded the professions for the simple reason that the national organizations representing those professions, including the Canadian Bar Association (CBA), asked to be excluded.

Mitchell assumed that the CBA spoke for the “majority” of the legal profession and acknowledged that it “may be proved to these organizations and their membership in the light of experience that their judgement was unsound,” and at that time the exclusion could be revisited.<sup>2</sup> This was not a difficult political calculus. In the 1940s, almost every lawyer was self-employed and therefore already exempt from employment-related statutes, and the few who were employees were mostly in-house counsel who likely would have been excluded from the legislation anyways as managerial or “confidential” employees.<sup>3</sup> Therefore, even if employed lawyers were not expressly excluded it was unlikely any would have unionized. Nor was there any organization pushing back against the lawyer exclusion. The labour movement was focused on larger issues with the proposed legislation and with getting new labour legislation enacted as quickly as possible.<sup>4</sup> Therefore, deferring to the professional associations was a politically expedient choice for the federal government in 1948.

What happened next reflects a particular historical moment in time in Canadian labour law. With the uncertainty of a postwar economy still looming and the impending reversion of jurisdiction over labour relations back to the provinces, there was widespread consensus across the country that, in the pursuit of labour relations stability, the federal government should develop a model of collective bargaining that could be adopted as a provincial template. The *IRDIA* served this purpose *and in the years* surrounding its enactment, all the provinces introduced collective bargaining legislation modelled after the *IRDIA*. While there was some debate about some parts of the legislation in some provinces, the professional exclusion was adopted wholesale in all the provinces (except Saskatchewan) without comment or discussion. In this manner, the professional exclusion, unusual by international standards, became a peculiar feature of the Canadian collective bargaining law landscape with

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2. House of Commons, Committee of the Whole, *House of Commons Debates*, 20-4, No 6 (17 June 1948) at 5368.

3. The *IRDIA* included the typical clause still found today in Canadian collective bargaining legislation which excludes employees from coverage who “exercise managerial functions” or are “employed in a confidential capacity in matters relating to labour relations”: *IRDIA*, *supra* note 1, s 2(1)(i).

4. See discussion below, Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900–1948* (Oxford: Oxford University Press, 2001) at 294-295.

virtually no debate.<sup>5</sup> No Canadian government attempted to justify the exclusion on policy grounds. Rather, the federal government's decision to heed the request from a few professional organizations to be excluded from postwar federal labour legislation led indirectly to lawyers being excluded from collective bargaining legislation across the country.

There was not much fuss about the professional exclusion initially. However, as professional practice evolved in subsequent decades and more professionals from the excluded occupations became "employees," the exclusion caught the eye of policymakers, academics, and the labour movement. At an academic symposium held at the University of Toronto in 1965, there was general agreement that there was no policy rationale for excluding professionals from collective bargaining legislation.<sup>6</sup> Professor Mark MacGuigan of the University of Toronto Law School summed up the general mood of the participants when he observed that a professional employee "in relation to his employer is nothing other than another employee, and for whom the economic aspect is therefore vital" and that collective bargaining "will make professional employees more rather than less fully professional, for it will restore to them in some measure the independence and self-control of which they have been deprived by their status as employees."<sup>7</sup>

The influential 1968 federal task force on labour relations (the "Woods Task Force") dealt with the issue of collective bargaining by professionals at length and concluded that there was no rational policy justification for it.<sup>8</sup> By 1972, the federal government had come around to this way of thinking. That year, it ratified ILO Convention 87, which requires governments to protect the right to collective bargaining of all employees "without distinction whatsoever," and it removed the professional exclusion from the *Canada Labour Code*. Most provinces then fell into line and followed

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5. Practicing lawyers are not singled out for special treatment in collective bargaining legislation in the United States, the UK or Australia: See Laura Midwood & Amy Vitacco, "The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations" (2000) 18:1 Hofstra Lab & Empl LJ 299.

6. See John HG Crispo, ed, *Collective Bargaining and the Professional Employee: Conference Proceedings: December 15-17, 1965* (Toronto: Centre for Industrial Relations, University of Toronto, 1966).

7. Mark MacGuigan, "Arguments For and Against Collective Bargaining by Professionals" in John HG Crispo, ed, *Collective Bargaining and the Professional Employee: Conference Proceedings: December 15-17, 1965* (Toronto: Centre for Industrial Relations, University of Toronto, 1966) 26 at 31, 33.

8. Canada, Privy Council Office, *Canadian Industrial Relations: Report of the Federal Task Force on Labour Relations* (Ottawa: Task Force on Labour Relations, 1968) [Woods Task Force]; Shirley B Goldenberg, *Professional Workers and Collective Bargaining* (Ottawa: Task Force on Labour Relations, 1968).

the federal government's lead in repealing the professional exclusion from their primary collective bargaining legislation. It took longer for some of these provinces and the federal government to extend full statutory collective bargaining rights to lawyers employed by the crown, but most eventually did so.<sup>9</sup> Only four Canadian jurisdictions have stubbornly persisted with the professional exclusion: Ontario, Alberta, Nova Scotia, and Prince Edward Island (the "Exclusionary Provinces").

The fact that the lawyer exclusion remains in place in the Exclusionary Provinces is surprising considering that thousands of lawyers from coast to coast, including many in the Exclusionary Provinces, are unionized and have been participating in collective bargaining for decades. This experience should have ended any doubt that collective bargaining is suitable for employed lawyers. More remarkable still is the persistence of the exclusion after the Supreme Court of Canada's (SCC) recent "shift to a purposive and generous approach to labour relations" in the guarantee of freedom of association under section 2(d) of the Charter.<sup>10</sup> The 2015 decision in *Mounted Police Association of Ontario v Canada (Attorney-General)* especially casts doubt on the constitutionality of occupational exclusions from collective bargaining legislation. Indeed, in recommending the removal of the professional exclusion found in the Ontario *Labour Relations Act* in their final Changing Workplaces Review (CWR) report in 2017, the expert special advisors concluded that the SCC's decision in *MPAO* "mandated" the removal of the exclusion.<sup>11</sup> Still, Ontario and the other Exclusionary Provinces persist with the exclusion.

This article traces the history of the professional exclusion from collective bargaining legislation in Canada from 1947 to the present day, with a special emphasis on the exclusion of employed, practicing lawyers. The story takes us from a time when almost every lawyer was a self-employed entrepreneur to today when thousands of lawyers are employed in all sorts of public- and private-sector jobs across the country. A notable aspect in the story of the persistent exclusion of lawyers in a handful of provinces is the almost complete absence of any justification provided by any government official in the nearly 75 years since the exclusion was first introduced. Even when obligated to justify the exclusion to

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9. In Newfoundland and Labrador and British Columbia, lawyers are not excluded from the main collective bargaining legislation, but crown attorneys and civil lawyers employed by the government are excluded from the public sector collective bargaining legislation.

10. *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at 125 [MPAO].

11. *The Changing Workplaces Review: An Agenda for Workplace Rights: Final Report* (Ontario: Ministry of Labour, 2017) c 10.7, recommendations 139-142 at 309-310, online (pdf): <files.ontario.ca/books/mol\_changing\_workplace\_report\_eng\_2\_0.pdf> [https://perma.cc/V5E3-FCWL].

the International Labour Organization in 1997, the best the Ontario government could do is argue that the “adversarial nature” of unionization and collective bargaining renders it incompatible and unsuitable with the professional workplace.<sup>12</sup> Thus, the argument was that the exclusion is necessary to stop lawyers from unionizing and seeking access to collective bargaining. This is a purpose that is almost certainly inconsistent with the broad and generous approach to section 2(d) of the *Charter* developed by the SCC in recent years.

The essay will proceed as follows. Part I traces the origins of the professional exclusion in the 1948 *IRDIA* and the subsequent import of the exclusion into provincial collective bargaining legislation. Part II examines the movement beginning in the 1960s to expand collective bargaining rights to professionals culminating in 1972 with the removal of the professional exclusion from the *Canada Labour Code* and the decision by most provinces afterwards to do the same. Part III discusses the practice and experience of lawyer collective bargaining in the Canadian jurisdictions that removed the professional exclusion (the “Inclusionary Provinces”). In Part IV, we examine the treatment of lawyers and their efforts to engage in collective bargaining in the four Exclusionary Provinces: Alberta, Ontario, Nova Scotia, and PEI. Part V describes the treatment of the lawyer and professional exclusion in academic and policy literature from the 1960s forward. Finally, Part VI examines the professional exclusion through the lens of the generous and expansive interpretation of *Charter* section 2(d) freedom of association and considers whether the exemption is likely to survive a *Charter* challenge. Ultimately, the essay concludes that the professional exclusion is unlikely to survive a section 2(d) challenge, which raises the important policy question of why the professional exclusion is not just repealed in the few jurisdictions where it persists.

#### I. *The source of the lawyer exemption: the Federal Industrial Relations Disputes Investigation Act, 1948*

Prior to 1948, collective bargaining legislation in Canada, from the 1907 *Industrial Disputes Investigation Act* to the 1944 *War-time Labour Relations Regulation*, Order in Council PC 1003 (“PC 1003”) and provincial variations did not expressly exclude practicing lawyers. In practice though, very few lawyers would have been covered by such legislation anyways, because hardly any lawyers were “employees.” In 1941, 90.5 per cent of lawyers were self-employed in private practice. By 1951, 83 per cent of

12. “CFA Report No 308” (1997) at para 172, online: *International Labour Organization* <[www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002\\_COMPLAINT\\_TEXT\\_ID:2904114](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2904114)> [perma.cc/32JL-FB9N].

practicing lawyers were self-employed.<sup>13</sup> The vast majority of Canadian lawyers worked as self-employed practitioners in law firms with one or two lawyers.<sup>14</sup> In the late 1940s, only about five per cent of practicing lawyers were employed in private industry, usually in the capacity as in-house general counsel and who therefore would likely have been excluded from collective bargaining legislation under the managerial or confidential employee exclusions. Only about five to six per cent of practicing lawyers were employed in public administration by the late 1940s.<sup>15</sup> Prior to the 1970s, lawyers employed by community organizations, unions, or advocacy organizations “were almost nonexistent.”<sup>16</sup>

Therefore, since the legal profession was comprised almost entirely of self-employed practitioners, legislation targeting collective bargaining between employees and employers attracted little interest within the legal community beyond a handful of practitioners who worked in the burgeoning field of labour law representing unions or employers. The fact that practicing lawyers were not expressly excluded from collective bargaining legislation was neither here nor there. Almost all lawyers were ineligible to join trade unions anyways, and those lawyers who were “employees” and therefore technically covered by the legislation demonstrated little interest in joining unions. For junior lawyers, employment by small law firms was merely a temporary stopover on the path to partnership or the establishment of a private practice. Trade unions were for the working class, not lawyers.

In the summer of 1947, the CBA became interested in Bill C-338, *An Act to Provide for the Investigation, Conciliation, and Settlement of Industrial Disputes*. Bill C-338 would replace both the *IRDIA* and PC 1003 while incorporating many of the features of the collective bargaining model introduced by PC 1003, including the principles of majoritarianism and exclusivity that had been borrowed with some revisions from the American *National Labor Relations Act* (the “Wagner model”). The federal government anticipated that Bill 338, once enacted, would serve as a template for provincial collective bargaining legislation and create a de facto national labour code in the postwar period, despite labour relations

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13. David Stager & Harry Williams Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 179.

14. *Ibid* at 176-177: “Prior to the 1950s, law firms were characterized by one or two lawyers working in a modest office, with the assistance of a typist-bookkeeper and occasionally a law clerk or student. Large firms of 25-30 lawyers were non-existent....”

15. *Ibid* at 271.

16. HW Arthurs, R Weisman & F Zemans, “The Canadian Legal Profession” (1986) 11 *American Bar Foundation Research J* 447 at 460.



falling primarily under provincial jurisdiction.<sup>17</sup> This desire for consistency in federal and provincial labour law was widely shared by the provinces coming out of World War II.

The CBA was concerned with a section of Bill 338 which precluded lawyers from representing clients in conciliation proceedings under the proposed legislation.<sup>18</sup> In a written submission dated 23 April 1948, the Chairman of the CBA Committee on Industrial Relations and Labour Law, an ad hoc committee hastily formed in 1948 to make representations on the Bill, requested that the section be removed.<sup>19</sup> Although not referenced in the April 23rd letter or in any other document I have been able to locate, it is clear from the debates found in the Hansard reports, reviewed below, that the CBA also requested that lawyers be exempted entirely from the new federal labour legislation.<sup>20</sup> This request for exclusion was accepted by the government as demonstrated by the inclusion in Bill 338 of a novel professional exclusion provision.

Bill 338 defined “employee” as excluding, “a member of the medical, dental, architectural, or legal profession qualified to practice under the laws of a province and employed in that capacity.”<sup>21</sup> Bill 338 lapsed, but its substantive terms were re-introduced in the following session as Bill C-195, *An Act to Provide for the Investigation, Conciliation and Settlement of Industrial Disputes*. Bill C-195 introduced legislation that would be known as the *Industrial Relations and Disputes Investigation Act, 1948 (IRDIA)*. Bill 195 added “engineers” to the list of excluded professions that had originally appeared in Bill 338. This change was made at the request of the National Association of Professional Engineers and the Engineering Institute of Canada, which had lobbied the government to treat engineers in the same manner as the other four listed professions.<sup>22</sup>

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17. See House of Commons, Committee of the Whole, *House of Commons Debates*, 20-3, No 5 (17 June 1947) at 4230-4231 (Hon Humphrey Mitchell).

18. “The Twenty-Seventh Annual Meeting of the Canadian Bar Association” (1944) 22:7 *Can Bar Rev* 577 at 578.

19. Letter from Cecil Robinson, Chairman of the Dominion Section of the CBA Committee on Industrial Relations and Labour Law to Colin Gibson, Secretary of State, Government of Canada (23 April 1948) (the section in question was ultimately removed from the Bill at the CBA’s request).

20. I reviewed the debates and documents from the House of Commons and Committee hearings relating to Bill 338 and Bill 195, as well as minutes of all CBA meetings during this period. I was unable to locate any document prepared by the CBA that demands the exclusion of lawyers from either Bill. However, as explained below, the Minister of Labour states on multiple occasions in the Hansard that the CBA has requested that lawyers be excluded from the Bill.

21. Bill 338, *An Act to Provide for the Investigation, Conciliation and Settlement of Industrial Disputes*, 3rd Sess, 20th Parl, 1947.

22. See House of Commons, Committee of the Whole, *House of Commons Debates*, 20-4, No 4 (22 April 1948) at 3208.

If not for this late addition of “engineers” to the list, the professional exclusion likely would have passed with little debate or attention. The associations representing the four other professions had requested an expressed exclusion and the labour movement was indifferent to the exclusion since unions were not interested in organizing these professions. The Canadian Congress of Labour submitted a draft National Labour Code to the Standing Committee on Industrial Relations (IR Committee) for consideration in February 1948 that included the same definition of “employee” found in Bill 195 that excluded the listed professions.<sup>23</sup> Meanwhile, the Trades and Labor Congress of Canada argued for the government, “to expedite the passage of Bill 195 as quickly as possible.”<sup>24</sup> Therefore, in 1948, when the statutory exclusion of practicing lawyers was first proposed and debated, the two umbrella labour movement organizations supported the exclusion.

However, the addition of engineers caught the attention of several members of the IR Committee in the Bill 195 deliberations. Under PC 1003, some 1100 engineers in Ontario and Quebec had joined the Employee Professional Engineers and Assistants Union (EPEAU). The EPEAU had been certified and had already bargained several collective agreements with more still in negotiations. The EPEAU argued in submissions to the IR Committee that engineers should be covered by the legislation as they had been under PC 1003 and that it would be inappropriate and unjust for collective bargaining rights to be stripped from employees who had already exercised their rights to unionize and were covered by collective agreements. Some of the politicians sitting on the IR Committee agreed, and they went further and questioned the purpose and legitimacy of professional exclusion clause as a whole.

The central argument from the members of Parliament who objected to the professional exclusion was that insofar as professionals (including lawyers) were “employed” they stood in the same position as other employees and, therefore, they ought to have the same legal protections to form and join unions and engage in collective bargaining if they so choose. This sentiment is captured in the following selection of speeches from members of the Standing Committee on Industrial Relations:

*MP MacInnis*: “If you delete this [professional exclusion clause] altogether you are not compelling doctors, lawyers, or engineers, to come under this Act, but you are doing the same thing with them as you

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23. See House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (27 April 1948) at 41.

24. See *ibid* at 13.

are doing with the plumbers, conductors, street railway men, miners and others. You are leaving them free to make use of this Act or not make use of the Act. I do not think it is democratic procedure to say that a certain class of people cannot take advantage of legislation on our statute book to better their own condition, particularly when their own profession has failed to do that.”<sup>25</sup>

*MP Gillis:* “I would point out that there is nothing compulsory in the bill. If it applied to doctors, lawyers, engineers and what have you, the first thing they would have to do would be to conform with the mechanics of the bill, form a trade union, get certification and all the rest of it. If they did not want to do that, there is nothing in the bill that compels them to.”

*MP Johnston:* “Personally, I would have no objection to doctors obtaining collective agreements if they desired to. I would not have any objection to allowing lawyers to enter into a collective agreement if they themselves desire it.”<sup>26</sup>

A secondary concern raised by opponents of the professional exclusion provision was that the list of professions excluded was random and that other professions had already come forward asking to be excluded as well and more would do so later. This would create confusion and inconsistency and therefore the law should just cover professional employees in the same manner as other employees. This concern is reflected in the following comments made during Committee:

*MP Archibald:* “I should like to ask the Minister if it would not be practical to drop all of [the professional exclusion subsection]? You have mentioned certain professionals there, skilled and unskilled. If you are going to mention any professions why do you not include preachers, chartered accountants and politicians? Why single these people out and give them status of being above and beyond the ordinary hoi polloi? I would suggest the removal of that. Then, as the Minister has already pointed out, it would fall back to themselves for labour relations, and they have good sense and all the rest of it. Leave it out. Then there would be no fight over who was a professional man.”<sup>27</sup>

*MP Skey:* “I should like to ask the Minister again if we are not already getting into a position whereby people like chemists and geologists, and so on, are asking for inclusion in their professional status, and if we would not have any number of other groups coming before the government or before the labour relations board asking in many other ways. We would have many other groups of employees and their professional associations.

25. See *ibid* at 209.

26. House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (13 May 1948) at 204.

27. *Ibid* at 205.

Would the deletion of the clause not save the government a tremendous amount of trouble in the future and place the whole onus on the board for deciding their status?"<sup>28</sup>

Some members of the Committee proposed an amendment to the Bill to permit professionals to organize and be certified in their own bargaining unit to guard against them being swept into a larger "all employee" unit that included manual or clerical labourers.<sup>29</sup> The American *Taft-Hartley Act*, enacted a year earlier in June 1947, had amended the *National Labor Relations Act* to ensure that "professional employees" (including lawyers) would not be swept into a bargaining unit with non-professional employees unless a majority of the professionals voted to join that broader unit. The concern about professionals being included in larger non-professional units included both a practical labour relations element related to a lack of community of interest, and a classist or elitist element expressed as a concern that professionals must not be forced to become "trade unionists." This idea that professionals should be able to associate and engage in collective bargaining if they so desire, but that they should not be compelled to join "trade unions" appears at various points in the Committee debates. For example, MP McInnes emphasized that removing the professional exclusion provision, "does not make trade unionists of engineers. I want to ease the minds of these professional people on that point. It does not degrade them. This Act does not compel bargaining as trade unions."<sup>30</sup>

Confronted with these objections, Minister of Labour Humphrey Mitchell provided a straightforward explanation for the decision to include the professional exclusion in the Bill: the relevant national associations had requested the exclusion and the government should respect the wishes of these associations. Minister of Labour Mitchell gave the following speech in Committee on 13 May 1948:

*Hon. Mr. Mitchell:* "We spent a good deal of time on the drafting of this legislation. What we did was we forwarded imperfect ideas to all of the national organizations in the country, labour organizations, professional organizations...and employer's organizations. What is going to be the

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28. *Ibid* at 207.

29. *Ibid* at 203; House of Commons Committees, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (18 May 1948) at 236.

30. House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (13 May 1948) at 228. See also MP Adamson: "the one thing we are trying to prevent is to have professional men as a trade union.... My intention certainly was to keep the profession as a profession and keep them separate and outside a trade union.": House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (18 May 1948) at 235.

yardstick? We took this as the yardstick, that the expression of the national organization speaking for their constituent members was the majority voice of the profession. That is why that is there. When you come to the medical profession and they pass a resolution and say, "We want to be excluded from certain legislation," then on a fundamental question like that I think you have got to give some respect to the viewpoint expressed by that organization. *The same thing applies to lawyers, dentists, architects and now we have got to the engineers.* As I said before there is nothing to prevent those people from forming an organization, and I expressed my own opinion that if they did so and they asked for the conciliation services of my department they would certainly get them.

That is the position we are in. What are you going to do? Are you going to listen to the majority opinion of the organizations, or are you not? *Whatever you may do about the engineers I think we are certainly obliged to have the lawyers, doctors, architects, and the dentists in the bill.* The only reason this discussion has come up is because there is a group inside a profession who feel that particular word 'engineer' should be excluded from the bill.<sup>31</sup>

And again, on 17 June 1948:

*Hon. Mr. Mitchell:* I have always taken the view that you should listen to the representations made by the parent organizations.... In my judgment due weight had to be given to their representations. It may be proved to these organizations and their membership in the light of experience that their judgement was unsound. If so, then will be the time to amend the section. With labour you listen in the main to representatives from the national organizations and similarly with representations from the employers. The representations we received from the organizations and from professional groups which obtained their status as professional men from provincial legislatures were very powerful.<sup>32</sup>

Other MPs agreed with the Minister's rationale of deference to the professional associations. For example, MP Timmins said to the Committee: "Speaking for myself as a lawyer and having regard to the representations made to the minister and his department in drawing this clause, the legal profession has said it desired to have lawyers excluded from this Act. I think we should be guided by that."<sup>33</sup> Therefore, the historical justification for the introduction of the lawyer exclusion into Canadian

31. House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (13 May 1948) at 208 [emphasis added].

32. House of Commons Debates, Committee of the Whole, *House of Commons Debates*, 20-4 No 6, (17 June 1948) at 5368.

33. House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (13 May 1948) at 210.

collective bargaining law was that the CBA requested it.<sup>34</sup> There was no argument presented in the House of Commons or at the IR Committee that collective bargaining by the relatively few lawyers who were employed at that time was somehow inappropriate due to the nature of legal practice.

Some MPs questioned whether the national association representing engineers fairly represented the interests of employed engineers as opposed to the interests of the management class of the profession. For example, MP Gillis argued in the IR Committee: “I said several times, and I reiterate it now, I do not think the institute [of professional engineers], as such, is speaking for the majority of the employee engineers. They represent largely the managerial end of the profession.”<sup>35</sup> There was no discussion in the Hansards of a comparable argument that the CBA’s position supporting the exclusion of practicing lawyers in 1948 represented the position of the management, sole-practitioner component of the legal profession rather than that of “employed” lawyers. However, there can be little doubt that was the case. In the 1940s, the CBA was an organization that represented almost exclusively male, self-employed legal practitioners who would not have been eligible to unionize under the *IRDIA* even if the exclusion were not included in the legislation. We would not expect to find a strong voice within the CBA of that period advocating for the rights of employed lawyers to unionize and engage in collective bargaining.<sup>36</sup>

As intended, the *IRDIA* served as the template for collective bargaining legislation at the provincial level. By 1955, every province except Saskatchewan had enacted collective bargaining legislation modelled after the *IRDIA* that included the professional exclusion in language either identical to or closely modelled after that found in the *IRDIA*, including:

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34. Not all professional associations that requested to be excluded received their wish. The government received requests to be excluded from organizations representing dietitians, land surveyors, chemists, and physicists but none of these professions were excluded. There was little explanation provided by government officials as to why only five professions were excluded. In rejecting the dietitians’ request, Mitchell stated simply that dietitians, “do not stand in the same class as the professions of engineering, architecture, dentistry, medicine and the like”: House of Commons, Committee of the Whole, *House of Commons Debates*, 20-4, No 6 (17 June 1948) at 5365.

35. House of Commons, Standing Committee on Industrial Relations, *House of Commons Debates*, 20-4, No 1 (13 May 1947) at 212.

36. The minutes of proceedings for the 1948 CBA Conference referenced the “good work” of the newly formed Industrial Relations Section in lobbying for changes to Bill 195, which was “praised on every hand” for “putting forward the lawyer’s viewpoint on labour relations”: “The Thirtieth Annual Meeting of the Canadian Bar Association” (1948) 26:7 *Can Bar Rev* 1097 at 1100.

Nova Scotia (introduced in 1947),<sup>37</sup> Ontario (1948),<sup>38</sup> Manitoba (1948),<sup>39</sup> New Brunswick (1949),<sup>40</sup> Alberta (1950),<sup>41</sup> Newfoundland and Labrador (1950),<sup>42</sup> and British Columbia (1954).<sup>43</sup> Prince Edward Island followed in 1962.<sup>44</sup> Quebec's *Labour Relations Act* of 1944 had excluded lawyers, however, the *Professional Syndicates Act* of 1925 recognized and protected rights of professionals to organize associations and unions and to bargain enforceable collective agreements that did not include majoritarianism and exclusivity.<sup>45</sup> In every instance, the language excluding lawyers from coverage was introduced without debate or controversy at the provincial level as part of the adoption of the broader package of labour legislation modelled after the *IRDIA*. In this way, the request by the CBA to be excluded from federal labour legislation in 1948 had the indirect effect of excluding practicing lawyers from provincial collective bargaining legislation everywhere in Canada except Saskatchewan, where employed lawyers have always been treated the same as other employees.

## II. *The Woods Task Force, ILO Convention 87, and the dismantling of the lawyer exemption in most Canadian jurisdictions*

Little attention was paid to the professional exclusion within Canadian labour policy circles until the late 1960s, when the "Woods Task Force" was established to study possible reforms to the Canada Labour Code. The SCC has described the final report released in 1968 and entitled *Canadian Industrial Relations: Report of the Federal Task Force on Labour Relations* as "Canada's leading Task Force on Labour Relations."<sup>46</sup> The report advocated for an inclusive approach to legislative protections for collective bargaining and the extensive list of exemptions found in Canadian labour relations legislation was identified as a problem requiring "corrective action."<sup>47</sup>

37. *Trade Union Act*, SNS 1947, s 2(1)(i)(ii).

38. *Labour Relations Act*, SO 1948, c 51. This legislation was largely a placeholder that granted the Lieutenant Governor in Council to enact regulations that mirrored the federal *IRDIA* once that legislation was enacted. In December 1948, after the *IRDIA* had been enacted in June of that year, Ontario Regulation 279/48 was filed. That Regulation (section 1(1)(h)) included the professional exclusion found in the *IRDIA*, including employed practicing lawyers.

39. *Labour Relations Act*, SM 1948, c 27, s 2(1)(i).

40. *Labour Relations Act*, SNB 1949, s 2(1)(i).

41. *An Act to Amend the Alberta Labour Act*, SA 1950, c 34, s 18.

42. *Labour Relations Act*, SN 1950, No. 15, s 2(i).

43. *Labour Relations Act*, SBC 1954, c 17, s 2(1).

44. *Industrial Relations Act*, SPEI 1962, c 19, s 1(i).

45. *Labour Relations Act*, RSQ 1944, c 30, s 2(a); *Professional Syndicates Act*, RS 1925, c 255, s 1.

46. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 41 [*Dunmore*].

47. Woods Task Force, *supra* note 8 at para 250.



In a research study prepared for the Task Force, Professor Shirley Goldenberg argued that collective bargaining was compatible with professional ethics and that the professional exclusion should be removed.<sup>48</sup> She noted that there could be occasions in which lawyers perform an essential service such that a work stoppage could jeopardize a “vital public interest.” In those cases, restrictions on the right to strike would be justified. However, Goldenberg cautioned that where the right to strike is restricted it is incumbent upon the government to ensure those workers receive a “fair deal.”<sup>49</sup> This observation foreshadowed Justice Abella’s comments in the 2015 decision in *Saskatchewan Federation of Labour v Saskatchewan* in which the SCC recognized a constitutional right to strike. Goldenberg argued that professional licensing bodies, such as law societies, should be “ruled out” as the bargaining agent that represents professionals in collective bargaining, noting that “it would be undesirable to combine in one body the public interest function of licensing with the private interest function of bargaining.”<sup>50</sup>

Ultimately, the Woods Task Force recommended that collective bargaining coverage be extended to professionals and, accepting the advice of Professor Goldenberg, that the licensing body for the professional not be the collective bargaining representative for professional employees.<sup>51</sup> The federal government did not immediately act upon the Task Force recommendations. However, on 23 March 1972, the government ratified ILO Convention 87, *Concerning Freedom of Association and the Protection of the Right to Organize, 1948*. Convention 87 requires that states give effect to the protected right of all employees “without distinction whatsoever” to join a union or association of the employees’ choosing, to engage in collective bargaining, and to strike.<sup>52</sup> The following week, the government introduced Bill C-183, *An Act to Amend the Canada Labour Code*, which removed the professional exclusion from the *Canada Labour Code*.

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48. Goldenberg, *supra* note 8 at 96.

49. *Ibid* at 97-98; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [SFL].

50. Goldenberg, *supra* note 8 at 98-99. Goldenberg argued that professional associations that control access to could restrict numbers to improve their own self-interest in bargaining. Also, the fact that professional associations will inevitably include members who are employees and members who are employers creates a potential conflict of interest. Goldenberg preferred that independent trade unions represent professionals.

51. Woods Task Force, *supra* note 8 at para 441.

52. “Convention 87, Freedom of Association and Protection of the Right to Organize Convention,” (1948), No. , art 2, online: International Labour Organization <222.ilo.org/dyn/normlex/en/f?p=NOR\_MLEXUB:12100:0::NO::p12100\_instrument\_id:312232> [perma.cc/SP8X-5FPY]. Article 9 provides an exception for the armed forces and police only.



In his introductory remarks at first reading, Minister of Labour Martin O'Connell referenced the recent ratification of Convention 87 and its requirement for collective bargaining rights to be extended to all workers, including professionals. He then noted:

The bill would extend bargaining rights to professional employees who until now have not been entitled to bargain collectively. We believe that these people have tended in recent years to be put into a kind of no man's land between management on the one side and the organized worker on the other, without the right to be certified. We propose to rectify this. But in doing so we recognize that professional employees have specialized knowledge and training and that they may choose to have their own bargaining unit.<sup>53</sup>

The new law introduced a definition of "professional employee" and directed that a bargaining unit comprised of only professionals was appropriate unless such a unit would otherwise not be appropriate, that a unit comprised of more than one profession may be appropriate, and that a person performing the functions of a professional but lacking the formal qualification could be included in a unit with the professionals. Today, the same basic model appears in section 27 of the *Canada Labour Code*.<sup>54</sup>

Following the federal government's ratification of ILO Convention 87 and the repeal of the professional exclusion in the *Canada Labour Code* in 1972, most Canadian provinces amended their collective bargaining legislation to follow suit, including: Manitoba (in 1972),<sup>55</sup> British Columbia (1975),<sup>56</sup> and Newfoundland and Labrador (1977).<sup>57</sup> New Brunswick (in 1971)<sup>58</sup> and Quebec (1964)<sup>59</sup> had repealed the lawyer exclusion earlier and Saskatchewan had never excluded professionals. Some of the provinces included special rules pertaining to the appropriate bargaining unit, such as a direction that a unit comprised solely of lawyers or professionals was deemed to be appropriate or that professionals could not be included in a unit of non-professionals unless a majority of the professionals voted in favour of such an arrangement. However, for the most part, once the lawyer exclusion was removed, employed practicing lawyers were treated like any other employee covered by the collective bargaining legislation.

53. House of Commons, Committee of the Whole, *House of Commons Debates*, 28-4, No 2 (29 March 1972) at 1269.

54. *Canada Labour Code*, RSC 1985, c L-2, s 27.

55. *Manitoba Labour Relations Act*, 1972, c. 75, s. 1(t), s. 29(3)

56. *Labour Code of British Columbia Amendment Act*, 1975, c 33, s 1(b). See Paul Weiler, *Reconcilable Differences: New Directions for Labour Law* (Toronto: Carswell, 1980) at 35 (discussing the decision to include professionals in the 1975 BC *Labour Code*).

57. *Labour Relations Act*, SN 1950 No 15, s 2(u), s 39.

58. *Industrial Relations Act*, SNB 1971, c 9, s 2(5).

59. *Labour Code*, RSQ 1964, c 141, s 20.

The only provinces to retain the lawyer exclusion beyond the 1970s were Ontario, Alberta, Nova Scotia, and PEI. Table 1 summarizes the status of the lawyer exclusion in each of Canada’s jurisdictions as of 2021.

**Table 1: History of Adoption and Repeal (where applicable) of the Lawyer Exemption in Principle Private Sector Collective Bargaining Statutes**

Jurisdiction	First Excluded Lawyers	Removed Exclusion
Canada	1948	1973
Alberta*	1950	n/a
British Columbia	1954	1975
Manitoba	1948	1972
New Brunswick	1949	1971
Newfoundland & Labrador	1950	1977
Nova Scotia*	1947	n/a
Ontario*	1948 Re-introduced in 1995	1992–1995
P.E.I.*	1962	n/a
Quebec	1944 (Lawyers could organize under <i>Professionals Syndicate Act</i> )	1964
Saskatchewan	n/a	n/a

\* The Exclusionary Provinces

There was little or no political debate about the removal of the lawyer exclusion in those provinces that repealed the exclusion during the 1960s and 1970s. The provinces simply followed the federal lead just as they had done in introducing the exclusion initially in the 1940s and 1950s. Removing the exclusion was consistent with Canada’s ratification of Convention 87 and with the recommendations of the Woods Task Force and therefore extending collective bargaining rights to professionals, including employed lawyers, was in step with the mood of the time in favour of broad access to the statutorily protected collective bargaining rights.

### III. *The practice of lawyer collective bargaining in the inclusionary provinces*

With the exclusion removed, many lawyers<sup>60</sup> employed in the private sector in the Inclusionary Provinces joined unions and are today covered by collective agreements. Some collective agreements that cover practicing lawyers include provisions that address the lawyers' ethical and professional obligations as members of the law bar. Typical is the following language found in a collective agreement between the Manitoba Legal Aid Lawyers' Association and Legal Aid Services Society of Manitoba:

9.01 Each employee shall observe standards of behaviour consistent with his functions and role as a public servant and as a member of the Law Society of Manitoba and in compliance with the terms of this Agreement and the employee shall observe his oath of office and oath of allegiance where he has taken an oath of allegiance.<sup>61</sup>

Similarly, an agreement between the Professional Employees' Association of BC and the Family Maintenance Agency permits covered lawyers to refuse employer directions that, in the lawyer's opinion, would require them to violate an ethical standard.<sup>62</sup> However, other than lawyer-specific clauses such as these, a half-century of collective bargaining by practicing lawyers employed in the private sector across Canada has demonstrated there is nothing special about employed lawyers that warrants exclusion from collective bargaining legislation. Collective bargaining has proven time and again to be an adaptable institution.

Some governments that extended statutory collective bargaining protections to private-sector lawyers delayed doing the same for their own employees. The federal *Public Service Staff Relations Act of 1967*, which extended collective bargaining rights to federal public-sector employees, excluded lawyers employed in the department of justice; that exclusion was not removed until April 2005.<sup>63</sup> One year later, the Association of

60. It is difficult to tabulate the precise numbers of unionized lawyers in Canada because in the private sector, lawyers are sometimes included in broader bargaining units that include non-lawyers. As part of this research, I contacted unions that represent bargaining units that include practicing lawyers as part of an informal survey of the number of unionized lawyers. This is obviously an unscientific method of calculation. Unionized lawyers are most commonly employed by unions as in-house legal counsel and by legal clinics and other "progressive" employers.

61. "Agreement between the Province of Manitoba and Legal Aid Manitoba and the Legal Aid Lawyers' Association 2019–2022" (29 September 2021) at 6, online (pdf): *Government of Manitoba* <[www.gov.mb.ca/csc/labour/pubs/pdf/agreements/legal\\_aid.pdf](http://www.gov.mb.ca/csc/labour/pubs/pdf/agreements/legal_aid.pdf)> [perma.cc/7CDC-HBVR]

62. Eighth Collective Agreement: Between THEMIS Program Management & Consulting Limited and the Professional Employees Association" (2019) art 26.4, online (pdf): *PEA* <[pea.org/system/files/FMEP-Eighth-Collective-Agreement-FINAL.pdf](http://pea.org/system/files/FMEP-Eighth-Collective-Agreement-FINAL.pdf)> [perma.cc/E6D3-362P].

63. *Public Service Labour Relations Act*, SC 2003, c 22.

Justice Counsel (AJC) was certified to represent lawyers employed in the federal public service.<sup>64</sup> Today, the AJC represents approximately 2600 lawyers employed by the government of Canada. The AJC and the Treasury Board have concluded four collective agreements since the AJC was certified. They have agreed to refer collective bargaining disputes to binding determination under section 182 of the *PSLRA*.<sup>65</sup>

Newfoundland and Labrador, which extended coverage to private-sector lawyers in 1977, continues to exclude lawyers “employed in the Department of Justice as legislative counsel” from its *Public Service Collective Bargaining Act*, and although the province’s crown attorneys have an association, it has never bargained a collective agreement on behalf of the employees.<sup>66</sup> Civil lawyers employed by the Newfoundland government are not presently represented by any employee association. In British Columbia, the *Public Service Labour Relations Act* still defines “employee” as excluding “a practicing lawyer or articulated student...who is engaged in the practice of law.”<sup>67</sup> However, in October 2000, the *Crown Counsel Act* was amended to recognize the BC Crown Counsel Association (BCCCA), a society incorporated under the *Society Act*, as the exclusive bargaining agent for all crown counsel and to require the BCCCA and the employer (the BC Public Service Agency) to bargain in good faith and make reasonable efforts to conclude agreements that include “matters affecting wages or salary, hours of work and other working conditions.”<sup>68</sup> Approximately 450 crown counsel are represented by BCCCA. The parties have bargained collective agreements that govern working conditions of crown counsel in BC and that include access to grievance and disputes arbitration, and processes for resolving collective bargaining disputes, including access to binding interest arbitration. Arbitrators have decided bargaining disputes under this process.<sup>69</sup>

The British Columbia Government Lawyers Association (BCGLA) is incorporated under the *Societies’ Act* of BC and represents civil lawyers

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64. *Federal Law Officers of the Crown v Treasury Board of Canada*, 2006 PSLRB 45 (CanLII)

65. See Treasury Board and Association of Justice Counsel, “Determination of outstanding issues tied to the renewing the 2014–2018 collective agreement,” (10 July 2018), online (pdf): *Association of Justice Counsel* <[www.ajc-ajj.ca/sites/default/files/2019/12/2018\\_arbitral\\_award.pdf](http://www.ajc-ajj.ca/sites/default/files/2019/12/2018_arbitral_award.pdf)> [perma.cc/UY9Y-YZVH]

66. *Public Service Collective Bargaining Act*, RSNL 1990, c P-42, s 2(1(i)(ix)). The union is known as Newfoundland and Labrador Crown Attorneys Association (NLCAA).

67. *Public Service Labour Relations Act*, RSBC 1996, c 388, s 1 [*PSLRA*].

68. *Crown Counsel Act*, RSBC 1996, c 87, s 4.1(1).

69. See “Agreement between the BC Public Service Agency and BC Crown Counsel Association,” (last visited 20 June 2022), online (pdf): *Government of British Columbia* <[www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-employee-labour-relations/crown\\_counsel\\_agreement\\_15.pdf](http://www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-employee-labour-relations/crown_counsel_agreement_15.pdf)> [perma.cc/3MTP-ASZJ].

employed by the government. In contrast to the formalized bargaining process in place for crown counsel, the government has historically refused to recognize the BCGLA as the exclusive legal bargaining agent representing these employees. Since the civil lawyers are excluded from the *PSLRA*, the BCGLA has no statutory mechanism to require the government to engage in collective bargaining. However, in 2015, the province acknowledged that the SCC decisions in *MPAO* and *SFL* required that collective bargaining rights be extended to civil lawyers employed by the state.<sup>70</sup> The government proposed a process for collective bargaining and indicated its intention to remove the exclusion of civil lawyers from the *PSLRA*. In August 2019, the BCGLA commenced a *Charter* challenge asserting that the exclusion of lawyers from the *PSLRA* infringed section 2(d), as did the government's proposed plan to sweep the lawyers into a broader "all professionals" bargaining unit. That action remained outstanding at the time of writing in summer 2021.

New Brunswick similarly conceded that the exclusion of public-sector lawyers from coverage under collective bargaining legislation could no longer be justified after the SCC's recent expansive re-interpretation of section 2(d) freedom of association. In 2009, the government removed a provision excluding lawyers previously found in the *PSLRA* following a Court of Queen's Bench ruling that the exclusion of "casuals" in the same legislation contravened section 2(d).<sup>71</sup> In his introduction of Bill 80, *An Act to Amend the Public Service Labour Relations Act*, Minister of Human Resources Rick Brewer indicated that the government was extending collective bargaining rights to government lawyers to bring the province in line with the SCC's decision in *BC Health Services*, which had recognized a right to collective bargaining.<sup>72</sup>

Quebec's crown prosecutors are afforded a right to collective bargaining under an *Act Respecting the Process for Determining the Remuneration of Criminal and Penal Prosecuting Attorneys and Respecting their Collective*

70. In its Response to the Notice of Civil Claim, the government agreed with the BCGLA's pleading that: "In August 2015, the Province acknowledged that Civil Lawyers had a right to bargain collectively and expressed willingness to offer them access to a 'more meaningful process of collective bargaining as determined by the Supreme Court of Canada'": *British Columbia Government Lawyers Association on Its Own Behalf and on Behalf of All Its Members v Her Majesty the Queen in Right of the Province of British Columbia*, BCSC File No 198773 at para 1 (Response to Civil Claim, 13 September 2019).

71. *CUPE v PNB*, 2009 NBQB 164. The exclusion of casuals was repealed in April 2010: *An Act to Amend the Public Service Labour Relations Act*, SNB 2010, c 20.

72. New Brunswick, Legislative Assembly, *Official Report of Debates (Hansard)* (22 May 2009) at 22: "The Supreme Court of Canada has ruled in other jurisdictions that the right to join a union is protected under the Canadian Charter of Rights and Freedoms. With this amendment, we are demonstrating the commitment of the province of New Brunswick to respect the Supreme Court's ruling."

*Bargaining Plan (Prosecutors' Act)*.<sup>73</sup> Crown prosecutors, represented by the Association of Attorney-General's Prosecutors of Quebec (ASPGQ), have engaged in strike action on multiple occasions since 1986.<sup>74</sup> Non-prosecuting lawyers and notaries in Quebec employed by the state are represented by an association recognized under the *Professional Syndicates Act* known today as Les avocats et notaires de l'État Québécois (LANEQ). LANEQ members have a statutory right to strike under the Quebec *Labour Code* subject to certain rules requiring essential service designations to be agreed or imposed by the Administrative Labor Tribunal (Essential Services Division).<sup>75</sup> Collective bargaining between the Quebec government and ASPGQ and LANEQ has often been contentious, leading to a number of strikes over the years, a complaint to the ILO's Expert Committee on Freedom of Association (the CFA ordered the government to comply with Convention 87 and 98),<sup>76</sup> and recent rulings by the Superior Court and Court of Appeal that back-to-work legislation violated section 2(d) and was not saved by section 1 of the Charter.<sup>77</sup>

#### IV. *Still, they persisted: the continued lawyer exclusion in Alberta, Ontario, Nova Scotia, and PEI*

The preceding discussion demonstrates a long history of collective bargaining by practicing, employed lawyers across Canada in both the private and public sectors. Thousands of Canadian lawyers are covered by collective agreements. Nevertheless—Ontario, Alberta, Nova Scotia, and PEI<sup>78</sup>—have stubbornly persisted with professional exclusion.

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73. *Act Respecting the Process for Determining the Remuneration of Criminal and Penal Prosecuting Attorneys and Respecting their Collective Bargaining Plan*, 2005, c P-27.1.

74. "Quebec Prosecutors, government lawyers on strike," Global News (8 February 2011), online (pdf): <globalnews.ca/news/108696/quebec-prosecutors-government-lawyers-on-strike-3/> [perma.cc/X3CA-DJ35]; *An Act to Amend the Act Respecting Attorney General's Prosecutors and the Labour Code*, CQLR c 22.

75. *Civil Service Act*, CQLJ c F-3.1, s 69. For a Tribunal decision considering essential services designation in relation to LANEQ members, see: Quebec (Government of) (Department of Professional Relations, Treasury Board) and Lawyers and Notaries of the Quebec State, 2016 QCTAT 6023 (CanLII).

76. "Report in which the committee requests to be kept informed of development: Report No 344" (2007), online (pdf): *International Labour Organization* <www.ilo.org/dyn/normlex/en/f?p=1000:70006:0::NO:70006:P70006\_COMPLAINT\_TEXT\_ID,P70006\_PARAGRAPH\_NO:2910179,407> [perma.cc/UPK6-H8ES].

77. *Les avocats et notaires de l'État québécois c Procureure générale du Québec*, 2019 QCCS 3897, aff'd 2021 QCCA 559; *Procureur général du Québec c Les avocats et notaires de l'État québécois*, 2021 QCCA 559, leave for appeal to SCC refused, 39695 (14 October 2021).

78. PEI introduced the *Industrial Relations* in 1962 which excluded professionals, including practicing lawyers. Today the professional exclusion appears in section 7(2) of the *Labour Act*. There is no PEI Hansard for the period in which the professional exclusion was introduced, and I have been unable to locate any discussion by politicians or the government that explains the government's justification for the lawyer exclusion.



Nova Scotia introduced the professional exclusion, including practicing lawyers, in the 1947 *Trade Union Act*, using the same language as the federal *IRDIA*.<sup>79</sup> There was no Hansard before 1950, and I was unable to locate any justification by a public official for the exclusion either from this earlier period or the present day. Today the lawyer exclusion is found in section 2(2) of the *Trade Union Act*.<sup>80</sup> The NS *Civil Service Collective Bargaining Act* also excludes practicing lawyers.<sup>81</sup> Notwithstanding the statutory exclusion, the NS Crown Attorneys Association (NSCAA) has persuaded the government to come to the bargaining table by threatening and engaging in strike action over the years. Over 90 per cent of crown attorneys participated in a 1998 strike over compensation and other working conditions. This strike led the province in 2000 to recognize the NSCAA as the exclusive representative of crown attorneys and enter into a framework agreement that establishes a system of collective bargaining that includes access to conciliation and interest arbitration to resolve bargaining disputes.<sup>82</sup> The parties have resorted to interest arbitration to resolve bargaining disputes on multiple occasions since 2000.<sup>83</sup> The crown attorneys are the exception to the general rule that employed lawyers in Nova Scotia are effectively blocked from collective bargaining, and they won collective bargaining rights the old-fashioned way, by engaging in extra-statutory strikes.

The lawyer exclusion has been in place in Alberta since 1950.<sup>84</sup> A search of the Alberta Legislative Library Scrapbook Hansard for that session of Parliament found no references to or discussion of the professional exclusion when it was introduced. There are a handful of lawyers employed by unions in Alberta who are covered by broader “all employee”

79. *Labour Relations Act*, SN 1950, No 15, s 2(i). Nova Scotia introduced the exclusion prior to the passage of the *IRDIA*, modelled after the language that had been included in the original Bill 338 adopted by the federal government in 1947. As noted earlier, Bill 338 lapsed and Bill 195 was introduced in 1948 and enacted as the *IRDIA* later that year.

80. *Trade Union Act*, RSNS 1989, c 475.

81. *Civil Service Collective Bargaining Act*, RSNS 1989, c 71, s 11(2)(g).

82. Shelagh MR Campbell, *Continental Drift in the Legal Profession: The Struggle for Collective Bargaining by Nova Scotia's Crown Prosecutors* (PhD Dissertation, St Mary's University, 2010) at 193 [unpublished], online (pdf): Patrick Power Library, SMU <library2.smu.ca/xmlui/handle/01/23268> [perma.cc/W53H-4SRP].

83. See “Employment Agreement between the Province of Nova Scotia and the Nova Scotia Crown Attorneys’ Association” (1 April 2015), online (pdf): *Nova Scotia* <novascotia.ca/psc/pdf/employeeCentre/collectiveAgreements/NS\_Crown\_Attorneys\_Agreement\_April\_1\_2015\_-\_March\_31\_2019.pdf> [perma.cc/V2D2-M6YY]; *Nova Scotia (Human Resources) v Nova Scotia Crown Attorney's Association*, 2008 CanLII 92148 (Arbitrators: JA MacLellan & Donald H McDougall), <https://canlii.ca/t/j6nsd>.

84. *An Act to Amend the Alberta Labour Act*, SA 1950, c 34, s 18. Today the exclusion appears in section 1(l)(ii) of the *Labour Relations Code*.

bargaining units in Alberta as a result of voluntary recognition.<sup>85</sup> However, this type of voluntary recognition is exceedingly rare. The exclusion of lawyers from the *Labour Relations Code* has mostly ensured that lawyers in Alberta do not have access to collective bargaining. The *Public Service Employees Relations Act* also excludes practicing lawyers, but it includes a curious provision that permits the Alberta Labour Relations Board to nevertheless include lawyers in a statutorily mandated “all employee” bargaining unit represented by the Alberta Union of Public Employees if it is satisfied that a majority of lawyers and persons training to become lawyers employed by the government wish to be included in that unit.<sup>86</sup> In a 2019 decision, the Labour Board ruled that this statutory scheme did not infringe section 2(d) of the *Charter* by prohibiting crown attorneys from organizing a separate bargaining unit represented by the Alberta Crown Attorneys’ Association (ACAA).<sup>87</sup>

Ontario’s history regarding the lawyer exclusion is more complicated than the other provinces. The beginning of the story is familiar. Ontario introduced the lawyer exclusion initially by means of a regulation in late 1948 when it incorporated the *IRDIA* into provincial law.<sup>88</sup> The *Labour Relations Act, 1950* later consolidated earlier legislation and regulations into a unified labour code and the lawyer exclusion became part of that legislation.<sup>89</sup> There was limited discussion about the exemption at that time. The only reference to the professional exclusion in the Hansard for this period is a comment made on 5 April 1950, by MPP Joe Salsberg of the Labour-Progressive Party, who argued that the exclusion of professionals from the *Labour Relations Act* was “wrong in principle” and that it should be left to employed professionals to decide if they wish to exercise collective bargaining rights under the statute. MPP Salsberg also predicted correctly that the ranks of lawyers and other professionals employed by governments would continue to grow and that there was no justification for excluding them from collective bargaining laws.<sup>90</sup> There is

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85. For example, lawyers employed by the Health Services Association of Alberta are covered by a collective agreement.

86. *Public Service Employee Relations Act*, RSA 2000, c P-4, s 1(1), s 13.

87. *Alberta Crown Attorneys’ Association v Alberta (Justice and Solicitor General)*, [2019] Alta LRBR 337, 42 CLRBR (3d) 57, rev’d 2021 ABQB 949. The Board noted that if its conclusion that the statutory prohibition on crown attorneys forming their bargaining unit was constitutionally permissible was incorrect, then it would have ruled that exclusion of lawyers from the *PSERA* violates section 2(d), given that the evidence demonstrated that the ACAA had in practice been unable to engage in meaningful collective bargaining due to exclusion from the *PSERA*.

88. O Reg 279/48, s 1(1)(h).

89. *Labour Relations Act*, SO 1950, c 34, s 3.

90. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, C-1 (5 April 1950) at 495-496.



no recorded response by the government officials to these objections and the law passed with the professional exclusion, where it remained until 1992.

That year, an NDP-led government repealed the long-standing professional exemption as part of a package of reforms included in Bill 40, *Labour Relations and Employment Statute Amendment Act*, introduced on 4 June 1992. The new law extended coverage to the previously excluded five professions. It deemed that a unit comprised solely of members of a single profession is appropriate, while a unit with professionals and other employees was appropriate only if a majority of the professionals wish to be included in the broader unit.<sup>91</sup> Once again, there was little discussion in the legislative debates leading to the enactment of Bill 40 on 5 November 1992 about the extension of collective bargaining to professionals. The elimination of the professional exclusion was raised a few times in the meetings of the Standing Committee on Resources Development (Standing Committee). On 4 August 1992, Deputy Minister of Labour Jim Thomas commented that one area of reform targeted by Bill 40 was enhancing the ability to organize. In that vein, he observed: “Professional employees and domestics, formerly excluded from the right to organize under the act, and not permitted to organize under the act, are now permitted to organize, just as in most other jurisdictions.”<sup>92</sup>

Labour organizations were uniformly supportive of the removal of the professional exclusion. However, there was concern expressed in some quarters about the possibility of strikes by lawyers who they argued provide essential services. For example, the Ontario Association of Children’s Aid Society requested that lawyers who provide “mandatory services” either continue to be excluded or that the law’s new rules restricting replacement workers be relaxed to ensure continued services in the event of a work stoppage.<sup>93</sup> In comments before the Standing Committee, opposition Conservative MPP Elizabeth Witmer referenced the OACAS’s concerns and argued that the professional exclusion should be maintained due to the threat of strikes:

The reason for the original exclusion was the perceived inconsistency between a professional’s obligation to his or her clients and the right to strike. It was also thought that the right to bargain collectively is not

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91. Bill 40, *An Act to amend certain Acts concerning Collective Bargaining and Employment*, 2nd Sess, 35th Leg, Ontario, 1992 (assented to 5 November 1992), SO 1992, c 21, s 6(4).

92. Ontario, Legislative Assembly, Standing Committee on Resources Development (4 August 1992) at 1440.

93. Ontario, Legislative Assembly, Standing Committee on Resources Development (5 August 1992) at 1110.

critical to those individuals, because they are governed by their own specific professional regulatory bodies. I would say at this time that the rationale for the original exclusion continues and is very important in our deliberations. I'm concerned that if we go ahead as the government has proposed under Bill 40, professionals would be potentially in a conflict-of-interest situation between their professional responsibilities and the responsibilities and accountabilities that could be demanded by them by virtue of belonging to a trade union.<sup>94</sup>

This was the extent of the debate regarding the removal of the professional exclusion in 1992. The obvious rejoinder to MPP Witmer's comments, that truly essential lawyers could be granted a right to binding interest arbitration like other essential workers, was not raised in the committee discussions. The law received Royal Assent on 5 November 1992.

Once the lawyer exclusion was removed from the *Labour Relations Act*, lawyers in Ontario quickly exercised their statutory right to unionize. Between 1993 and 1995, a variety of unions representing bargaining units comprised partially or exclusively of lawyers were either certified by the OLRB or voluntarily recognized by employers.<sup>95</sup> However, this movement to organize employed lawyers was short-lived. In November 1995, the newly elected Progressive Conservative government re-introduced the professional exclusion and legislatively stripped lawyers from existing bargaining units.<sup>96</sup> Consistent with the pattern we have discussed, in debates and in Committee, the government offered no explanation or rationale for these actions beyond noting that repealing Bill 40 in its entirety had been part of the Progressive Conservative's election platform.

A relatively small number of practicing lawyers remain covered by collective agreements in Ontario as a residue from the brief period in which lawyers were covered by the *Labour Relations Act* because their employers have voluntarily permitted their coverage to continue.<sup>97</sup> Since 2017, the Ontario Public Service Employees Union (OPSEU) has obtained bargaining rights through voluntary recognition for a variety of small bargaining units that include lawyers. In each case, the union filed

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94. Ontario, Legislative Assembly, Standing Committee on Resources Development (8 October 1992) at 1700.

95. See *Workers' Compensation Board*, [1995] OLRD No 875; *Ombudsman Ontario*, [1993] OLRD No 466; *Neighbourhood Legal Services (London & Middlesex) Inc.*, [1993] OLRD No 1039; *Brant County Community Legal Clinic*, [1994] OLRD No 529.

96. *Labour Relations Act*, SO 1995, c 1, Schedule A, s 7(2) [LRA].

97. The list of employers who permit their employed lawyers to be covered by a collective agreement appears to be comprised exclusively of unions and law clinics, including Unifor, the Ontario Nurses Union, Canadian Union of Public Employees, Canadian Association of University Teachers, Building Trades Workers Services, and staff lawyers employed at Kensington-Bellwoods Community Legal Services, Scarborough Community Legal Services, and Injured Workers' Consultants.

an application for certification at the OLRB, notwithstanding the lawyer exclusion still found in the *LRA*. In four of the five applications, the employer responded by pleading that the lawyers are excluded from the legislation and therefore not eligible to be covered by the application for certification.<sup>98</sup> In each of those cases, OPSEU launched a *Charter* challenge against the professional exclusion. This provocation motivated all four employers to agree to a framework agreement requiring the employer to voluntarily recognize OPSEU for a unit including lawyers provided that a majority of the employees voted for OPSEU in a vote conducted by the OLRB.<sup>99</sup> OPSEU subsequently won all five votes and proceeded with bargaining towards a first collective agreement.

This tactic of threatening a *Charter* challenge against the constitutionally vulnerable lawyer exemption has helped other unions obtain voluntary recognition agreements for units covering lawyers. For example, lawyers employed by Legal Aid Ontario (LAO) obtained extra-statutory collective bargaining rights after their union, the Society of Energy Professionals, launched a *Charter* challenge against the lawyer exclusion in the *Labour Relations Act* in 2015.<sup>100</sup> This action followed upon a multi-year campaign by the lawyers and the Society to persuade LAO to voluntarily recognize the Society and commence bargaining, initially without success. LAO refused the Society's advances, informing the union that the statutory exclusion meant that LAO had no obligation to recognize or bargain with the Society:

LAO does not have any legal obligation to voluntarily recognize a trade union to represent employees to whom the [Ontario *Labour Relations Act*] does not apply, nor to enter into a bargaining relationship with a trade union entirely outside the established process and structure of the OLRA.<sup>101</sup>

98. The four employers who relied upon the lawyer exemption to resist the application were West Scarborough Community Legal Services, Advocacy Centre for Tenants Ontario, Canadian Environmental Law Association, and Durham Community Legal Services. The Income Security Advocacy Centre did not rely on the professional exclusion and agreed to voluntarily recognize OPSEU provided a majority of employees voted for union representation in a vote conducted by the OLRB: *OPSEU v Income Security Advocacy Centre*, 2017 CanLII 81380 (OLRB).

99. *OPSEU v Advocacy Centre for Tenants Ontario*, 2017 CanLII 81402 (OLRB); *OPSEU v Canadian Environmental Law Association*, 2017 CanLII 81403 (OLRB); *OPSEU v West Scarborough Community Legal Services*, 2019 CanLII 74860 (OLRB); *OPSEU v Durham Community Legal Clinic*, 2021 CanLII 106320 (OLRB).

100. "The Changing Workplaces Review" (6 November 2015) at 24-25, online (pdf): *The Society of Energy Professionals* <d3n8a8pro7vhm.cloudfront.net/thesociety/pages/3941/attachments/original/1595258280/Changing\_Workplaces\_Review\_Society\_Submission.pdf?1595258280> [perma.cc/T34Q-XYUS].

101. Yamri Taddese, "LAO Staff Lawyers' Union Bid Rejected" *Law Times* (28 October 2013), online: <www.lawtimesnews.com/news/general/lao-staff-lawyers-union-bid-rejected/261068>

The *Charter* challenge was scheduled to be argued in December 2016.<sup>102</sup> However, in August 2016, with the *Charter* application looming, LAO finally agreed to negotiate with the Society on behalf of LAO lawyers towards a framework agreement for collective bargaining. In October 2016, a secret ballot vote was conducted. LAO staff lawyers voted overwhelmingly in favour of unionization. Thereafter, LAO voluntarily recognized the Society as the bargaining representative for a unit comprised of non-managerial lawyers. The *Charter* challenge was withdrawn. In a subsequent interest arbitration, Arbitrator William Kaplan agreed with the Society's position that the bargaining dispute resolution mechanism should be binding interest arbitration and not the "traditional dispute resolution model for collective bargaining" (strike/lockout), as argued by LAO.<sup>103</sup> The Society represents approximately 350 staff lawyers employed at LAO.

The treatment of government lawyers in Ontario's collective bargaining legislation has followed a similar trajectory to that of their private-sector counterparts. With a brief reprise during the NDP years of 1993–1995, the *Crown Employees Collective Bargaining Act (CECBA)* has excluded crown attorneys and civil lawyers employed by the Ontario government.<sup>104</sup> When the NDP-led government proposed the removal of the lawyer exclusion in the *CECBA* in 1993, the only concern expressed during the debates was the possibility of disruption of essential government services in the event of a work stoppage. The Law Society of Upper Canada expressed in a letter to the government that it "makes no submission" on the extension of statutory collective bargaining rights to lawyers working for the crown but argued that "crown attorneys in criminal proceedings or civil attorneys who represent the government in other matters should not be given the right to strike, and they do not want the right to strike."<sup>105</sup> Indeed, neither of the associations that represented crown attorneys (Ontario Crown Attorney's Association, OCAA) and civil lawyers (Association of Law Officers of the

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[perma.cc/7UC8-DBFC].

102. Jacques Gallant, "Legal Aid Lawyers Locked in Legal Battle with Province over Unionization," *Toronto Star* (13 August 2016), online: <[www.thestar.com/news/gta/2016/08/13/legal-aid-lawyers-locked-in-legal-battle-with-province-over-unionization.html](http://www.thestar.com/news/gta/2016/08/13/legal-aid-lawyers-locked-in-legal-battle-with-province-over-unionization.html)> [perma.cc/NA7R-9PRM].

103. *Legal Aid Ontario v The Society of Energy Professionals, IFPTE Local 160* (2017), 131 CLAS 128, 2017 CanLII 26673 (Arbitrator: William Kaplan).

104. *Crown Employees Collective Bargaining Act*, SO 1972, c 67, s 1(1)(iv). Today the exclusion is found in the *Crown Employees Collective Bargaining Act*, SO 1993, c 38, s 1(1).

105. Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 35-3, vol b (13 December 1993) at 2040 (Mr. Hanrick).

Crown, ALOC) requested a right to strike, preferring interest arbitration instead.<sup>106</sup>

The lawyer exemption was removed from the *CECBA* between December 1993 and November 1995, at which time the Conservative-led government reinstated it. The exemption remains in the *CEBCA* today, even though in practice the Ontario government—through both Conservative and Liberal-led governments—has engaged in extra-statutory collective bargaining with OCAA and ALOC over terms and conditions of employment of their members pursuant to a series of five collectively bargained “framework agreements” since 1988.<sup>107</sup> That bargaining relationship was instigated by the “Weiler Report” of 1988, which concluded that government lawyers should have a right to collective bargaining like other employees.<sup>108</sup> Weiler explained that the labour market for professionals had changed considerably since the early postwar period and that by 1988, “most of our prototype professionals are employed by someone else, rather than work alone or in partnership with colleagues.”<sup>109</sup>

In 2000, Arbitrator Kaplan ordered a 30 per cent salary increase for the crown lawyers.<sup>110</sup> Following that award, the government informed the associations that it was no longer prepared to accept binding arbitration awards, and it proposed a new model in which the government could decline to implement an arbitrated award. ALOC and OCAA ultimately agreed to a revised model that addressed some of the government’s concerns. However, they later asserted that they had done so “with a gun to our head” because due to the statutory exclusion, without a framework agreement in place the associations would have no legal relationship with the employer that would protect a right to bargain.<sup>111</sup> Finally, in July 2010, OCAA and ALOC gave notice to the government that they intended to file a *Charter* challenge under s 2(d) of the *Charter* regarding the constitutionality of the lawyer exclusion in the *CECBA*. In August 2010, the associations agreed not to proceed with the constitutional challenge as part of a settlement resulting in a Fifth Framework Agreement that would operate until 2057

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106. *Ibid.*

107. See Timothy Hadwen et al, *Ontario Public Service Employment and Labour Law* (Toronto: Irwin, 2005) at 289.

108. Paul C Weiler, *The Professional Employee in Government: A Report to the Honorable Murray Elston, Chairman, Management Board of Cabinet, Government of Ontario, on the Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario* (January 1988) at 29 (Chair: Murray Elston) [Weiler, Professional Employee].

109. *Ibid* at 32.

110. *Association of Law Officers of the Crown and Ontario Crown Attorneys Association v Ontario (Management Board of Cabinet)*, [2000] OLAA No 790 (QL) (Arbitrator: William Kaplan).

111. *Association of Law Officers of the Crown v Ontario (Management Board of Cabinet)*, 2014 CanLII 87074 (Arbitrators: Louisa M. Davie, Chris Paliare, Paul Boniferro).

and that included a revised bargaining dispute resolution process more favourable to the associations.<sup>112</sup> Today, ALOC represents approximately 750 lawyers employed by the Ontario government outside of the criminal law division.<sup>113</sup> The OCAA represents over 1000 assistant crown attorneys and crown counsel.<sup>114</sup>

V. *The treatment of the lawyer exclusion in academic and policy literature*

The lawyer exclusion has persisted in the Exclusionary Provinces notwithstanding that every Canadian law reform report since 1968 and every scholar who has considered the exclusion has recommended its repeal. We already noted the 1968 report of the Woods Task Force, which brought together Canada's leading labour law and industrial relations scholars and recommended that the professional exclusion be removed from the *Canada Labour Code*, finding no justification for it. Weiler came to the same conclusion in his 1988 report for the Ontario government on professional bargaining in the public sector, concluding that: (1) professionals, including lawyers, have significant concerns about the employment conditions "which can only be effectively addressed through some kind of group organization and dealings with their government employer," and (2) "that there is no inherent incompatibility between such employee organization and their professional obligations." Therefore, he recommended that "the same basic right as is now enjoyed by just about everyone else employed in this province and across the country" be extended to professionals.<sup>115</sup> This included extending unfair labour practice provisions to professionals and a statutory model of collective bargaining.<sup>116</sup>

More recently, the 2017 Ontario Changing Workplaces Review also recommended the removal of the professional exclusion from the Ontario *Labour Relations Act*.<sup>117</sup> The Final Report noted that historically the exclusion has been justified on the basis that "professionals were seen

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112. See settlement preceding the Fifth Framework Agreement between OCAA, ALOC, and the government provided at paragraph D(2): "The Employer and ALOC/OCAA agree that these amendments to the Framework Agreement resolve any and all disputes regarding the constitutionality of the exclusion from the Crown Employees Collective Bargaining Act, 1993 pursuant to s. 1.1(3) paragraph 5."

113. "About ALOC" (last visited 25 February 2022), online: *Association of Law Officers of the Crown* <[www.aloc.ca/About-ALOC.aspx](http://www.aloc.ca/About-ALOC.aspx)> [perma.cc/TE26-8EKN].

114. "About Us" (last visited 21 June 2022), online: *Ontario Crown Attorney Association* <[www.ocaa.ca/about-us/](http://www.ocaa.ca/about-us/)> [perma.cc/3MXQ-ZVNY].

115. Weiler, *Professional Employee*, *supra* note 108 at 71

116. *Ibid* at 60

117. "Changing Workplaces Review," *supra* note 11 at 10.7, 139-142.



as having adequate protection through their self-regulated professional bodies.” There was also a concern that conflicts could arise between “a professional’s continuing duty and obligation to his or her patients or clients and the right to strike.” However, the special advisors concluded that those concerns could not justify the exclusion. Harking back to comments by some of the MPs during the 1940’s debates preceding the passage of the *IRDIA*, the advisors noted that the selection of five out of forty-six regulated professions in Ontario was random, and that obvious solutions exist to address concerns about strikes by essential lawyers, including a neutral interest arbitration process used by other essential workers.<sup>118</sup> Moreover, as noted earlier, the advisors concluded that the exclusion of professionals was inconsistent with section 2(d) freedom of association as mandated by the SCC, particularly in its 2015 decision in *MPAO*.<sup>119</sup> In his report on statutory exclusions for the CWR, Professor Michael Lynk similarly concluded that as a result of *MPAO*, the complete exclusion of an occupational category of employees from any statutory access to collective bargaining is a presumptive breach of the *Charter*, which could be saved only by a compelling justification from a Canadian government under the section 1 analytical framework.<sup>120</sup>

The general pattern in the small body of academic literature that considered the lawyer exclusion in the past was to identify presumptive historical justifications for the exclusion in the early postwar period when very few lawyers were “employed,” and to then proclaim that those early justifications no longer apply. Historical justifications cited in the literature for the lawyer exclusion can be summarized into three general categories:

- (1) normative judgments about *how lawyers ought to behave* as professionals and about the role and purpose of collective bargaining and “trade unions”;
- (2) arguments that *lawyers do not need collective bargaining* because they are already well paid, are mostly self-employed anyways, and already have representation by their professional associations; and
- (3) arguments that *practical labour relations problems and potential conflicts of interest* would result if statutory

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118. *Ibid.*

119. *MPAO*, *supra* note 10.

120. Michael Lynk, “A Review of the Employee Occupational Exclusion under the Ontario Labour Relations Act, 1995” (2015) at 15, online (pdf): *University of Toronto* <cirhr.library.utoronto.ca/sites/default/public/research-projects/Lynk-11-Exclusions%20Under%20LRA.pdf> [perma.cc/77NJ-3UVA]. See also David Doorey, “Reflecting Back on the Future of Labour Law” (2021) 71:2 UTLJ 165 at 188.

collective bargaining were extended to lawyers, particularly relating the potential of strikes and conflicts of interest.<sup>121</sup>

Over time, the first two arguments came to be seen as outdated and elitist, particularly as the proportion of professionals who are “employees” of organizations expanded rapidly through the latter half of the twentieth century and union representation expanded into the public sector, white collar, and professional ranks.<sup>122</sup> The argument that lawyers are already represented by lawyer associations such as law societies and bar associations was dismissed on the obvious basis that law societies and bar associations do not bargain employment contracts on behalf of employed lawyers. In addition, as recommended in the Woods Task Force, concerns were expressed that the governing bodies of lawyers should not be involved in bargaining working conditions and compensation on behalf of employed lawyers because those organizations have control over labour supply through licensing powers. The third argument has been addressed through a variety of legislative devices, including special bargaining unit rules that order or grant labour boards discretion to create professional units and by substituting binding interest arbitration in cases of essential services. In addition, as noted earlier, unions representing lawyers have bargained collective agreement clauses that recognize lawyers’ professional obligations and clarify that collective agreement terms do not diminish these obligations.

#### VI. *The constitutional landscape: the lawyer exclusion and section 2(d)*

For most of the period since the 1940s, the exclusion of professionals raised no constitutional questions. After the *Charter* arrived on the scene in 1982, any thoughts that the guarantee of freedom of association in section 2(d) would mark a new era of expanded collective bargaining rights were quickly shot down. The SCC, in the “First Labour Trilogy”<sup>123</sup> in 1987 and the 1990 *PIPS* decision,<sup>124</sup> ruled that there was no *Charter* right to strike or to engage in collective bargaining. Optimists who believed that section

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121. See George W Adams, “Collective Bargaining By Salaried Professionals” (1977) 32:2 *Industrial Relations* 184 at 193. Weiler, *Professional Employee*, *supra* note 108 at 29; M MacGuigan, *supra* note 7 at 33.

122. AWR Carrothers, “Collective Bargaining and the Professional Employee” in John HG Crispo, ed, *Collective Bargaining and the Professional Employee: Conference Proceedings: December 15-17, 1965* (Toronto: Centre for Industrial Relations, University of Toronto, 1966) 1 at 15-16. Weiler, *Professional Employee*, *supra* note 108 at 32.

123. *Reference re Alberta Public Service Employee Relations Act*, [1987] 1 SCR 313, 38 DLR (4th) 161; *PSAC v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 [Labour trilogy] (no *Charter*-protected right to strike).

124. *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1 (no *Charter* right to collective bargaining).



2(d) or section 15 equality rights would bring a swift end to occupational exclusions from protective labour legislation were soon disappointed.<sup>125</sup> In its 1999 decision in *Delisle v Canada (Deputy AG)*, the SCC confirmed that there was nothing constitutionally suspect about the federal government's decision to exclude police officers from public sector collective bargaining legislation.<sup>126</sup> If the *Charter* did not protect collective bargaining, then nothing stopped governments from cherry picking winners and losers by excluding entire occupations from coverage under protective labour legislation.

However, the constitutional landscape is much different today. The story is well known and need not be repeated at length here.<sup>127</sup> Suffice to say, beginning with its 2001 decision in *Dunmore*, the SCC embarked on a two-decade-long expansion of the substance of section 2(d) from a very restricted vision of freedom of association to an expansive, generous, and purposive interpretation. That odyssey has so far led the SCC to recognize a constitutional right to collective bargaining and to strike.<sup>128</sup> In *Dunmore*, the SCC ruled that the exclusion of agricultural workers from the *Labour Relations Act* infringed section 2(d) in a manner that could not be saved by section 1. That decision raised eyebrows: Did it mean that other occupational exclusions from collective bargaining legislation, including the professional exclusion, were now invalid? Several years later, in its 2007 decision in *BC Health Services*, the SCC ruled that section 2(d) "should be presumed to provide at least as great a level of protection" of freedom of association as ILO Convention 87.<sup>129</sup> Since the ILO's Committee on Freedom of Association had already declared a decade earlier that the professional exclusion found in Ontario's *Labour Relations Act* was inconsistent with Convention 87, it appeared that the exclusion was on life support.<sup>130</sup>

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125. See David M Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Montreal & Kingston: McGill-Queen's University Press, 1987) at 89-90 (arguing that occupational exclusions from collective bargaining legislation would be struck down under a Charter analysis). See also discussion in Doorey, *supra* note 120 at 188-189.

126. *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 176 DLR (4th) 513.

127. See Doorey, *supra* note 120; Brian Langille, "The Condescending Constitution (Or, the Purpose of Freedom of Association Is Freedom of Association)" (2016) 19:2 CLELJ 335; Paul Cavalluzzo, "The Impact of Saskatchewan Federation of Labour on Future Constitutional Challenges to Restrictions on the Right to Strike" (2016) 19:2 CLELJ 463.

128. See *Dunmore*, *supra* note 46; *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [BC Health Services]; *Ontario (Attorney General) v Fraser*, 2011 SCC 20; *MPAO*, *supra* note 10; *SFL*, *supra* note 49.

129. *BC Health Services*, *supra* note 128 at paras 70, 79.

130. "CFA Report No 308," *supra* note 12 at para 187.

Nevertheless, the Exclusionary Provinces disregarded the ILO's CFA and the careful language used by the SCC in the *Dunmore* decision left some doubt about the constitutional status of the professional exclusion. The SCC wrote that the exclusion of an entire occupation from collective bargaining legislation violates section 2(d) only if it "substantially interferes" with the exercise of constitutionally protected freedoms, including the freedom to join with coworkers and make collective representations to an employer without reprisals. In *Dunmore*, section 2(d) was infringed by the exclusion of agricultural workers because the evidence supported a finding that agricultural workers had been unable to associate in any meaningful way without the statutory protections offered by the *LRA*.<sup>131</sup> However, the SCC noted also that section 2(d) would not be infringed by the exclusion of an occupational category if the excluded workers "prove capable of associating despite its exclusion from a protective regime."<sup>132</sup> It was on this basis that the SCC distinguished its earlier decision in *Delisle*. The SCC explained in *Dunmore* that the exclusion of the police from the *Public Sector Labour Relations Act* considered in *Delisle* did not violate section 2(d) because the police had managed to organize into a strong association notwithstanding the exclusion.

Even applying the narrow standard in *Dunmore*, a strong case can be made that the lawyer exclusion infringes section 2(d). While some lawyers have been able to unionize and access collective bargaining in the Exclusionary Provinces, this success is due either to the fact their employer is a union or "progressive" social advocacy organization and ideologically predisposed to respecting collective bargaining rights regardless of a statutory exclusion, or the voluntary recognition is due to the successful threat by the union to launch a *Charter* challenge against the lawyer exclusion. It would be strange indeed if the successful leveraging of the constitutionally vulnerable professional exclusion to win voluntary, extra-statutory collective bargaining rights were used as evidence to justify the statutory exclusion. Overall, experience in the Exclusionary Provinces indicates that without access to protective labour relations legislation, there are substantial barriers facing these employees in establishing a viable collective bargaining relationship.

However, the scope of section 2(d) has expanded significantly since *Dunmore*. In its seminal 2015 decision in *MPAO*, the SCC overruled its earlier decision in *Delisle* and decided that the exclusion of police from the *PSLRA* infringed section 2(d) after all. The SCC noted that *Delisle*

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131. *Dunmore*, *supra* note 46 at para 41.

132. *Ibid* at para 39.

was decided before the recent “shift to a purposive and generous approach to labour relations” and before the SCC had recognized a broad right to a meaningful collective bargaining process.<sup>133</sup> In *Delisle*, the SCC considered only whether the exclusion prevented the employees from forming or joining an association, whereas after *MPAO* the question is whether the exclusion prevents employees from exercising, in practice, a meaningful process of collective bargaining through an independent association chosen by the employees.<sup>134</sup> The SCC ruled in *MPAO* that the purpose of the exclusion in the *PSLRA* was “to prevent [RCMP officers] from engaging in collective bargaining,” which infringed section 2(d).<sup>135</sup> The SCC also found that the alternative, employer-imposed representation regime for RCMP members substantially interfered with freedom of association in purpose and effect because it was not chosen or controlled by members or independent from management. As a result of these findings, the SCC did not find it necessary to independently determine whether the effects of the exclusion in the *PSLRA* were unconstitutional.<sup>136</sup>

The infringement was not saved by section 1 because it failed both the rational connection and the minimal impairment tests. On the minimal impairment test, the fact that other employees in the same occupation (police) are covered by collective bargaining legislation and bargain collectively across the country was fatal to the government’s defence: “Unless it is established that the RCMP is materially different from the provincial police forces, it is clear that total exclusion from meaningful collective bargaining cannot be minimally impairing. A material difference has not been shown.”<sup>137</sup> Section 2(d) did not require the government to include the police under the *PSLRA*, but it did require the state to put in place “collective bargaining processes” that ensure the employees can exercise a meaningful process of collective bargaining.<sup>138</sup>

*MPAO* renewed the question of whether the professional exclusion found in collective bargaining legislation in the four Exclusionary Provinces infringed section 2(d). These provinces have left employed lawyers to fend for themselves in the common law regime, without any “collective bargaining process” at all to ensure access to a meaningful

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133. *MPAO*, *supra* note 10 at para 125.

134. *Ibid.*

135. *Ibid* at para 134.

136. *Ibid* at para 136.

137. *Ibid* at para 152.

138. *Ibid* at para 137.

process of collective bargaining including a right to strike or to access neutral interest arbitration.<sup>139</sup> As the SCC noted in *Dunmore*:

history has shown, and Canada’s legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade.<sup>140</sup>

It did not take long for the labour law community to point out that the professional exclusion was inconsistent with section 2(d) as described in the SCC’s decision in *MPAO*. As noted above, in 2017, the special advisors to the Ontario government in the Changing Workplaces Review wrote:

This prohibition directed at professionals employed in a professional capacity is inconsistent with, and contrary to, the constitutional guarantee of freedom of association. The Court’s purposive approach to section 2(d) was most recently summarized by Chief Justice McLachlin and Justice LeBel in *Mounted Police Association*...

There is no suggestion in any of the recent jurisprudence that professionals employed in a professional capacity should be denied the constitutional right of freedom of association. Quite the contrary, the broad and purposive interpretation of section 2(d) of *The Constitution Act, 1982* mandates the removal of this exclusion and extending LRA coverage to this group of employees.<sup>141</sup>

However, once again, the Ontario government disregarded the recommendation to remove the professional exclusion first introduced nearly three-quarters of a century earlier.

An issue with the section 2(d) jurisprudence is that despite the purposive approach espoused in *MPAO*, the SCC has not explicitly overturned *Dunmore*’s positive rights framework for under-inclusion cases.<sup>142</sup> In the handful of post-*MPAO* labour board and lower court decisions considering whether other statutory exclusions violate section

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139. *SFL*, *supra* note 49. See Brian Etherington, “The Right to Strike under the Charter After Saskatchewan Federation of Labour: Applying the New Standard to Existing Regulation of Strike Activity” (2016) 19:2 CLELJ 429.

140. *Dunmore*, *supra* note 46 at para 20. See also Beatty, *supra* note 125 at 90 (noting that the practical effect of the occupational exclusions “is to create two separate legal superstructures, which entail radically different degrees of worker participation in the settlement of the rules that govern the workplace.... Legally, that is discrimination of the most blatant and explicit kind”).

141. “Changing Workplaces Review,” *supra* note at 11 at 10.7, 139-142. See also, Lynk, *supra* note 120 at 15.

142. Recently, a majority of the Court suggested it remains an open question whether the heightened substantial interference threshold outlined in *Dunmore* still applies to negative freedom of association claims: see *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 21.

2(d), most decision-makers have continued to apply *Dunmore* in some fashion. For example, in *Alberta Union of Provincial Employees v Northern Alberta Institute of Technology*, the Alberta Labour Relations Board found that the longstanding exclusion of systems analysts from the *Public Service Employee Relations Act* did not violate the *Charter* because, unlike in *MPAO*, they had not been subjected to any alternative, deficient bargaining system.<sup>143</sup> The Board noted that the workers were not prohibited from associating outside the statutory regime for the purposes of making representations to their employer on working conditions and that there was no evidence “that such representations have been attempted, been denied or been ineffective.”<sup>144</sup> This decision was upheld on judicial review.<sup>145</sup> However, in *Alberta Crown Attorneys’ Association* (described above), the Board emphasized that its earlier decision was based primarily on the conclusion that the union lacked standing to raise the *Charter* argument, that the constitutional “findings” were obiter, and that they turned on the lack of any evidence (as required by *Dunmore*) of whether the workers had attempted to organize extra-statutorily.<sup>146</sup>

In contrast, in the recent case of *Illi v Legislative Assembly of British Columbia*, the BC Labour Relations Board found that the exclusion of legislative assembly constables from the *Labour Relations Code* based on parliamentary privilege violated the *Charter* because “it is not established that there is another method besides the *Code* by which the SPCs can access and exercise their *Charter*-protected right to meaningful collective bargaining.”<sup>147</sup> In *United Nurses of Alberta v Alberta Health Services*, the applicant association successfully challenged the exclusion of nurse practitioners from employee status under Alberta’s *Labour Relations Code*.<sup>148</sup> This amendment was enacted in 2003 after a period of inclusion. Ultimately, neither the respondent employer nor the Attorney General provided any defence regarding the provision’s constitutionality. The Board accepted the uncontested evidence that at least one of the purposes

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143. *Alberta Union of Provincial Employees v Northern Alberta Institute of Technology* (2015), 262 CLRBR (2d) 38 at paras 24-26, 2015 CanLII 26017 (ABLRB) [*Alberta Union*]; *MPAO*, *supra* note 10 at para 136.

144. *Alberta Union*, *supra* note 143 para. 25.

145. *Alberta Union of Provincial Employees v Northern Alberta Institute of Technology*, 2018 ABQB 236 at paras 70-73.

146. *Alberta Crown Attorneys’ Association v Alberta (Justice and Solicitor General)* (2019), 42 CLRBR (3d) 57 at paras 122-126, 2019 CanLII 113205 (ABLRB).

147. *Illi v Legislative Assembly of British Columbia*, 2021 BCLRBD 176 at para 77, rev’g *Legislative Assembly of British Columbia v Legislative Assembly Protective Services Association*, 2020 BCLRB 134.

148. *United Nurses of Alberta v Alberta Health Services* (2019), 43 CLRBR (3d) 17, 2019 CanLII 111202 (ABLRB) [cited to CLRBR].

of the exclusion was to prevent these workers from bargaining collectively since, among other things, UNA had been negotiating on behalf of nurse practitioners at the time the amendment was introduced.<sup>149</sup>

In *International Union of Operating Engineers, Local 793 v Hermanns Contracting Limited*, the applicant union successfully challenged the exclusion of horticultural workers from the Ontario *LRA*.<sup>150</sup> As is the case with lawyers, horticultural workers are covered by collective bargaining in many other provinces and were covered by the *OLRA* between 1992–1995 before the government stripped them of that coverage. The union argued that the exclusion substantially interfered with freedom of association by denying the workers access to any collective bargaining regime—especially considering their general vulnerability as employees and specific vulnerability as horticultural employees—and that the legislature had an improper purpose in excluding them. The Attorney General argued that the union was advancing a positive rights claim, there was no express intent to leave horticultural employees in a vulnerable position, mere exclusion did not violate section 2(d) since the workers were not specifically prevented from organizing, negotiating, or withdrawing their services, and other employees (including lawyers) were similarly excluded from the *LRA*.

Notably, the parties in *Hermanns Contracting* essentially agreed that the *Dunmore* analysis applied. The OLRB adopted this framework “but as informed by the subsequent decisions of the Supreme Court of Canada” including *MPAO*, adding that “[w]hether or not there has been substantial interference with a protected freedom can only be determined in a factual context that considers the substantive content of that freedom.”<sup>151</sup> On the evidence, the Board found the exclusion constituted substantial interference because, among other things, there was no evidence of any voluntary associational activities by the excluded employees at all. Furthermore, the Board found it could infer that the legislature had intended to prevent collective bargaining:

The AG’s argument in this regard is based on a flawed premise. That premise is that the Union must be able to point to express language on the part of the Ontario legislature that the intent of the horticultural exclusion was to disenfranchise horticultural workers from unionization

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149. *Ibid* at paras 51-53.

150. *International Union of Operating Engineers, Local 793 v Hermanns Contracting Limited* (2017), 20 CLRBR (3d) 1, 2017 CanLII 82853 (OLRB) [cited to CLRBR]. The Attorney General did not argue that the affected workers were governed by the *Agricultural Employees Protection Act* with the result that the employees were not protected by any collective bargaining legislation, similar to lawyers and other professionals excluded from the *Labour Relations Act*.

151. *Ibid* at para 70.

and collective bargaining. Indeed, the Union could not cite any such language. However, what the Union could and did show was that the Ontario Legislature excluded horticultural workers from collective bargaining up to 1992, allowed them access for about 3 years, and then restored the exclusion. Therefore, they are in a completely analogous position to the agricultural workers in *Dunmore supra* in this regard.<sup>152</sup>

The OLRB also rejected the need to find evidence of some special vulnerability of horticultural workers to justify inclusion, noting that the employee relationship is inherently vulnerable. As well, the OLRB downplayed the fact there were a few voluntary (extra-statutory) collective agreements that covered horticultural workers, noting that those agreements existed because the employers wanted to compete for work on unionized job sites.<sup>153</sup> There was no evidence of horticultural workers being able to unionize and bargain collective agreements in the face of employer opposition while excluded from collective bargaining legislation.

The wholesale exclusion of horticultural workers meant that none of the minimum requirements for a meaningful collective bargaining regime were available to them:

...As described above, the Supreme Court of Canada has prescribed minimum requirements for freedom of association. Those requirements include:

- The right to collectively present demands related to employment conditions to the employer
- The duty of the employer to receive the demands in good faith
- The right to a meaningful process of collective bargaining
- The ability of employees to advance workplace concerns free of management's influence

The exclusion of horticultural workers from the Act means that the Act does not provide horticultural workers with those minimum requirements. The horticultural employees are not covered by the Act. Nor are they covered by the *AEPA*. They have no statutory protection. They are like the title character in the 1960's hit record by Martha and the Vandellas because they have "nowhere to run to, nowhere to hide". The affected horticultural workers are in a statutory no man's land.<sup>154</sup>

In effect, the OLRB found the exclusion substantially interfered with the employees' freedom of association both in purpose and effect. The government did not attempt to defend the exclusion under section 1.

152. *Ibid* at para 111.

153. *Ibid* at para 107.

154. *Ibid* at paras 128-129.



Given the foregoing, if a fresh *Charter* challenge against the exclusion of lawyers from collective bargaining legislation makes it to a tribunal or court, the first question to be addressed will be whether the purpose or effect of the exclusion infringes section 2(d). In *Dunmore*, the SCC noted that “the exclusion of an entire category of workers from the *LRA* can only be viewed as a foreseeable infringement of their *Charter* rights.”<sup>155</sup> We learned in *Dunmore* that a law which has as its purpose the prevention of workers gaining access to collective bargaining infringes section 2(d).<sup>156</sup> As reviewed in this essay, there is not much evidence to explain the purpose of the lawyer exclusion, because although it dates to the late 1940s when there were hardly any employed lawyers, government officials have rarely ever explained why it persists. We know how it got there initially: the CBA asked for the exclusion in consultations leading to the passage of the federal *IRDLA* in 1948, and the provinces then simply adopted the exclusion when they introduced their own Wagner model legislation modelled after the federal legislation in the period surrounding World War II. However, this deference to the presumed majority view of the legal profession as expressed by the CBA over 70 years ago could hardly serve as a basis for the government’s section 1 defence today. The majority view of the legal profession in 2021 is likely much different than in 1948 and in any event, the *Charter*’s purpose obviously is not to uphold the majority view of the ruling class within an occupation.<sup>157</sup>

There is little direct evidence from governments in the Exclusionary Provinces that explains the purpose of the professional exclusion. I was unable to locate any statement by a government official in Alberta, Nova Scotia, and PEI that explains why the exclusion was initially adopted and why it persists. The closest evidence we have to a modern statement of purpose from an Exclusionary Province is found in the government’s response to the complaint filed by the Canadian Labour Congress with the ILO’s Expert Committee on Freedom of Association in 1997 arguing that

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155. *Dunmore*, *supra* note 46 at para 47.

156. *Ibid* at para 120. See also *Delisle*, *supra* note 126 at para 89.

157. As far as I have been able to ascertain, the CBA has been silent regarding the lawyer exclusion for the past 70 years. I reviewed CBA annual minutes of proceedings and communicated with CBA officials requesting evidence that the national CBA has taken a position on the lawyer exclusion from collective bargaining legislation since 1950. I have found no record of any position statement. I also communicated with the Ontario Bar Association Director of Policy and Programming who informed me that he was unaware of the OBA ever taking a position on the lawyer exclusion found in Ontario’s collective bargaining legislation. The ongoing exclusion of lawyers from the *LRA* was not mentioned in the OBA’s submission to the CWR: <<https://www.oba.org/CMSPages/GetFile.aspx?guid=d316aa69-0655-4973-bce4-a9ab13c7d05c>>.” to “... OBA’s submission the CWR: “Changing Workplace Review Consultation” (29 October 2015), online (pdf): *Ontario Bar Association* <[www.oba.org/CMSPages/GetFile.aspx?guid=d316aa69-0655-4973-bce4-a9ab13c7d05c](https://www.oba.org/CMSPages/GetFile.aspx?guid=d316aa69-0655-4973-bce4-a9ab13c7d05c)> [perma.cc/2CFH-LHT5].



the professional exclusion in Ontario violated ILO Conventions 87 and 98. The government responded that:

labour laws originally enacted with industrial settings in mind are not always suitable for non-industrial workplaces, such as private homes and professional offices, where occupational duties and professional obligations may not be compatible with the highly formalized terms and conditions of employment and at least somewhat adversarial nature of relationships typical of a unionized environment.<sup>158</sup>

Therefore, the government argued that employed professionals in five of forty-six regulated professions should not have access to collective bargaining protections because unionization and collective bargaining “may not be” suitable for this type of worker. This claim supports the argument that the professional exclusion is the means by which the government aims to block or at least discourage workers employed in these five professions from unionizing and pursuing collective agreements. That the purpose of the professional exclusion is to block collective bargaining within the five professions is supported as well by the decision of the Ontario government to re-introduce the professional exclusion in 1995 and, significantly, to legislatively strip existing collective bargaining rights covering those professionals.<sup>159</sup>

Even if a court does not accept that preventing or discouraging lawyers from collective bargaining is the *purpose* of the exclusion, there is certainly a good strong argument that this is the *effect*. By exempting the professionals from statutory unfair labour practice provisions, certification procedures, the duty to bargain and government conciliation services, and the provisions protecting a right to strike, the government prevents unionization by the targeted professionals or at least preserves the prevailing power structure of the common law model to weaken collective bargaining to the point of ineffectiveness. Moreover, absent statutory protections for unionization and collective bargaining activities, employers are free to ignore unions’ recognition requests to bargain on behalf of the excluded professionals and workers who act collectively, including through strike activity, are vulnerable to discipline or outright dismissal.

The SCC has warned against governmental indifference to power structures in the employment relationship and legal models that fail to provide adequate protections for the right of employees to join associations

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158. “CFA Report No 308,” *supra* note 12 at para 172.

159. See *LRA*, *supra* note 96.

and bargain collectively. In *MPAO*, the SCC explained the section 2(d) test as follows:

To recap, s. 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining. Historically, workers have associated in order “to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict,” namely, their employers: *Alberta Reference*, at p. 366. *The guarantee entrenched in s. 2(d) of the Charter cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore “the historical origins of the concepts enshrined” in s. 2(d). It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.*<sup>160</sup>

At the same time, there may be a difference in analysis between cases where the government has imposed an alternative, constitutionally deficient bargaining scheme on excluded workers (as in *MPAO* itself), and cases where it has simply failed to extend any statutory measures at all. In the latter scenario, not specifically addressed in *MPAO*, there may be a requirement for an analysis of state responsibility for interference in the ability of excluded workers to associate, at least outside of the public sector where government itself is not the employer.<sup>161</sup> In *Dunmore*, for example, the vulnerability of agricultural workers led the SCC to find that their exclusion from the *LRA* functioned “not simply to permit private interference with their fundamental freedoms, but to substantially reinforce such interferences.”<sup>162</sup>

However, *MPAO* also affirmed that while a government does not need to include all occupations under the same statutory collective bargaining model, all workers are entitled to certain minimum constitutional protections as part of a meaningful collective bargaining process, which now includes a degree of employee choice and associational independence. This suggests that, as the OLRB found in *Hermanns Contracting* and the BC Board found in *Illi*, the complete omission of an occupation from any collective bargaining model at all will fail to satisfy section 2(d). While evidence of employee experience with the existing exclusionary regime may still be required, given the SCC’s recognition of the power imbalance

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160. *MPAO*, *supra* note 10 at para 80 [emphasis added].

161. See e.g. the analysis of the Ontario Court of Appeal in *Fraser v Ontario (Attorney General)*, 2008 ONCA 760 at paras 102-108.

162. *Dunmore*, *supra* note 46 at para 35.

inherent to employee-employer relationships it should no longer be necessary to show some special vulnerability of the affected employees to trigger a state obligation to provide (minimum) statutory protection. Furthermore, even if employed lawyers in some of the Exclusionary Provinces have had some limited success at organizing and bargaining extra-statutorily by threatening *Charter* litigation or relying on the good graces of their employers to agree to voluntary bargaining, this form of contingent recognition is not at all equivalent to a statutory guarantee of meaningful collective bargaining. To find otherwise would turn back the 2(d) clock 20 years into the past.

Assuming the professional exclusion infringes section 2(d), it is difficult to conceive how that infringement could be saved by section 1. The fact that thousands of lawyers across Canada have engaged in collective bargaining for decades and that most jurisdictions in Canada already include practicing lawyers under their collective bargaining legislation should provide an insurmountable obstacle to any section 1 defence. As noted earlier, the fact that police officers in other jurisdictions engage in collective bargaining supported by statutory infrastructure was fatal to the federal government's section 1 argument in *MPAO*.<sup>163</sup> This comparison should apply equally to cases of complete omission from any kind of representational or bargaining regime. The professional exclusion could fail every step of the section 1 proportionality test, but it would certainly fail the minimal impairment test. There is nothing unique or "materially different" about employed lawyers in Ontario, Alberta, Nova Scotia, and PEI (and Newfoundland and Labrador as pertaining to public-sector lawyers) that would warrant excluding them from protective collective bargaining legislation of the sort that already covers thousands of lawyers in every other Canadian jurisdiction.

### *Conclusion*

Several observations can be made about the situation facing lawyers interested in collective bargaining in the four Exclusionary Provinces. One is that without access to statutory collective bargaining machinery, employed lawyers in the private sector have no access to meaningful collective bargaining unless their employer agrees to an extra-statutory, voluntary recognition. In practice, this has only occurred when the employer is itself a union or what might be described as "a progressive employer" interested in workers' rights and access to justice issues (e.g. legal clinics). Even then, the lawyer's status as a bargaining unit employee

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163. *Ibid* at para 152.

is entirely contingent upon the ongoing good graces of the employer since, legally speaking, the lawyer is not an “employee” under the collective bargaining legislation which provides the legal foundation for the collective bargaining relationship. Access to meaningful collective bargaining for employed private-sector lawyers in the Exclusionary Provinces is entirely at the pleasure of employers.

A second observation is that unions have occasionally been successful at pressuring public sector or publicly funded organizations to voluntarily recognize bargaining agents representing lawyers by launching *Charter* challenges against the lawyer exemption or threatening to do so. In this way, the constitutionally questionable status of the professional exclusion hovers like an anvil over the proceedings. In some instances, as in New Brunswick and BC, governments have conceded that the SCC’s recent section 2(d) jurisprudence requires that statutory collective bargaining protections be extended to lawyers. In Nova Scotia, crown attorneys have persuaded the employer to come to the bargaining table by engaging in recognition strikes that threaten to shut down the justice system. Given the likelihood that the lawyer exclusion infringes section 2(d) as well as Canada’s obligation to comply with international instruments that it has ratified, including ILO Convention 87, it seems backwards to require lawyers to engage in nineteenth-century style recognition strikes to obtain access to basic statutory protections that have been available to many lawyers and most other employees across the country for over half a century.

A third observation is that where lawyers have managed to obtain collective bargaining rights, the bargaining process has worked well. Experience has demonstrated that there is nothing special about employed lawyers that justifies treating them differently than other employees. The only serious concern that has been raised about lawyer bargaining pertains to the risk that essential legal work would stop in the event of a work stoppage. However, that concern has been addressed sensibly by the industrial relations actors themselves by recognizing the option of binding interest arbitration and sometimes by legislation requiring interest arbitration or essential services agreements.

Finally, the most striking aspect of the story recounted in this essay of the persistent exclusion of practicing lawyers from collective bargaining legislation in Ontario, Alberta, Nova Scotia, and PEI is that the exclusion has never been seriously defended on policy grounds by any of these governments. The lawyer exclusion has its roots in political deference to the Canadian Bar Association of a bygone era when the legal profession was comprised of men working as sole practitioners far above the fray of

working-class trade unionism. That the exclusion has survived for nearly 75 years despite a fundamental transformation of the legal profession, a profound change in attitudes towards professional collective bargaining, and the entrenchment of a broad constitutional right to collective bargaining and to strike, is a testament to history's stubborn and irrational grip on the present.