

4-1-2011

Collective Bargaining in the Shadow of the Charter Cathedral: Union Strategies in a Post B.C. Health World

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Recommended Citation

Michael MacNeil, "Collective Bargaining in the Shadow of the Charter Cathedral: Union Strategies in a Post B.C. Health World" (2011) 34:1 Dal LJ 19.

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For the first twenty-five years after the Canadian Charter of Rights and Freedoms was enacted, it appeared that it would have little impact on Canadian labour laws. The Supreme Court of Canada took the view that the guarantee of freedom of association in the Charter did not include a right to strike and did not provide protection for collective bargaining. Common law rules regulating picketing did not come within the scope of the Charter's rules on freedom of expression. Academic commentators were divided on whether this was a good or a bad thing, some espousing the hope that the Charter could be applied in pursuit of greater justice in the workplace while others were thankful that the courts were not interfering with legislative formulation of collective bargaining law and policy. Slowly, however, the courts have come to a different view of the Charter, finding that its values serve to provide protection for picketing, and in a sweeping revision of former jurisprudence in 2007 holding that the guarantee of freedom of association does provide protection for collective bargaining. This article describes the changing judicial views of the Charter through three distinct periods, each roughly a decade long: the formative period, the period of consolidation, and the period of re-assessment. It also traces some of the academic reaction to these developments. It concludes by an assessment of how trade unions are attempting to harness the changing view of the Charter to pursue a variety of challenges to the existing legislated collective bargaining schemes in Canada. In doing so, the paper uses the metaphor of the Charter as a cathedral, with the judges and academic commentators as artists painting a variety of views of the Cathedral. It is only through assessing the multiplicity of views that one can hope to achieve even a partial understanding of the Charter's role in Canadian labour law.

Pendant les vingt-cinq premières années qui ont suivi l'adoption de la Charte canadienne des droits et libertés, il a semblé qu'elle n'aurait que peu d'incidences sur les lois canadiennes sur le travail. La Cour suprême du Canada estimait que la garantie de liberté d'association prévue dans la Charte ne couvrirait pas le droit de faire la grève et n'offrait pas de protection pour la négociation collective. Les règles de common law en matière de piquetage n'étaient pas visées par les dispositions de la Charte sur la liberté d'expression. Les observateurs du milieu universitaire étaient partagés sur la question de savoir s'il s'agissait d'une bonne ou d'une mauvaise chose; certains exprimaient l'espoir que la Charte puisse être appliquée dans la poursuite d'une meilleure justice en milieu de travail, d'autres étaient simplement reconnaissants que les tribunaux ne s'immiscent pas dans la formulation par le pouvoir législatif des lois et des politiques en matière de négociation collective. Les tribunaux en sont toutefois lentement venus à adopter une opinion différente de la Charte et ont conclu que ses valeurs servent à offrir une protection pour le piquetage, et en 2007, s'écartant remarquablement de la jurisprudence existante, ils ont conclu que la garantie de liberté d'association confère une protection pour la négociation collective. Cet article décrit l'évolution de la jurisprudence en ce qui a trait à la Charte pendant trois périodes, chacune étant à peu près d'une décennie : la période formative, la période de consolidation et la période de réévaluation. Il y est aussi question de la réaction de certains auteurs et observateurs à ces développements. L'article conclut sur une évaluation de la façon dont les syndicats tentent de profiter du changement de point de vue sur la Charte pour poursuivre diverses contestations des régimes de négociation collective qui existent actuellement au Canada. Ce faisant, l'article considère métaphoriquement la Charte comme une cathédrale, les juges et les observateurs du milieu universitaire étant des artistes qui en peignent chacun une vue différente. Ce n'est qu'en procédant à un examen de la multiplicité de vues que l'on peut espérer comprendre, ne fût-ce que partiellement, le rôle de la Charte en droit canadien du travail.

* Department of Law, Carleton University. Updated Version of a Paper Presented at the Inaugural Innis Christie Symposium in Labour and Employment Law, Schulich School of Law, Dalhousie University, Halifax, NS, 23 October 2010.

Introduction

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*Introduction*¹

In a famous article written in the 1970s,² Guido Calabresi and Douglas Melamed emphasized that their view of a unified theory of property and tort law was but one view of the cathedral. They referred to Monet's many paintings of Rouen Cathedral, commenting that to understand the Cathedral, one must see all of the paintings. The *Canadian Charter of Rights and Freedoms*³ is a cathedral, and the voluminous academic, professional, judicial and quasi-judicial commentary on what the *Charter* means and what it protects, fails to protect or should protect is a series of paintings, each of which provides but a limited perspective on the greater whole.

1. I wish to thank the organizers of the Innis Christie Symposium in Labour and Employment Law, especially Bruce Archibald, for inviting me to participate at the symposium. Innis Christie taught me Labour and Employment Law at Schulich School of Law, and taught me much about law, integrity, and the research process in those courses and in a summer when I worked as his research assistant as he was writing his seminal text on Employment Law. I also want to thank the participants at the seminar who provided me with much to think about, and Roy Adams who provided helpful comments on the paper.

2. Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

I acknowledge at the outset some problems with the metaphor. Others have argued that the *Charter* is “only paper, dead tree, with ink on it”⁴ and so ascribing to it cathedral qualities may be overemphasizing its grandeur and influence in the legal sphere. However the cathedral metaphor may serve to remind us just how little influence the *Charter* has in relation to social and political spheres, akin to the decline of churches as spheres of influence in modern society. The connecting of the *Charter* to Monet’s paintings of Rouen Cathedral also serves another purpose. It has been said that it was not really the Rouen Cathedral that Monet painted in his series, but rather it was the light. His views of Rouen Cathedral were really a view of light over time, and the particular view of the *Charter* that I attempt to paint in this paper is really a view of the changing discourses about the *Charter*, whether originating from the courts or from scholarly academic and professional writing.⁵

It is of course unlikely that viewing all the *Charter* cathedral paintings would indeed lead us to a complete understanding of the *Charter* cathedral, and I do not propose to subject you to viewing all of the available paintings. Nevertheless, I will provide a view of some of them, especially relating to trade unions and collective bargaining, showing that different people see different things at different times even when purporting to be looking at the same edifice.⁶ I recount a very brief history of judicial and scholarly treatment of freedom of association and other *Charter* rights as they relate to collective bargaining, leading particularly to the Supreme Court’s decision in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*⁷ and its aftermath. I am particularly interested in thinking about how unions should operate strategically in the *Charter* cathedral’s shadow. Does and should the *Charter* cathedral have a significant impact on union choices in using bargaining, political pressure, or litigation strategies in pursuing their aims?

4. Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 3.

5. Michael Polyani & Harry Prosch, *Meaning* (Chicago: University of Chicago Press, 1975) at 69. “It is commonly known that metaphors, like jokes, lose their effectiveness, if explained in detail.” So I will leave it to the reader to develop the metaphor more fully.

6. An alternate metaphor is that the *Charter* is a cathedral that is still being built, with all of these decisions and commentaries actually contribute to its construction. The written text of the *Charter* is but an architectural blueprint, and the subsequent builders, while guided by the blueprint, have many choices to make that affect how the edifice looks and functions. Think of the Sagrada Familia Cathedral in Barcelona, Spain where construction started in 1882 and is not expected to be complete until at least 2026 (http://en.wikipedia.org/wiki/Sagrada_Familia). The Wikipedia commentary notes: “Construction of the church is as much part of its attraction as the church itself.”

7. *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*].

I. *The formative period*

We can divide the artistic developments into three temporal phases, each roughly covering a decade: the formative period, the consolidation period, and the re-assessment period.

The legal story can be told rather quickly, and is essentially familiar to most of you. In 1982 the *Canadian Charter of Rights and Freedoms* was enacted as part of the *Canada Act*, repatriating the Canadian constitution. The *Charter* included a wide variety of protections for fundamental rights and freedoms, including freedom of expression, freedom of association, mobility rights and equality guarantees. What it did not contain was any explicit reference to key labour rights such as the right to collectively bargain or the right to strike. Trade unions were notably absent in the debates leading to the passage of the *Charter*, therefore little pressure was brought to bear for the inclusion of these rights.⁸ Yet, the inclusion of freedom of association, given its long association in international labour and human rights conventions with rights to unionize and collectively bargain, could easily have been understood as invoking those rights as fundamental ones to be protected by the *Charter*.

Following the *Charter*'s enactment, a series of uncoordinated challenges by trade unions and disaffected workers sought to test and define the limits of its protections in relation to a right to strike, to collectively bargain, to engage in picketing in support of strikes, and to be free from coerced association through union security clauses. In the formative period, the most influential artistic treatment of the *Charter*'s application to labour issues was produced by the Supreme Court's tryptich in the *Labour Trilogy* in 1987,⁹ with its decision in the *Alberta Reference* forming the main panel. The Court determined that freedom of association must be understood as an individual right, and one that should be given a relatively limited interpretation. It protects, the Court said, primarily the right to form and maintain associations, but not the right to act in association, and most certainly not the right to strike. Some of the brushstrokes used in painting that picture included such phrases as:

[T]he modern rights to bargain collectively and to strike...are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise.¹⁰

8. See a discussion in Arthurs, "Labour and the "Real" Constitution" (2007) 48 C de D 43.

9. *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Alberta Reference*]; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277; *PSAC v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249 [*Labour Trilogy*].

10. The *Alberta Reference*, *ibid* at 391 per LeDain J.

and

[G]olf is a lawful but not constitutionally protected activity. ... the Legislature could prohibit golf entirely. However, the Legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the *Charter* guarantee of freedom of association.¹¹

and

[Labour law] is based upon a political and economic compromise between organized labour—a very powerful socio-economic force—on the one hand, and the employers of labour—an equally powerful socio-economic force—on the other.¹²

And, in the dissenting opinion of Chief Justice Dickson: “International law provides a fertile source of insight into the nature and scope of the freedom of association of workers.”¹³

The formative power of that vision was demonstrated three years later in the Supreme Court’s decision in *PIPS v. Northwest Territories (Commissioner)*¹⁴ when Chief Justice Dickson, who had dissented in the *Alberta Reference*, nevertheless concluding that its view of the *Charter* cathedral left no room for the alternative view that freedom of association could protect collective bargaining rights.

In other decisions during this first decade affecting unions and collective bargaining, the Supreme Court shielded common law rules about picketing from *Charter* scrutiny,¹⁵ dismissed claims that the law of contempt and its use in controlling the picketing of a courthouse by strikers violated *Charter* guarantees,¹⁶ and found that the application of common law criminal contempt penalties to an illegally striking union did not violate the *Charter*.¹⁷

A major work in the Court’s formative oeuvre was completed by its decision in *Lavigne v. Ontario Public Services Employees Union*,¹⁸ which addressed to some extent the fear of trade unions that the *Charter* could be used as a sword to undermine statutory and collective agreement protections. The Court was divided on whether a freedom of non-

11. *Ibid* at 408 per McIntyre J.

12. *Ibid* at 414 per McIntyre J.

13. *Ibid* at 348 per Dickson CJ.

14. *PIPS v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1.

15. *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

16. *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214, 53 DLR (4th) 1.

17. *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609.

18. *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 81 DLR (4th) 545.

association was embedded within the freedom of association guarantee, but concluded that mandatory payment of Rand Formula union dues, and union expenditures of those compulsory dues on non-collective bargaining purposes, did not violate *Charter* guarantees. For those judges who viewed union expenditures on non-collective bargaining purposes a violation of freedom of non-association, they were nevertheless justified pursuant to s. 1 of the *Charter*.¹⁹

At the same time that the Supreme Court was producing its formative oeuvre on the *Charter* cathedral, academic commentators provided their own sketches of the cathedral. From Arthurs' view that, in the context of labour, "*Charter* litigation is not a game for serious people"²⁰ to that of Cavalluzzo, who predicted that the *Charter* would have a proportional and incremental impact on trade unions,²¹ the *Charter* cathedral was seen through a variety of prisms. Very few saw it as transforming labour relations, although some argued that it should.²² A number of commentators emphasized that the Court's view of the *Charter* cathedral was often tinted by the judges' own basic assumptions and ideologies, which were firmly embedded in a liberal framework of individualism, market ordering, separation of economic and political spheres, and commitment to formal, but not necessarily substantive equality.²³ Others argued that the painting produced by courts is not an accurate depiction of the *Charter* cathedral, claiming that a more accurate rendering would lead to a finding that freedom of association includes protection for collective bargaining and

19. There were a series of employment-related, but not collective bargaining related decisions made during this period as well. See *Slaight communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416; *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 82 DLR (4th) 321; *Mckinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700; and see cases dealing with benefits that had a tangential employment connection, some of them decided during the Consolidation Period: *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1; *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658; *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470.

20. H W Arthurs, "The Right to Golf: Reflections on the Future of Workers, Unions and the Courts from the Old to the New Dispensation" (Labour Law Under the Charter, delivered at the School of Industrial Relations and Faculty of Law, Queen's University, 24-26 September 1987), (Kingston, Ont: Queen's University, 1988) 17 at 18 [*Labour Law Under the Charter*].

21. Paul JJ Cavalluzzo, "Freedom of Association – Its Effect Upon Collective Bargaining and Trade Unions" *Labour Law Under the Charter* 267, *supra* note 19.

22. David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston, Ont: McGill-Queen's University Press, 1987); and David Beatty & Steve Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" *Labour Law Under the Charter* 214 at 215, *supra* note 19.

23. See, e.g. Judy Fudge, "Labour, The New Constitution and Old Style Liberalism" *Labour Law Under the Charter* 61, *supra* note 19; Michael MacNeil, "Courts and Liberal Ideology: An Analysis of the Application of the Charter to Some Labour Law Issues" (1989) 34 McGill LJ 85.

the right to strike.²⁴ Yet other commentators focused on the process of painting, of interpreting, seeking to understand the techniques that lead to the particular representation of the cathedral produced in a particular judicial decisions.²⁵

Brian Etherington provided a comprehensive overview of the painters in a 1992 article,²⁶ sorting the academic commentators into three classes: liberal romantics, realist skeptics and pragmatic pluralists. The liberal romantics, perhaps best exemplified by David Beatty, believed that *Charter* judicial review of labour statutes could lead to the righting of many injustices within our system of collective bargaining, such as the exclusion of marginalized workers from the protections of collective bargaining regimes. Realist skeptics, on the other hand, held little expectation that courts would use the *Charter* to effect any fundamental changes in our labour relations system. Pragmatic pluralists, perhaps best exemplified by Paul Weiler,²⁷ fell somewhere between the liberal romantics and the realist skeptics, arguing in favour of the legitimacy of judicial review under the *Charter*, but expressing concern about the competence of the courts to involve themselves in complex labour relations policy issues, yet ultimately demonstrating faith that the courts would figure out when it was appropriate to intervene and when it was best to stay out of policy making. Etherington's own review of ten years of Supreme Court *Charter* decisions on labour issues led him to conclude that the liberal romantic perspective had been completely rejected. While he acknowledged Weiler's argument that the cases demonstrated a pragmatic pluralist perspective towards judicial restraint, Etherington concludes that the realist arguments about the contingency of judicial review and pragmatic deference are not contradicted by the actual decisions. He tended towards the view that traditional judicial values and a post-*Charter* legal culture of individualism would lead to increasing judicial intervention in the labour scheme.

24. Geoffrey England, "Some Thoughts on Constitutionalising the Right to Strike" *Labour Law Under the Charter* 168, *supra* note 19.

25. Brian Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" *Labour Law Under the Charter* 112, *supra* note 19, warning against the corrosive effects of skepticism in assessing the legitimacy of judicial interpretation.

26. Brian Etherington, "An Assessment of Judicial Review of Labour Laws Under the Charter: Of Realists, Romantics, and Pragmatists" (1992) 24 *Ottawa L Rev* 685.

27. Paul C Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 *UTLJ* 117.

II. *The consolidation period*

In the second decade of *Charter* jurisprudence, the consolidation period, the Supreme Court painted more pictures of the cathedral as it related to freedom of association, freedom of non-association and picketing rights of unions. It also made important decisions about the role of arbitrators in considering *Charter* claims. With respect to freedom of non-association, the Court struggled in *R. v. Advance Cutting & Coring*²⁸ to build on the vision in *Lavigne*: by a substantial majority the Court solidified the view that *Charter* protection for freedom of association also included protection for freedom of non-association. By a five to four majority it also concluded that a Quebec statutory scheme making employment in the construction industry conditional on union membership did not violate the *Charter*, either because it did not impose compulsory ideological conformity, or in the swing vote of Justice Iacobucci, because the violation of freedom of non-association was justified under s. 1 of the *Charter*.

In 1995, the Supreme Court made a key decision in *Weber v. Ontario Hydro*,²⁹ holding that arbitrators under collective agreements not only had the jurisdiction to deal with *Charter* claims when raised in the context of applying collective agreements to workplace disputes,³⁰ but that they also had the jurisdiction to provide *Charter*-related remedies such as damages and declarations. Moreover, the jurisdiction of arbitrators to consider the *Charter* claims was deemed to be exclusive where “the conduct giving rise to the dispute between the parties arises either expressly or inferentially out of the collective agreement between them.”³¹ One possible consequence of this decision, noted by several commentators, is that it could render arbitrators virtually incapable of performing their core function of resolving collective bargaining disputes on the basis of the terms of the collective agreement with a primary goal of promoting the health of the parties’ relationship.³²

The consolidation period also saw a reconsideration of the extent of *Charter* protection for picketing as a form of free expression. In *U.F.C.W.*,

28. *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209.

29. *Weber v Ontario Hydro* [1995] 2 SCR 929, 125 DLR (4th) 583.

30. The Court had earlier affirmed this point in *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 S.C.R. 570, noting the specialized competence of arbitrators may be of assistance to reviewing courts in assessing the workplace context in which the *Charter* claim is being made.

31. *Weber*, *supra* note 29 at para 68.

32. Claire Mummé, “Labour Arbitration as Translation: The Transformation of Canadian Labour Arbitration in the Twentieth Century from a Semi-Autonomous Institution of the Shop to an Institution of the State” (January 1, 2008). Available at SSRN: <<http://ssrn.com/abstract=1485682>>; H Arthurs, “The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration,” (2000) 7 Can Lab & Empl L J 45.

Local 1518 v. Kmart Canada Ltd.,³³ the Court turned away from its view in the formative period, expressed in *Dolphin Delivery*, that common-law regulation of picketing was beyond the *Charter* cathedral's shadow, and confined the BC courthouse picketing case to its relatively unusual setting. The Court not only acknowledged in *Kmart* that picketing had substantial expressive elements that were *Charter* protected, but concluded that British Columbia Labour Code limitations on consumer leafleting were not justified under s. 1. Perhaps more significantly, near the end of the consolidation period, the Court repainted the *Charter* cathedral's shadow, deciding that common law rules regulating picketing should be interpreted in accordance with *Charter* values, thus leading it to reject the view that secondary picketing was per se illegal.³⁴ Nevertheless, the Supreme Court also summarily dismissed arguments that the *Charter*, through its s. 7 guarantee of liberty and the right not to be deprived thereof except in accordance with principles of fundamental justice, provided any protection for a right to strike.³⁵

In assessing the positive guarantee of freedom of association, the Supreme Court continued to reproduce its earlier view that collective bargaining and a right to strike were unprotected, but the consolidation period did see some new brushstrokes that set the stage to a fundamental reconsideration of the issue during the *Charter*'s third decade. In two cases during the consolidation period, the Supreme Court dealt with the lack of access to collective bargaining by different groups of workers. In *Delisle*,³⁶ the Supreme Court rejected the claim of RCMP officers that their exclusion from a statutory collective bargaining regime violated their *Charter* rights. The Court's rendering of the *Charter* cathedral was very similar to its earlier paintings in the *Labour Trilogy* and *PIPS*, finding no protection for collective bargaining, and significantly, denying equality-based claims that denial of access to a statutory collective bargaining regime violated s. 15 of the *Charter*.

A slightly different view of the *Charter* cathedral was presented in *Dunmore v. Ontario (Attorney General)*,³⁷ dealing with exclusion of agricultural workers from statutory collective bargaining protection. The

33. *UFCW, Local 1518 v Kmart Canada Ltd.*, [1999] 2 SCR 1083, 176 DLR (4th) 607 [*Kmart*]. See also the companion case of *Allsco Building Products Ltd v UFCW, Local 1288P*, [1999] 2 SCR 1136, 176 DLR (4th) 647.

34. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 SCR 156 [*Pepsi*].

35. *ILWU, Local 500 v Canada*, [1994] 1 SCR 150, noting that the arguments about the non-applicability of s 2(d) to a right to strike also applies to s 7.

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

37. *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016.

Supreme Court did not abandon its position that freedom of association does not protect collective bargaining, and it continued to insist that s. 15 did not apply to a claim of discrimination against an occupational group. Nevertheless, the Court did provide a somewhat different perspective in painting the picture, acknowledging that freedom of association could provide protection for some collective activity beyond the forming and maintaining of associations. In particular, it indicated that such group activities as “making collective representations to an employer, adopting a majority political platform, federating with other unions” were protected associational activities.³⁸ It further found that if the failure of the government to include a marginalized group within the protections of a statutory collective bargaining scheme prevented the workers from being able to exercise their freedom of association, the government could be ordered to remedy the lack of protection.

This entailed an expanded view of state action and an evidentiary base linking the absence of state protection to the inability to act in association. The Court’s choice of palette here drew on articulations of freedom of association in international labour and human rights instruments, as had Chief Justice Dickson in his dissenting opinion in the *Alberta Reference*. *Dunmore’s* aftermath is well known, with the Ontario legislature maintaining the exclusion of agricultural workers from statutory collective bargaining regimes while enacting a parsimonious statutory scheme that only provided some protection against employer interference in employee groups and a right to make collective representations to employers, without any corresponding employer obligation to negotiate with the union representing the agricultural workers.³⁹ That scheme was upheld by the Supreme Court in *Fraser v. Ontario (A.G.)*⁴⁰ which provides an important new contribution to its *Charter* cathedral oeuvre.

The Supreme Court’s oeuvre during the consolidation period sparked another series of *Charter* cathedral sketches by academic and professional commentators. These provided a variety of viewpoints. Diane Pothier’s assessment of 20 years of *Charter* jurisprudence concluded that, as of 2002, the *Charter* had at best a moderate influence on labour law, and that successful challenges produced results that were within the dominant

38. *Ibid* at para 17.

39. *Agricultural Employees Protection Act*, 2002, SO 2002, c 16. The employees’ right to make representations through their representative imposed on employers a duty to “listen to the representations if made orally, or read them if made in writing” and to “give a written acknowledgement that [it] has read them.” (ss 5(6) and (7)). Nothing more, certainly no requirement to bargain in good faith.

40. *Fraser v Ontario (AG)*, 2011 SCC 20 rev’g 2008 ONCA 760 [*Fraser*]. The decision is discussed in more detail below.

legislative model in Canada, being neither revolutionary nor counter-revolutionary.⁴¹ She did, however, acknowledge that the most recent developments, such as *Pepsi* and *Dunmore*, held the potential for a more significant judicial intervention into labour relations, although at that point it was too early to tell whether this would in fact arise.

A number of commentators focused particularly on *Dunmore*; for example, I argued that the Supreme Court in *Dunmore* and *Advance Cutting* showed an increased willingness of the courts to assess the balance struck by legislators, with particular concern for the democratic and representative role of unions in economic, political and social spheres.⁴² In her comment on *Dunmore*, Patricia Hughes notes that one lesson to be drawn, for those seeking to use the *Charter* to challenge exclusion of groups of workers from the protections of collective bargaining regimes, is the importance of perseverance.⁴³ She characterizes this case as one of a series in which the Court has abandoned its self-proclaimed restraint with respect to *Charter* review of labour relations issues. She also notes that the assessment of groups under s. 2(d) begins to take on the character of assessment under the equality rights guarantee in s. 15 of the *Charter*. This insight is particularly prescient in light of later critiques of *BC Health* which argue that an equality analysis would have provided a better foundation for addressing issues of differential treatment of health care workers and cases of under-inclusion. Hughes also raised the question of the extent of the legislature's obligation to take positive action, in light of *Dunmore*. This is a theme which, of course, the Court has been forced to reconsider in light of the appeal in *Fraser*.

Other commentators also saw the potential of *Dunmore*, with Roy Adams claiming that it had "the potential to radically change the norms, attitudes and practices that" inform the enduring practices of Canadian industrial relations.⁴⁴ In particular, he saw in the *Dunmore* reasoning the potential for developing rights outside the *Wagner Act*⁴⁵ model that has

41. Dianne Pothier, "Twenty Years of Labour Law and the Charter" (2002) 40 Osgoode Hall LJ 369.

42. Michael MacNeil, "Unions and the *Charter*: The Supreme Court of Canada and Democratic Values" (2002) 10 CLELJ 1.

43. Patricia Hughes, "*Dunmore v. Ontario (Attorney General)*: Waiting for the Other Shoe" (2002) 10 CLELJ 27. She notes that the trial decision and the decision of the Ontario Court of Appeal denying the claim of the agricultural workers appeared to apply the obvious conclusions arising from the right to strike trilogy and other cases; perseverance with an appeal to the Supreme Court paid off, both in forcing the legislature to act to provide a protective scheme, and in laying the foundation for a more complete reassessment of the meaning of freedom of association and its application to collective bargaining in *BC Health*, *supra* note 6.

44. Roy Adams, "The Revolutionary Potential of *Dunmore*" (2002) 10 CLELJ 117.

45. *National Labor Relations Act*, Pub L No 74-198, 49 Stat 452 (codified as amended at 29 USC § 151-169 (1935)) [*Wagner Act*].

shaped the Canadian labour relations architecture. Specifically, he saw the decision as opening the way for non-majority unions and a right to strike for groups that have not been licensed to do so through traditional certification processes. Steven Barrett, who represented the Canadian Labour Congress as an intervenor in *Dunmore*, argues that the decision opened the door for a more expansive reading of freedom of association, leading to recognition of protection for collective bargaining and the right to strike.⁴⁶ One cannot help but note his 'happy' willingness to leave it to further *Charter* challenges to determine whether his own broader reading of *Dunmore*, or a narrower perspective, would prevail. John Craig and Henry Dinsdale, two commentators who normally represent employer positions in litigation, commented on the lack of principled basis in *Dunmore* for extending protection for some union activities but not for collective bargaining and striking.⁴⁷ They characterized the decision as an attempt to gloss over the divisions with the Court about the nature and scope of freedom of association and role of judicial deference in labour relations. The Court would inevitably have to confront the question of what *Dunmore* really meant:

III. *The re-assessment period*

Confront it is exactly what the Supreme Court did in *BC Health*,⁴⁸ the leading decision so far in the *Charter*'s third decade, the re-assessment Period, sweeping away its established precedents, and holding that freedom of association does indeed include protection for a process of collective bargaining. But before discussing *BC Health*, it is worth noting another Supreme Court decision preceding it, one that might be regarded as initiating the re-assessment period.

Newfoundland (Treasury Board) v. NAPE,⁴⁹ like *BC Health* that was to follow, dealt with legislative intervention to override collective agreement terms. Here, the Province of Newfoundland, as employer, had entered into pay equity agreements with unions, making those agreements part of their collective agreements. In 1991, as the parties completed the process of identifying specific payments that would have to be made to eliminate and compensate for pay differentials between male and female employees, the government claimed to be facing an unprecedented fiscal crisis, and enacted a wage freeze on public sector employees and

46. Steven M Barrett, "*Dunmore v Ontario (Attorney General)*: Freedom of Association at the Crossroads" (2002) 10 CLEJ 84.

47. John Craig & Henry Dinsdale, "A 'New Trilogy' or the Same Old Story?" (2002) 10 CLEJ 59.

48. *BC Health*, supra note 6.

49. *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 [*NAPE*].

delayed the implementation of pay equity adjustments. The effect of the delay was to reduce the amount that the government would have to pay in total by \$24 million. In the decision released in 2004, the Supreme Court reviewed the statutorily imposed pay equity freeze under s. 15 of the *Charter*, concluding that the legislation had a discriminatory impact on female employees. The Court treated the inclusion of the pay equity scheme within the collective agreement as having legal significance. It was a contractually recognized 'entitlement' that was targeted by the legislation, and that characterization led the Court to reject the Province's argument that the pay equity entitlements were merely a privilege that the government could give and take away. In the end, however, the Court concluded that the delay in making the pay equity adjustments, with the major losses it entailed for the workers, was justified under s. 1 of the *Charter* by the government's need to address the very major financial crisis it was facing.

Two observations arise from the differing approaches in *NAPE* and *BC Health*. In the latter, the Court would reject the s. 15 challenge rather summarily, stating that "the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination."⁵⁰ Hence, distinctions are said to be based on occupational segregation, and there is no requirement to take into account discriminatory effect. This rejection of an equality basis for holding the government to account nevertheless can be seen, on the one hand, as opening the doors for the more robust freedom of association analysis that the Court was willing to adopt, but on the other, opening the door for courts to much more aggressively involve themselves in designing collective bargaining regimes for those who have been traditionally excluded from accessing existing regimes. The second observation arises from the justification that the *NAPE* Court recognized in upholding the validity of the discriminatory legislation. Although it concluded that the crisis situation did justify the restraint legislation, it noted that it would "look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints."⁵¹ The Court quoted this passage in *BC Health*, expressing doubt that cost cutting goals and an attempt to increase managerial

50. *BC Health*, *supra* note 48, at para 165.

51. *NAPE*, *supra* note 49 at para 72. See Patricia Hughes, "Newfoundland (Treasury Board) v *NAPE*: Women as Sacrificial Lambs" (2005) 11 CLEJ 383 for her trenchant criticism of the Court's application of s 1.

power could be pressing and substantial objectives that would justify the interference with freedom of association. However, the improvement of health care delivery was such a pressing and substantial objective, but one which the legislature overshot the mark by failing to consult and impairing collective bargaining rights more than necessary to achieve the objective. So while the Supreme Court's equality analysis in *BC Health* may be disheartening in comparison to *NAPE*, its more vigorous oversight of government justifications may be a significant advance for those challenging legislative limits on collective bargaining.

BC Health marks an astounding about-face in the Court's freedom of association jurisprudence. Going beyond the very limited right to make representations that had been acknowledged in *Dunmore* as an associational right, the Supreme Court re-examined the logic of its previous holdings, the history of the right to collective bargaining in Canada, the development of freedom of association as an international human rights norm, and the role of Charter values, convincing itself that the freedom of association portion of the *Charter* cathedral had been grievously misrepresented in earlier depictions. As a result, the Court declared invalid several sections of a British Columbia statute⁵² enacted to facilitate reorganization and cost savings within the health care sector in the Province.

There are five key points in the Court's decision.⁵³ First, freedom of association includes protection for the right of individuals to engage in associational activities, including protection for the process of collective bargaining. Second, the right is to a general process of collective bargaining, not to any particular statutory model. Third, freedom of association protects only against substantial interference with associational activity. This requires a two-part inquiry: what is the importance of the matter affected to collective bargaining; and how does the measure impact on the collective right to good faith negotiation *and* consultation. Fourth, the inquiry in every case is contextual and fact-specific, and situations of exigency and urgency may affect the content of the modalities of the duty to bargain in good faith. Such issues may become particularly important in determining if a violation of freedom of association is justified under s. 1 of the *Charter*. Fifth, and finally, the Court specifically mentions several examples of government action that may violate the guarantee of freedom of association, including acts of bad faith, unilateral modification of negotiated terms without meaningful negotiation or consultation, and the

52. *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2.

53. I draw on an earlier talk I presented to the Canadian Industrial Relations Association, on 6 June 2008 in Vancouver, BC).

Dunmore situation where denial of union access to a collective bargaining regime denies members of a vulnerable group the opportunity to exercise meaningful associative freedoms.

In the decision itself, the Court found that some of the statutory provisions interfering with collective bargaining were substantial, and therefore an infringement of freedom of association, while others were not sufficiently substantial to warrant Court oversight. In particular, provisions which nullified collective agreement terms and prohibited bargaining on contracting out, layoffs and bumping, were struck down, while provisions limiting schemes for transferring and reassignment of employees were not considered to be substantial interference. In assessing whether the legislative intervention was justified under s. 1 of the *Charter*, the Court found that the government did not provide convincing evidence of minimal impairment of the freedom of association. It noted the lack of consultation with unions before the passage of the legislation, and used this as a basis for its conclusion that the government had failed to demonstrate that there were no reasonable alternatives to this particular scheme that may have been less intrusive on the right to collective bargaining.

This decision has a number of important consequences. First, it had consequences for the particular employees and unions affected by the legislation that was under review. Ultimately, the British Columbia government enacted legislation rescinding the offending legislative sections, and paid \$84 million in compensation to the workers and unions affected by the unconstitutional provisions.⁵⁴ However, it must be noted that the consequences were in some ways quite limited, as the restructuring remained in place with significant detrimental consequences for unions and employees.

Second, *BC Health* has consequence for unions, employees, employers and government in assessing how it might be applied to other claims about intrusion on collective bargaining rights. An assessment of consequences requires evaluation along a number of dimensions. The remainder of this paper will assess the consequences of *BC Health* from the perspectives of unions' strategic choices in pursuing *Charter* litigation as a means of pursuing their social, political and economic agendas. To do this, I present a review of some of the debates about the dangers of *Charter* litigation in general, and a review of some of the literature assessing the significance of the potential changes arising from *BC Health*, asking whether they are merely reinforcing an already problematic regulatory regime, or whether they have the potential to create more revolutionary change? To more

54. See John P McEvoy, "BC Health Services: The Legacy after 18 Months" (2009) 59 UNBLJ 48.

fully assess the potential of a litigation strategy, I will finish by presenting an overview of post-*BC Health* cases that challenge current regulatory restrictions on collective bargaining, discussing some challenges are likely to be made, and including a look at some situations where governments are reacting or treading carefully even in the absence of a *Charter* challenge.

IV. *Trade union strategies: Avoiding or embracing the siren call of juridification and human rights*

Some Canadian trade union leaders as well as some labour and constitutional scholars are wary of the constitutionalization of labour relations and the path on which it might lead trade unions in pursuing the fruits of a robust approach to freedom of association. Roy Adams has noted the lack of enthusiasm displayed by union leaders at the Canadian Labour Congress Convention following the *BC Health* decision.⁵⁵ Buzz Hargrove, former president of the Canadian Auto Workers, echoed that mood when he emphasized the need for unions to engage in community and political action in the search for social change.⁵⁶ Only such action, he says, will provide the foundation on which significant progress will be made. Courts, in his view, are more likely to reflect that social change through their *Charter* interpretations, rather than building the foundation for change. Larry Savage, a political scientist focusing on labour issues takes much the same position. He argues that “the power of labour does not flow from rights. Rather, rights flow from labour’s political power.”⁵⁷ He fears that union pursuit of collective bargaining as a human right will tend to de-politicize class-based approaches, replacing them with elite driven judicial strategies which foster a sense of individualism at the expense of a belief in the transformative potential of collective worker power, doing little to challenge inequalities in wealth.⁵⁸

Yet there is little doubt that the *BC Health* decision can be seen, as Judy Fudge has put it, as a symbolic and moral victory that brings trade

55. Roy J Adams, “Prospects for Labour’s Right to Bargain Collectively After *BC Health Services*,” (2009) 59 UNBLJ 85.

56. Buzz Hargrove, “Striking a Collective Bargain: The Supreme Court Decision in *BC Health Services*” (2009) 59 UNBLJ 41.

57. Larry Savage, “Workers’ Rights as Human Rights: Organized Labour and Rights Discourse in Canada” (2009) 34 Labor Studies J 8.

58. See Roy Adams & Larry Savage: Roy J Adams, “From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining” (2008) 12 Just Labour 48; Larry Savage, “Labour Rights as Human Rights? A Response to Roy Adams” (2008) 12 Just Labour 68; and Roy J Adams, “I-Mode, the New Language of Workers’ Rights: A Rejoinder to Larry Savage” (2008) 12 Just Labour 76.

union rights into balance with many other *Charter* rights.⁵⁹ We need, nevertheless, to ask what the value of such a symbolic and moral victory is likely to be. Does it carry with it any significant costs, and are there useful ways for deploying symbols and moral victories? Some paint a relatively rosy picture of the *BC Health* decision and its likely aftermath. Roy Adams, who had earlier written about the revolutionary potential of *Dunmore*, saw as a key factor pointing the way ahead the Supreme Court's statement in *BC Health* that the *Charter* "should be presumed to provide at least as great a level of protection as is found in international human rights documents that Canada has ratified."⁶⁰ Adams concludes from his own review of international protections that *BC Health* demands protection for minority unions, ones that cannot demonstrate that they have the support of a majority of workers in some defined unit, granting them a constitutionally protected right to engage in collective bargaining on behalf of their members. He is thus highly critical of that aspect of the Ontario Court of Appeal's decision in *Fraser*, discussed below, holding that one of the collective bargaining rights protected by freedom of association is a system of exclusive representation by a union demonstrating that it has majority support.⁶¹

David Doorey's assessment of the application of *BC Health* to limits on union access to workers during organization campaigns sees conflicting elements in the *BC Health* logic.⁶² He argues that a commitment to following ILO freedom of association principles would lead to a fundamental reconsideration of the constitutionality of restrictions arising from employer property and managerial prerogative claims. But he sees the evidentiary burden of demonstrating substantial impairment of collective bargaining rights makes it unlikely that unions will be able to effectively challenge the statutory and jurisprudential status quo.

Adelle Blackett provides a cautiously optimistic rendering of the *Charter* cathedral, celebrating the Court's simultaneous drawing on the Wagner model to elucidate the content of collective bargaining rights while maintaining that freedom of association does not entail a right to any particular statutory regime. She notes that *BC Health* "has crafted both the space to valorize the industrial pluralism model that make the

59. Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support case in Canada and Beyond" (2008) 37 *Indus LJ* 25.

60. Roy Adams, "Prospects for Labour's Right to Bargain Collectively after *BC Health*" *supra* note 55, citing *BC Health*, *supra* note 48 at para 70.

61. Adams, *ibid* at 89.

62. David J Doorey, "Union Access to Workers during Organizing Campaigns: A New Look through the Lens of *BC Health Services*" (2010) 15 *CLELJ* 1.

freedom of association meaningful for paradigmatic Fordist workers, but has also expressly acknowledged that labour relations paradigm shift and that collective bargaining models might overlap and coexist as large sectors of the labour market face economic restructuring.”⁶³ Blackett also warns about the need to pay attention to the relationship between collective bargaining and equality, decrying the Court’s refusal to apply s. 15 of the *Charter* to discrimination as between groups in collective bargaining regulation. She points to the decision of the Quebec court in *CSN v. Québec (Procureur général)*⁶⁴ in which the Court struck down, on both s. 2(d) and s. 15 grounds, Quebec legislation barring access of mostly female homecare workers from the general statutory collective bargaining scheme without adequate alternative guarantees that would enable representative organizations to bargain on behalf of these workers. She sees this as a hopeful sign that courts might integrate freedom of association and equality analysis.

One particular problem arising from the Supreme Court’s insistence in both *Dunmore* and *BC Health* that the freedom of association guarantee does not create a right to any particular legislative scheme is figuring out a way of overcoming the public-private issue; it is the refusal of employers to engage in collective bargaining unless statutorily required to do so that acts as a barrier to union representation by private sector workers. Quebec commentators have noted, however, that there is a way around that problem in their province, by importing the freedom of association analysis into the application of the Quebec Charter of Human Rights and Freedoms.⁶⁵

Several commentators question whether the Supreme Court’s reasoning in *BC Health* can withstand close scrutiny. In particular, Langille and Tucker criticize the *BC Health* Court’s revised view of collective bargaining history, which in the right to strike trilogy had been characterized as a modern statutory right, as imbricating a particular approach to collective bargaining (the modified Canadian Wagner Act model) within the interpretation of freedom of association.⁶⁶ As well, Langille subjects the Court’s use of international human rights norms to close review, expressing concern that the Court did not adequately address

63. Adelle Blackett, “Mutual Promise: International Labour Law and *BC Health Services*” (2009) 48 SCLR (2d) 365, at 395.

64. *CSN v Québec (Procureur général)*, 2008 QCCS 5076, [2009] JQ no 13317.

65. Christian Brunelle, Michel Coutu & Gilles Trudeau, “La constitutionnalisation du droit du travail: un nouveau paradigme” (2007) 50 C de D 5.

66. Brian Langille, “The Freedom of Association Mess: How We Got into it and How We Can Get out of It” (2009) 54 McGill L J 177; Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada” (2008) 61 Labour/Le Travail 151.

the problems of using International Labour Organization conventions to which Canada is not a party and relying on the ILO's Freedom of Association Committee as a definitive source for legal interpretation of what freedom of association means within the Canadian constitution.⁶⁷

Some of the most trenchant criticism comes from those who fear the same thing that the pragmatic pluralists have always been concerned about: an insufficiently expert and accountable court engaging in the exercise of writing a constitutional labour code. One fear is that the code contain a pastiche of statutory collective bargaining protections (duty to bargain in good faith, specific unfair labour practices, union security clauses, exclusivity and majoritarianism, arbitration as a required dispute resolution process) that may entrench some of the problematic aspects of the Wagner model that informed the development of Canadian labour relations statutes. Fudge describes the *BC Health* decision as an instance of the Court embracing "Fordist labour rights in a post-Fordist economy"⁶⁸ and further comments that constitutionalizing collective bargaining rights will not solve the problems of unions' economic and political weakness. Bartkiw is another who urges caution, if not skepticism, about the true impact of labour victories in recent *Charter* cases. His concern, like that of others, is that a decision like *Fraser* may "reinforce the legitimacy of what is increasingly understood as a restrictive model for effectuating the concept of "freedom of association," let alone for ameliorating socioeconomic inequality in concrete terms."⁶⁹ Langille, who generally applauds the outcomes in both *BC Health* and *Fraser*, argues that the results could have been achieved without equating freedom of association with its instantiation in the extant Canadian statutory collective bargaining regimes. The way to this result in Langille's view is to treat those cases as a violation of the Charter's equality guarantee,⁷⁰ as also advocated by Blackett.⁷¹ Achieving this would require the Court to fundamentally alter course in its approach to s. 15 interpretation, and in particular its insistence that the provision prohibits only those forms of discrimination based on the listed grounds or ones analogous thereto. It might be argued that it is no more unrealistic to expect the Court to do such a significant about

67. Brian Langille, "Why Are Canadian Judges Drafting Labour Codes – And Constitutionalizing the Wagner Act Model?" (2010) 15 CLEJ 101; B Langille, "Can We Rely on the ILO?" (2007) 13 CLEJ 273.

68. Judy Fudge, "Brave New Words: Labour, the Courts and the Canadian Charter of Rights and Freedoms" (2010) 28 Windsor Yearbook of Access to Justice 23.

69. See, eg Timothy J Bartkiw, "Proceed With Caution, or Stop Wherever Possible? Ongoing Paradoxes in Legalized Labour Politics" (2010) 15 CLEJ 77 at 100.

70. Langille, *supra* note 66.

71. *Supra* note 63.

face than it was to expect it to fundamentally re-consider its position on freedom of association.

There remain the skeptics, too, who acknowledge with some surprise that the Court's move to provide access to collective bargaining to vulnerable groups may be a good thing, but whose fundamental reaction is "so what". Harry Arthurs, for example, takes the position that the *Charter* generally, and its impact on workers is no exception to that position, makes little or no difference to economic, social or political life.⁷² Despite the relative ineffectiveness of the *Charter*, Arthurs nevertheless remains concerned that using "the *Charter* as a template for the design of industrial relations systems ... [increases] the risk that in the long term the approach of the courts will prevail over that of experts. This in turn enhances the likelihood that legislatures will arrive at dysfunctional or at least sub-optimal solutions."⁷³

For unions, the issue becomes the extent to which litigation strategies are a sensible way of using union resources to promote the welfare of their members and of workers generally, as opposed to working within existing schemes or focusing on political action to resist encroachment on existing rights or to seek more fundamental change. One aspect of making that evaluation is determining the limits and potential of *BC Health* with respect to both issues that unions would seek to advance, and issues where the decision could be used as a sword against unions. That assessment needs to take into account the many situations in which Charter rights are or might be invoked.

V. *Current and potential challenges*

A plethora of cases have already started testing the application of *BC Health* to a range of issues, including limits on access to collective bargaining for particular groups, limits on bargaining processes, regulation of strikes, and the (re)structuring of collective bargaining regimes. The overview below examines some of the more important cases.

1. *Under-inclusive regimes and access to collective bargaining protections*

A number of cases have challenged statutory exclusions that deny access to collective bargaining regulatory frameworks for specific classes of

72. Harry Arthurs, "Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging" (2010) 15 CLEJ 373 [One Shoulder Shrugging]; H Arthurs & B Arnold, "Does the *Charter* Matter?" (2005) 11 Rev Const Stud 37; H Arthurs, "Labour and the 'Real' Constitution" (2007) 48 C de D 43; H Arthurs, "Constitutionalism – An Idea Whose Time Has Come and Gone?" (2008) 75:3 Amicus Curiae 3.

73. One Shoulder Shrugging, *ibid* at 382.

workers. To date, these challenges have been somewhat successful, with courts in some cases revisiting and reversing earlier decisions. For instance, the Quebec Superior Court has held that the denial of access to collective bargaining for home care workers violates s. 2(d),⁷⁴ as has the New Brunswick court in relation to denial of access to public sector collective bargaining regime for casual and temporary workers.⁷⁵ The case of exclusion of RCMP officers from collective bargaining, which had been upheld in *Delisle*, has now been reversed in light of *BC Health*.⁷⁶ In Ontario, the legislature responded to political pressure, undoubtedly with the spectre of litigation in the background, and extended access to collective bargaining for part-time college staff. In a report preceding the legislative initiative, Kevin Whittaker noted that all parties consulted supported the extension of collective bargaining rights to part time college employees, and so the focus of his report was on whether part time employees should be in separate bargaining units or whether they should be rolled into larger existing units along with full-time employees.⁷⁷ He recommended, and the legislature adopted the separate bargaining unit model.⁷⁸

There are several points to be made about these cases. In *BC Health* the Court had identified under-inclusive legislation as a possible violation of the newly articulated freedom of association protection for collective bargaining, but had noted as well that such protection might only be extended where “the freedom would be *next to impossible* (emphasis added) to exercise without positively recognizing a right to access a statutory regime.”⁷⁹ The ‘next to impossible’ standard appears to set a very

74. CSN, *supra* note 62.

75. *CUPE v New Brunswick*, 2009 NBQB 164, 350 NBR (2d) 73. In Nova Scotia, this issue was settled at a political level, without resort to litigation. The government agreed to the inclusion of casual workers in the bargaining unit of permanent employees: *Civil Service Collective Bargaining Act*, RSNS 1989, c 71, s 11(1) as amended by SNS 2007, c 33, expanding the definition of employee to include students and persons hired on a casual or seasonal basis for a period of more than ten weeks in a twelve month period.

76. *Mounted Police Association of Ontario v Canada (Attorney General)* (2009), 96 OR (3d) 20, [2009] CLLC para 220-027 (SC) [MPAO]. The federal government has appealed the decision, but has also introduced Bill C-43 in Parliament in June of 2010 to enact the *Royal Canadian Mounted Police Labour Relations Modernization Act*. The Bill would create a tailored collective bargaining regime for the RCMP. However, in October 2010, just days before the existing regime would have become invalid under the remedy provided in MPAO, the government obtained a stay from the Ontario Court of Appeal, effective until thirty days after the Supreme Court hands down its decision in *Fraser: Mounted Police Association of Ontario v Canada (Attorney General)*, 2010 ONCA 635. The granting of the stay was made subject to four conditions that would enable the associations seeking to represent the RCMP officers to have access to them through emails, meetings on the employer’s premises and posting on bulletin boards.

77. Kevin Whittaker, *A Review of the Colleges Collective Bargaining Act* (2008).

78. *Colleges Collective Bargaining Act*, 2008 SO 2008, c 15.

79. *Supra* note 7 at para 34.

high bar to those complaining about lack of access. The Supreme Court had already indicated in *Dunmore* that RCMP officers like those pursuing their case in *MPAO* were not in a particularly vulnerable position. The *MPAO* decision eludes these barriers by finding that the root of the claim is not in the exclusion of officers from the public sector bargaining regime, but in the regulatory imposition of a non-collective bargaining labour relations regime which effectively thwarts the ability of officers to choose their own representatives. Other cases ignore the 'next to impossible' standard and instead concentrate on whether the lack of access substantially contributes to a violation of protected freedoms.⁸⁰

The case of Quebec home workers is based not only in a freedom of association analysis, but also in a s. 15 *Charter* claim. That it was able to do so says more about the ghettoization of women in particular kinds of jobs than about the potential of equality analysis generally for addressing the claims of groups denied access to collective bargaining. And even when a union obtains access, it does not necessarily mean that it will be easy for it to exercise their new rights. Two years after the passage of enabling legislation, and fourteen months after an application for certification was filed, part-time college workers in Ontario still have not had a union certified to represent them because of a variety of challenges posed by the colleges.⁸¹

Perhaps the most significant under-inclusion case is *Fraser v. Ontario (Attorney-General)*⁸² which revisits the aftermath of the *Dunmore* decision. In *Dunmore*, the Supreme Court had determined that the lack of positive protection for agricultural workers and their unions constituted a violation of freedom of association, but did not hold that they were entitled to access the protections of a collective bargaining regime. The response of the Ontario legislature, enacting the *Agricultural Employees Protection Act*⁸³ was to provide minimal levels of protection to workers against employer interference in the formation and maintenance of union, and to create a right to make representations to employers. But it did not provide for collective bargaining as many would have understood the term, and not surprisingly agricultural workers and the union seeking to represent them again challenged this response. The trial decision, delivered before

80. See e.g., *CUPE v New Brunswick*, *supra* note 75.

81. The Ontario Public Service Employees' Union filed an application to represent part-time staff in July 2009. In a decision released 27 September 2010, over 14 months later, the Ontario Labour Relations Board was still dealing with preliminary objections and had not yet finally ruled on the certification application. *OPSEU v Colleges Compensation and Appointments Council*, 2010 CanLII 55406 (ONLRB).

82. *Fraser v Ontario (AG)*, 2008 ONCA 760, 92 OR (3d) 481, rev'd 2011 SCC 20, [2011] 2 SCR 3.

83. *Agricultural Employees Protection Act*, SO 2002, c 16 [AEPa].

the Supreme Court had done its switch in *BC Health*, concluded that the legislative response met the minimal requirements laid down in *Dunmore*. By the time the Ontario Court of Appeal ruled on the matter, *BC Health* had been released, and the Court of Appeal concluded that the freedom of association protection for collective bargaining required a much more extensive legislative intervention. The Court declared the *AEPA* invalid, and ordered the legislature to provide agricultural workers with sufficient protection to enable them to engage in meaningful collective bargaining. This entailed the imposition of a duty to bargain in good faith, exclusive bargaining rights for unions representing a majority of employees, and a system of dispute resolution in the face of bargaining impasse and for grievances arising under a collective agreement. This vision of the requirements arising from extending freedom of association to collective bargaining aroused a tremendous amount of discussion and critique.

Justice Winkler's opinion raised a variety of issues. First is whether courts can order the legislature to engage in positive protection. Second, his articulation of what an acceptable scheme appears to reproduce most of the key elements of the Wagner Act model that is encapsulated in the Ontario *Labour Relations Act*, which appears to be at odds with the Supreme Court position that no 'particular' scheme of collective bargaining was mandated by the *Charter*. Third, this typifies the fear of some commentators, discussed above, about the appropriateness of judges drafting labour codes. Nevertheless, even those who have that fear are willing to concede the justice of having agricultural workers with protections equal or equivalent to those provided to most other workers.

The Supreme Court responded by overturning Justice Winkler's decision and holding that the *AEPA* provided adequate protection for freedom of association.⁸⁴ The majority opinion, jointly authored by Chief Justice McLachlin and Justice LaBel, rejected a spirited concurring opinion written by Justice Rothstein seeking to completely undo *BC Health* and reinstate the *Labour Trilogy* and supporting jurisprudence holding that freedom of association does not provide protection for strikes or collective bargaining.⁸⁵ Despite reaffirming freedom of association as extending protection to collective bargaining, the majority gave a very narrow reading of the extent of that protection. It reiterated yet again that no particular statutory scheme of collective bargaining was protected,

84. *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

85. *Ibid.* Justice Rothstein was joined in his view that the Court should reverse its *BC Health* decision by Justice Charron. Justice Deschamps also concurred in the result, but would have read the *BC Health* protection for collective bargaining even more narrowly than the majority. Justice Abella wrote a strong dissent that would have upheld the decision of the Ontario Court of Appeal.

and that the key to deciding whether the freedom has been violated was to determine if there was a commitment to the duty to bargain in good faith. Although the *AEPA* does not specifically refer to bargaining, but only to an employer's obligation to listen to or read representations made by an employees' association, the Court concluded that the *AEPA* provided sufficient protections. It reached this conclusion in two steps. First it reiterated that the form that collective bargaining rights take is to be decided by the legislature,⁸⁶ and, more controversially, that a right to make representations is an adequate extension of collective bargaining rights. Second, it decided that there is an implied statutory duty to consider such representations in good faith. Indeed, the Court chided the union for failing to make significant attempts to make the *AEPA* scheme work.

This decision has the potential to substantially limit claims by groups arguing that their lack of access to collective bargaining protections is a violation of their freedom of association. Whether it will have as much impact with respect to the other issues that unions might seek to litigate, such as limitations on subjects of bargaining, the legislative overruling of collective agreements, or limits on the right to strike remains to be seen. But it certainly changes the calculations for unions employing a litigation strategy to extend collective bargaining rights to excluded groups. On the positive side, the decision may act as a positive encouragement to legislatures to explore innovative and novel representation schemes that are better suited to the complex economic and social contexts within which many vulnerable and precarious workers are imbricated.

2. *Bargaining structures and restructuring*

Several cases have explored the extent to which *BC Health* places restrictions on government restructuring of public sector bargaining structures. *BC Health* was itself a case in part about revised bargaining structures, and at least two cases since have reviewed such legislative initiatives. In *Confédération des syndicats nationaux v. Québec (Procureur général)*⁸⁷ the Quebec Superior Court found that a sweeping legislated restructuring of health sector bargaining units in Quebec violated the guarantee of freedom of association, noting the lack of consultation with the unions about the restructuring and the interference with freedom of association arising from the intermingling of groups of employees sharing

86. *Ibid* at para 106. The majority was not deterred from this conclusion by the statement of the Minister of Labour at the time the *AEPA* was introduced in the legislature, where he said that the statute was not intended to extend collective bargaining to agricultural workers. The Supreme Court rather disingenuously concluded that he was referring to Wagner-style collective bargaining, and was not claiming that the *AEPA* did not provide for any form of collective bargaining.

87. *Confédération des syndicats nationaux v Québec (Procureur général)*, 2007 QCCS 5513 [CSN].

little community of interest. Perhaps most significant in terms of fitting within the specific framework of the *BC Health* analysis was the finding that the reorganization included restrictions on the negotiation of specific subjects. It was this factor that led an Alberta court⁸⁸ to distinguish *CSN* and conclude that the health sector bargaining unit restructuring carried out in that province did not violate freedom of association. It rejected the claim that freedom of association includes protection for employees wishing to form smaller bargaining groups within the larger bargaining units defined by the legislature.

This particular view, which seems consistent with *BC Health*, raises interesting questions about majoritarian exclusivity which the Ontario Court of Appeal in *Fraser* had required as part of a valid collective bargaining scheme, but which did not seem to concern the Supreme Court. As Langille has put it, “it seems to me that those jurisdictions which deploy the notion of majoritarianism do not and cannot also have “minoritarianism.”⁸⁹ Somebody, other than the workers or the union, gets to decide on the contours of the bargaining unit, whether it be a labour relations board or the legislature.

3. *Limiting the subjects of bargaining*

In *BC Health*, the Supreme Court struck down parts of the challenged legislation because it imposed terms and conditions and prohibited unions and employers from bargaining about those matters, or agreeing to collective agreement terms inconsistent with the imposed conditions. It is not surprising, therefore, to see a number of challenges to similar efforts in other statutory interventions. The Quebec healthcare restructuring struck down in *CSN* provides one example. A second example is the successful challenge by BC teachers to legislation that voided collective agreement terms and prohibited bargaining on a range of issues.⁹⁰ Another challenge to such legislation has been started by PIPS, objecting to many of the limitations on bargaining set out in the federal *Public Service Labour Relations Act*.⁹¹ Professional Institute of the Public Service of Canada and Public Service Alliance of Canada have also launched *Charter* challenges⁹²

88. *AUPE v Alberta Health Services*, 2010 ABQB 344, 491 AR 115.

89. Langille, *supra* note 67 at 125.

90. *British Columbia Teachers' Federation v British Columbia*, 2011 BCSC 469.

91. See *Notice of Application, PIPS v Canada (AG)*, 1 May 2008, online: Professional Institute of the Public Service of Canada <<http://www.pipsc.ca/portal/page/portal/website/issues/constitution/challenge-application.en.pdf>>.

92. See *Notice of Application, Gordon v Canada (AG)* 27 April 2009, online: Equality Rights Central <http://www.equalityrightscanada.com/papers_docs/20100628105956/Issued_Notice_of_Application_Apr_27_09_%28PSAC%29.pdf>.

to the federal *Expenditure Restraint Act*⁹³ and the *Public Sector Equitable Compensation Act*,⁹⁴ the first of which imposed wage freezes on federal public service workers, overriding negotiated collective agreements and prospectively limiting bargaining on wages and benefits. The *Public Sector Equitable Compensation Act* extensively regulated the processes by which pay equity claims within the federal sector could be dealt with. In one case, the Federal Court has ruled that the ERA imposition of a wage freeze done without adequate consultation, constituted an unjustified infringement on freedom of association and the right to collective bargaining.⁹⁵ A much more troubling reading of protection for collective bargaining was given by a British Columbia court when it held that freedom of association does not provide any protection against the ERA's overriding of collective agreement terms imposed by arbitration as opposed to those reached by collective bargaining.⁹⁶

An intriguing example of the potential constraints placed on government by the expanded approach to freedom of association can be seen in Ontario, which has statutorily imposed a wage freeze on non-unionized public sector workers,⁹⁷ but which to date is relying on a voluntary call for a freeze for unionized workers, coupled with a threat to withhold funding increases to a level to ensure that the employers do not agree to wage increases. The speculation is that the government's bifurcated approach is a direct result of concerns about the constitutionality of imposing a wage freeze on unions.⁹⁸ In the most recent stage of this process, there are two significant developments. First, interest arbitrators are indicating an unwillingness to defer to the government's call for a wage freeze.⁹⁹ Second, the government engaged in high-level consultations with employers and unions in order to achieve some form of plan by which the government's goals might be met.¹⁰⁰ Some unions were concerned that if those consultations failed to lead to an agreement, they could be used as justification for the imposition

93. *Budget Implementation Act, 2009*, SC 2009, c 2, s 393.

94. *Budget Implementation Act*, *ibid*, s 394.

95. *Meredith v Canada (Attorney General)*, 2011 FC 735. Perhaps the most startling aspect of this decision is the characterization of the process by which decisions were made on RCMP wages as a collective bargaining relationship. Following the Supreme Court in *Fraser*, it emphasizes the right to make representations and have them considered in good faith as the key to freedom of association.

96. *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*, 2011 BCSC 1210.

97. *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, SO 2010, c 1, s 24.

98. *QP Briefing*, Vol 1:24, 15 October 2010 (Toronto Star Intelligence Unit).

99. Robert Benzie & Rob Ferguson, "Arbitrator rules against wage freeze, Liberals scoff" *Toronto Star* (16 September 2010).

100. Robert Benzie, "Province's wage-freeze talks go off the rails" *Toronto Star* (26 August 2010).

of statutory wage freeze for the unionized sector matching the freeze for the non-unionized workers. The government strategy could be to argue that even if there is a violation of freedom of association, the extensive consultations show that no other means of achieving the objective is available.¹⁰¹

4. *The right to strike*

Adams also argues that a logical consequence of the commitment to complying with international norms is that the Court must conclude that there is a constitutionally protected right to strike. On that point there are a number of commentators who appear to be in agreement. Etherington espouses the view that the Supreme Court will eventually recognize protection for a right to strike, albeit in some limited form.¹⁰² The Court is likely to avoid case by case review of limits on striking by recognizing the legitimacy of timing and support regulations, and accepting legislative authority to substitute a right to strike with some other form of acceptable dispute resolution such as interest arbitration. As a result, the Court would intervene “only where strike activity was completely prohibited or so severely restricted as to effectively deny access to a meaningful process of collective bargaining.”¹⁰³ Jamie Cameron also argues that the logic of *BC Health* should lead to the conclusion that a right to strike is protected, but notes that the Court could hold to its former view that there was no protection for strikes, but only by relying on unsound distinctions or twisting existing doctrine in new directions.¹⁰⁴

One Court of Appeal decision has found a *Charter*-based right to strike, but concluded that the restrictions on the right to strike were justified under a s. 1 analysis.¹⁰⁵ The British Columbia Teachers Federation and the Health Employees Union had engaged in prohibited mid-contract strikes to protest a series of legislative enactments, including the statute reviewed in *BC Health*. The appellants challenged the definition of strike in the British Columbia *Labour Code* which had been the basis for an anticipatory Board declaration that the protest strikes would be a violation of s. 57 of the *Code*. The Court of Appeal refused to engage in an analysis under s. 2(d), but instead concluded that the prohibition on

101. As of January 2011, however, no such statutory freeze has been imposed.

102. Brian Etherington, “Does Freedom of Association Under the *Charter* Include the Right to Strike after *BC Health*? Prognosis, Problems and Concerns” (2010) 15 CLELJ 315.

103. *Ibid* at 330.

104. Jamie Cameron, “The Labour Trilogy’s Last Rites: *BC Health* and a Constitutional Right to Strike” (2010) 15 CLELJ 313.

105. *British Columbia Teachers’ Federation v British Columbia Public School Employers’ Assn.*, 2009 BCCA 39, 306 DLR (4th) 144.

strikes violated the guarantee of freedom of expression. In doing so, it suggested that public sector unions may be in a different position from private sector ones. Public sector strikes inevitably target government and public opinion and it is generally impossible to divide strike motivations into political and collective bargaining categories. The Court concluded that “the effect of the mid-contract strike prohibition is a restriction on an effective means of expressive action and for that reason alone, it trenches on the s. 2(b) guarantee of free expression.”¹⁰⁶ Nevertheless, the Court refused to carve out, as the unions argued it should, through the application of the minimal impairment test, a *Charter*-protected exception to the ban on mid-contract strikes for peaceful, non-tortious, non-criminal political strikes. It also rejected the view that there should be an exception for political strikes that do not significantly affect the public interest. The rejection was based on their view that either of these approaches provides at best only a vague and indeterminate test for what is permitted and what can be regulated. It raised the concern, expressed by Justice McIntyre in the *Alberta Reference*, of avoiding judicial re-engagement in the control of strikes and the desirability of deferring to the legislature in imposing limits on strikes that avoid the exercise of judicial or administrative discretion.

5. *Freedom of non-association*

Brian Etherington raises the possibility that *BC Health* could provide the basis for revisiting the extent to which freedom of non-association limits various union security arrangements sanctioned by Canadian legislation.¹⁰⁷ He notes that the extensive reliance on international labour norms as a basis for interpreting freedom of association could be extended to applying those norms, with their relatively strong protection for freedom of non-association, to closed shop provisions and expenditure of union dues on non-collective bargaining purposes. The willingness of the Court to do so may be enhanced by its openness to revisiting legislative balances. He concludes that *Lavigne* and *Advance Cutting* could get the same treatment as the *Labour Trilogy*.

In relation to this, it is worth noting the startling decision of the Alberta Labour Relations Board in *U.F.C.W., Local 401 v. Old Dutch Foods Ltd.*¹⁰⁸ reaching the opposite result. It held that the legislative failure to require the inclusion of a Rand Formula in collective agreements violated

106. *Ibid* at para 37.

107. Brian Etherington, “The BC Health Services and Support Decision—The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did It Come From and Where Will It Lead?” (2008) 30 *Comp Labor Law & Pol’y* J 715.

108. *UFCW, Local 401 v Old Dutch Foods Ltd* (2009), 188 LAC (4th) 289, 171 CLRBR (2d) 1 [*Old Dutch*].

freedom of association, as the gap made it much more difficult for unions to effectively organize and engage in collective bargaining. The Attorney General initiated a judicial review. The union and the employer agreed to include a Rand Formula in their collective agreement. The employer therefore was not a party to the judicial review. The Attorney General and the union reached agreement that the application for review should be allowed on the grounds that the Board did not have jurisdiction to make a declaration of constitutional invalidity. However, a number of affected employees in the bargaining unit filed for intervenor or status, which the Alberta Court of Queen's Bench granted.¹⁰⁹ The Alberta Court of Appeal has now ruled that the issue is moot and that there is no basis for giving aggrieved employees intervenor status.¹¹⁰ Nevertheless, the saga indicates that there may be the possibility under the right circumstances, for arguing the kind of claim Etherington foresaw.

6. *Interpretation and Charter values*

BC Health has also been invoked in a number of cases, usually by unions, seeking sympathetic interpretation of specific statutory provisions. They call on boards or court to use *Charter* values to aid in the interpretation of statutory provisions. Although the Supreme Court has indicated in a number of decisions that it is willing to consider *Charter* values in assessing both common law rules and interpretive choices,¹¹¹ it has recently indicated it will not be particularly receptive to such claims in relation to interpretation of collective bargaining statutes. In *Plourde v. Wal-Mart Canada Inc*¹¹² the Court refused to reconsider its interpretation of the Quebec *Labour Code* provision dealing with what constitutes a good and sufficient for an employer dismissing employees. In particular, the Court confirmed the position that a closing of a business provided such a good and sufficient reason, and there was no basis under ss. 15 and 17 of the *Code*, protecting workers from discriminatory dismissals, on which to look at the reason for the closing. In refusing to engage in a *Charter* values analysis, the Court remarked that the entire *Code* "is the embodiment and legislative vehicle to implement freedom of association in the Quebec workplace. The *Code* must be read as a whole. It cannot be correct that the Constitution requires that every provision (including s. 17)

109. *Alberta (AG) v UFCW, Local 401*, 2010 ABQB 455.

110. *Alberta (AG) v UFCW, Local 401*, 2011 ABCA 93, 502 AR 188.

111. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130; *Pepsi*, *supra* note 34, and *Health Services*, *supra* note 7.

112. *Plourde v Wal-Mart Canada Inc*, 2009 SCC 54, [2009] 3 SCR 465.

must be interpreted to favour the union and the employees.”¹¹³ Perhaps more startling is the concern expressed about handing labour a “lopsided advantage” because employees, bargaining through a union, can take advantage of the freedom of association guarantee, whereas employers, bargaining individually, cannot do so.

7. *The role of labour boards adjudicating Charter invalidity*

BC Health is generating considerably more work for labour relations boards, who have been asked to assess the *Charter* validity of some of the statutory provisions which they are mandated to enforce. Boards have responded to the *Charter* arguments in some cases to the point of determining that some provisions are invalid and cannot be enforced. For example, the Quebec Commission des Relations du Travail has refused to enforce the provisions of the Quebec collective bargaining statute that precluded agricultural workers from being able to be represented by a union pursuant to the statute.¹¹⁴ The Ontario Labour Relations Board refused to apply provisions of the statute that had the effect of stripping bargaining rights from a union in the construction sector where the employer’s designation as a construction employer no longer accurately described the nature of its business.¹¹⁵ In Alberta, the Board went so far as to declare that the failure to include Rand Formula protection in the collective bargaining statute violates freedom of association. These cases continue to give hope to unions that it is not only the *ad hoc* restrictions on collective bargaining and the right to strike that may be subject to challenge.¹¹⁶ They may be able to chip away at many entrenched limitations that serve to hamper effective collective bargaining.

Conclusion

Ultimately, unions’ use of *Charter* litigation needs to be evaluated across multiple dimensions. The review of issues in the proceeding section demonstrates that such litigation in a post-*BC Health* world produces some victories, but the extent of those victories remains to be seen. Giving vulnerable workers access to collective bargaining regimes from which they had previously been excluded is a small step towards a more just world. But if the collective bargaining regimes themselves, whether they are ones already created by legislation or ones mandated by judicial fiat,

113. *Ibid* at para 56.

114. *Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 501 c L’Écuyer*, 2010 QCCRT 191.

115. *Independent Electricity Market Operator v Canadian Union of Skilled Employees*, [2009] OLRB Rep November/December 826.

116. *Old Dutch*, *supra* note 108.

do little to empower those vulnerable workers, the justice gains will be small indeed.

There is little to instill confidence that the kinds of constitutional interventions that we are seeing are likely to lead to a fundamental shift in the decline of union density and the eclipsing of collective bargaining as a central form of workplace governance. Even the *BC Health* decision did not ultimately block the BC government's ability to impose many of the costs of health care bargaining reform on vulnerable workers whose jobs were contracted out and whose vested rights were substantially curtailed. Other apparent victories also exemplify the narrowness of the gains. Two years after Ontario college part-time workers were extended collective bargaining rights, no certification order has yet been granted. Despite the characterization of collective bargaining as a fundamental right, the Supreme Court could still hold that Wal-Mart could close a store to thwart unionization, without being held to account under the unfair labour practice provisions of the Quebec *Labour Code*. The spectre that increased judicial intervention in collective bargaining regimes may lead to more robust protection for freedom of non-association is given some credence in *Old Dutch* when the court opening a space for disenchanted workers to intervene and argue that the imposition of a Rand Formula violates their rights.

It does not seem likely that *Charter* intervention will lead to extensive rewriting of existing labour codes. As Doorey points out,¹¹⁷ even if one could invoke international norms to argue that the current regime regulating such issues as union access to employer property are a violation of fundamental rights, it is not likely that the courts will see these as sufficiently substantive to intervene, or are likely to defer through as a section one analysis to the existing legislative balancing. The Court's view in *Plourde*¹¹⁸ that the legislative *Code* is the vehicle for embodying freedom of association in practice suggests that the Court is still likely to be relatively deferential to legislative choices. The pragmatic pluralists may celebrate such a position, and it serves to remind unions that their potential for success still depends extensively on being overtly political in pursuing their goals. There may be some promise of litigation success in areas such as a right to strike which, in Etherington's view of the logic of *BC Health* the Supreme Court would have difficult avoiding.¹¹⁹ This view of past and prospective successes suggests that unions should indeed include *Charter* litigation in

117. *Supra* note 62.

118. *Supra* note 112.

119. *Supra* note 102.

their toolbox, not only for the specific gains that they might make in any particular case, but as a way of focusing attention on collective bargaining as a fundamental justice claim, and as a way of mobilizing workers in other social and political spheres. But ultimately it is hard to avoid the view that the *Charter* cathedral's influence on collective bargaining is not likely to fundamentally alter basic structures of power and inequality, or to counter the forces of globalization and economic restructuring that cast even a longer shadow than does the *Charter* cathedral.