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Why the Right-Freedom Distinction Matters to Labour Lawyers- And to All Canadians

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This lecture is about very basic legal ideas such as rights, freedoms, and the distinction between them. It makes the argument that clear thinking about these basic ideas is required and that when these ideas are neglected we have a recipe for real legal confusion. More than that, a failure to attend to these basic concepts and their relationship can produce, as it has in recent Supreme Court of Canada Charter cases on "Freedom of Association," a real threat to the fundamental freedoms of all Canadians.

Cet article traite de concepts juridiques très élémentaires : droits, libertés, et ce qui distingue les uns des autres. L'auteur avance l'argument qu'il faut envisager ces concepts avec lucidité et que les négliger ne peut que mener à une profonde confusion juridique. Qui plus est, si on n'accorde pas à ces concepts élémentaires et à la relation qu'ils ont entre eux l'importance voulue, le résultat risque fort d'être une menace réelle aux libertés fondamentales de tous les Canadiens, ainsi que l'ont démontré des arrêts récents de la Cour suprême sur la liberté d'association.

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I. *An argument for Innis*

Innis Christie was my teacher, my mentor, my colleague, and my greatest academic supporter—he was unrelentingly generous to me and on my behalf. He is the reason I am a labour lawyer and why I am an academic. I am profoundly, as are many, in his eternal debt. It is one of the true honours of my life to be asked to give this lecture in his name.

A lot can and has been said, and said well, about the magnificent arc of his career. Innis Christie has been, and long will be, justly celebrated and acknowledged for his teaching, for his shaping of generations of law students, for his academic writing, for his academic leadership—not only as dean but throughout his career, for his public service, for his strengths as an adjudicator, for his national reputation as an arbitrator, and as Harry Arthurs reminded us in last year's lecture, for his influence on the very way people think about his field of law. But at the core of all of this accomplishment was the real person, Innis. He embodied all that our profession aspires to—he was smart, he was principled, he had great judgement, he worked hard, he asked a lot of himself and he expected others to do the same. He was decent, he was humane, he was down-to-earth, he was competitive, and he loved to laugh. In a world which increasingly seems to have far too few of them, he was a hero.

Martin Luther King famously said on the Washington Mall that he had a dream of a day when people “would not be judged by the colour of their skin.” Most people remember that. Sometimes they forget what Dr. King went on to say—“but by the content of their character.” Innis was a man of sterling character. The example he set by simply being Innis is, I believe, why we remember and honour him. Innis showed that being a good man was not simply compatible with a great career in the law, but essential to it.

In this lecture I will make an argument. It is an argument I hope that Innis would have liked. I am not sure if he would have agreed with it. But I do think he would have liked the cut of its jib. I think this because the argument is a bit old fashioned, because it tries to take legal thinking seriously on its own terms, because its theory is close to the ground and is found in some very simple, first year, law school sorts of ideas, because some fundamental labour law issues are in play, and because it claims that what is at stake is important for all Canadians. I also like to think Innis would have liked the cut of its jib because it is somewhat contrarian—it goes against the grain of much current thought in high places, such as the Supreme Court of Canada. The fact the powerful people in high places say things does not make them true. I know Innis shared that view.

Finally, I like to think Innis would have liked the cut of this argument's jib because this argument is made in the faith that clear thinking will, in the end, win out. Innis was not naïve—he did not think clear thinking was all that the world needed to become a better place. But he understood that without clear thinking, nothing worthwhile will come our way.

II. *An overview of the argument*

Now, before beginning the argument, a word about what this argument is about and where it is going, and why I think it is important.

On October 12th of this year the Federal Minister of Labour, Lisa Raitt, issued the following edict in connection with the Air Canada flight attendants negotiations: “I...hereby...direct the Canada Industrial Relations Board to either impose a new collective agreement on the parties or impose final binding arbitration to resolve outstanding terms of the collective agreement.” This order ended with an Imperial flourish —“In witness whereof the Minister of Labour has hereto set her hand this 12th day of October 2011.”¹

My view is that this is entirely chilling and we should all wake up to that fact. In Putin's Russia, or in China, overt connections between the state executive and powerful private interests are common and respect for the fundamental freedoms of ordinary citizens hard to find. It is not supposed to be that way here.²

If you find this evaluation a bit strong I ask you to consider what immediately preceded this edict. This was the Ministers' claim that there was a serious “essential services” issue—that is “an immediate and serious danger to the safety or health of the public”³—which was to be referred to the Board and which would have had the effect of delaying a strike. I view it as a serious comment on the current state of our democracy when a Minister of the Crown can, almost winking at us, make such a transparently unfounded and equally transparently motivated claim, in any circumstances. Let alone when serious issues and fundamental freedoms are at stake. Perhaps the worst part is the reaction of a large part of the

1. The order was allegedly made pursuant to s 107 of the *Canada Labour Code*, RSC 1985, c L-2 [*Canada Labour Code*]. The document can be found on the Canadian Industrial Relations Board website at <http://www.cirb-ccri.gc.ca/download-telechargement/ministerial_referral_107.pdf>.

2. The parties found it chilling too—for they immediately agreed to privately arbitrate their differences—rather than run the risk of having an arbitrator or an agreement imposed upon them.

3. See *Canada Labour Code*, *supra* note 1, s 87.4.

Canadian media and the Canadian public—that this is normal. “I’m all right Jack” seems the new morality of our time.⁴

The good news is that, in my view, this sort of exercise of state power is illegal. This is what the most important cases we read in law school—*Roncarelli v Duplessis*,⁵ *Smith and Rhuland*,⁶ the Insite Safe Injection case⁷—tell us. And, as these cases show unlike Russia or China, we still have a real judicial system with the power and will to enforce our basic ideas about living in a society governed by law, and not executive diktat.

But there is a complication in connection with cases like *Air Canada*.

The argument I make here is that we are currently at risk when it comes to getting *Air Canada*, and similar cases, straightened out. This is because they have a constitutional dimension and any challenge to Minister Raitt’s actions will be argued, as with the Post Office case and others, as a 2(d) ‘freedom of association’ case. It is my view that the Supreme Court of Canada has unnecessarily but darkly muddled the waters of 2(d), and that as a result we are in grave danger when it comes to the Court’s ability to get this one right. What I wish to do in this lecture is to sharpen our thinking about freedom of association and to clarify the waters. All in an effort to remove what I see as a clear and present danger to our ability to do what has to be done in situations such as the *Air Canada* fiasco.⁸

The argument is about the most important labour law decisions of my lifetime—*Dunmore*,⁹ *B.C. Health*,¹⁰ and *Fraser*.¹¹ For non-labour lawyers in the audience, let me briefly note that in the 2007 decision in *B.C. Health Services* the Supreme Court of Canada, following an opening it had

4. This is something to which I will return—the idea that simply because the actions of others have an impact on us that we have a right to object to that behaviour—or that the government must intervene to shelter us. Even if all that is happening is that those others are doing what they are free to do in a way which does not affect the legal rights of the rest of us.

5. *Roncarelli v Duplessis*, [1959] SCR 121 (Premier of Province cannot order Liquor Commission to revoke a liquor licence for a reason irrelevant to the purposes of the licencing regime—because the holder exercised his freedom to support Jehovah Witnesses).

6. *Smith & Rhuland Limited v The Queen, ex rel Brice Andrews*, [1953] 2 SCR 95 (Labour Relations Board acted illegally when it exercised its discretion not to certify a union for a reason irrelevant to purposes of the statute granting power to certify unions—because Secretary General of the Union exercised freedom to be to be member of communist party).

7. *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, 336 DLR (4th) 385. (Minister of Health acted illegally when he exercised his discretion not to renew a statutory exemption for safe injection clinic for reasons which bear no relation to, and in fact undermine, the purposes of the statutory regime granting the discretion.)

8. If we succeed in achieving this clarity we will also have laid bare what the cost of the dominant ‘I’m all right Jack’ attitude of our times really is.

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

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

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

created in *Dunmore* in 2001, dramatically overturned 20 years of *Charter* jurisprudence and held that our constitutional guarantee of freedom of association (2(d)) protects collective bargaining. As most people put it, the Court held that there is a constitutional “right” to collectively bargain in Canada. The 2011 *Fraser* case affirms this holding. But in those cases the court expressly did *not* decide whether there is a constitutional “right” to strike. It left that question open. This is the question which is squarely on the table now. This is the issue which has been placed front and centre by the actions of our Federal government in *Air Canada* and elsewhere.¹²

The problem is that these very important *Charter* cases are very confused in their thinking. This confusion stands in the way of the Court getting these abuses of power we witness in connection with *Air Canada* under legal control. They will, if not addressed, block a much needed response, equal in power to *Roncarelli* and *Smith v. Rhuland*.

But my interest in these cases is even deeper. Their potential to do harm is very basic, and extends beyond *Air Canada* type cases, because they are a threat to our rights and freedoms in general. That is, I believe that what they say is quite wrong—and wrong in a way which will affect all of our fundamental freedoms and rights.

I believe this is because these cases misunderstand a crucial distinction – the distinction between rights and freedoms—in a way which is dangerous for all Canadians, not simply as workers, but as citizens. The Supreme Court of Canada not only confuses this distinction, which I seek to defend, but purports to be positively hostile to it. In *Fraser* the majority actually says: “the *Charter* cannot be separated into two kinds of guarantees—rights and freedoms.”¹³ This is, in my view, a really very unfortunate sentence to have been uttered by your Supreme Court. Akin, only much more serious, to saying there is no difference between a pop fly and a home run. Even the Supreme Court of Canada cannot make that

12. On this issue, see the essays in the special edition of the Canadian Labour and Employment Law Journal, Brian Langille, ed, “Is There a Constitutional Right to Strike in Canada” (2009-2010) 15 CLEJ 1.

13. *Fraser*, *supra* note 11 at para 67. (The majority also quotes previous cases in which the term “right” was used when the Court meant “freedom,” and vice versa, such as the “freedom from cruel and unusual punishment” (from *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 107, [2007] 1 SCR 350). It states, as a rebuttal to Rothstein J, that “many of the rights in sections 7 to 12 do not entitle individuals to any form of state action.” This is true, but they provide rights against state action—they place a duty on the government to *not* do something, which is perfectly compatible with the proper conception of what a “right” entails. Because freedom describes a state in which I can choose to do or not do something, and all private actors can do likewise, a freedom obviously imposes a duty on the state to not interfere with that activity, but it imposes no duties whatsoever on other private actors, unless we are to turn that “freedom” into a derivative “right.” See below.

so by simply saying it. There is a grammar to concepts. You do not get to make them up.

Now, how will the argument proceed? This argument starts with some very basic reminders about private law, i.e. common law. It does so because we have to in order to see what is really going on in our constitutional cases. Some of our most important cases in the history of Canadian labour law—*Hersees of Woodstock*¹⁴ and *Pepsi Cola*¹⁵ will be prominent in my examples—are about these very basic private law ideas. The problem is that sometimes these very basic and important ideas get lost—go AWOL. Sometimes they show back up again. Legal life is always much better when they do not go AWOL.

Then, I will argue that these very basic common law ideas are required to understand the basics of our labour law statutes such as the Ontario *Labour Relations Act* or the *Nova Scotia Trade Union Act*. I will show how our often-lost-sight-of, our AWOL, basic ideas make clear exactly what our labour law statutes are up to.

Finally, I make the claim that our basic ideas not only make our common law and statutes clear, but they are also required to make sense of all of our recent constitutional litigation regarding freedom of association—i.e. to really make sense of what is going on in *B.C. Health* and *Fraser*.

My argument is that we will never be able to see what is so dangerously wrong with the *Fraser* decision—and never be in a position to right the wrongs of Air Canada—without our AWOL basic ideas coming home and shedding their light on these most important cases in our constitutional law.

Thus the argument goes in a number of steps—but it also goes common law, statute law, constitutional law. And it *ends* with an exhortation to all Canadians to appreciate the implication of the argument for the exercise of their constitutional freedoms.

14. *Hersees of Woodstock Ltd v Goldstein* (1963), 38 DLR 2d 449 (Ont CA) [*Hersees*].

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

III. *The argument*

1. *Private law as the starting point for understanding freedoms and rights*

The first basic idea which often goes missing these days is the distinction between rights and freedoms.¹⁶ There is, in spite of what the Supreme Court says, a basic distinction between freedoms and rights. Rights have to do with what I can demand that you do (pay me the \$1000 price you agreed to in our contract) or not do (not assault me). Freedoms have to do with what I am free to do or not do (to speak or not—to think this or not this—to join a union or not—to worship a God or not).

It makes no sense—it is conceptual nonsense—to say “I have a right to free speech.” Rather say, “I have freedom of speech.” Of course people, and lawyers, and judges DO say the former all the time—they speak of a right to free speech, or a right to freedom of association, and so on, when what they are talking about are freedoms. This is one of our problems.

This common way of talking is perhaps explained in our private law, but not excused, by the fact that my freedom of speech, for example, is in fact protected by a “perimeter” of what are correctly called rights. So, you cannot put your hand over my mouth to stop me exercising my freedom to speak—or send a bunch of thugs round to beat me up because I have joined a union—those would be torts—assaults. These tort and other normally applicable “background” legal rules do in fact construct much of the relevant legal structure in place when we speak of free speech.¹⁷

Thus, it might be natural to speak of a “right” to free speech. But natural as it is, it is more than potentially misleading because that to which I actually have a right is that you not assault me (when I am exercising my freedom of speech or association). These are two separate legal matters—my freedom concerning what I do, and my right about what you do.

So, that is the first very basic, but often lost sight of, idea—the right/freedom distinction.

16. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1946). For an instruction manual see John Finnis, “Some Professional Fallacies about Rights” (1971) 4 *Adelaide LR* 377. See also Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It”, (2009) 54 *McGill LJ* 177 [Langille, “Freedom of Association Mess”] at 198-201.

17. I do not take any position on the basic justification for this background set of rules—in a Kantian system of equal liberty, for example, or elsewhere. But see Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009). I merely appeal to what all lawyers know—that our rules are ones which we all have equally (i.e. are formally equal in their application). This is their great strength and, as all labour lawyers know, their weakness as well. See *infra*.

Even more primitive is the second and often lost distinction. This is the distinction between your actions which affect me or my interests, on the one hand, and your actions which violate my legal rights, on the other.

For example, I am free to start a restaurant in Truro. So are you. My restaurant may have a big impact upon you, your interests, and your exercise of your freedoms. If I start a restaurant and it is very good it may drive your not very good restaurant out of business.¹⁸ This has a large impact upon you but you have no legal claim against me. I have not violated your rights. My exercise of my freedom has had an impact upon your exercise of your freedom and upon your material interests. But here the freedoms simply contend—or contest—in fact. They do not conflict in law.

So, here are the two very basic but often lost ideas—(1) the distinction between my actions which affect you or your interests and my actions which violate your rights.¹⁹ And (2) the distinction between rights and freedoms.

There is a third idea which is often lost sight of and intimately connected to the first two. It follows from our ideas that because we cannot even get into court we have no worries about a judge trying to “balance” the exercise of our freedoms. The idea of a judge weighing up our interests is foreign to our understanding of contending freedoms. We do not want and do not expect a judge to weigh up which of two competing restaurants in Truro deserves to “win” out. But, so too, if you do violate my rights then there is also no balancing or proportionality involved. We do not want, and do not get, a judge saying things like—“Yes, the defendants burned down your restaurant, but you must understand that there they had a vital interest at stake—their business was suffering, they had rent to pay, and three kids in college—that led them to that course of action and it falls to

18. Or, given the “success” of McDonalds,” etc., the other way round—my not very good restaurant may drive your excellent establishment out of business.

19. Note that impacts can be positive or negative. That is, we all inflict gains as well as losses upon each other all of the time without attracting any legal scrutiny or cause for alarm. So, if I have a hotel in our town, and your restaurant is awarded three Michelin stars, and my hotel business does very well indeed, and all thanks to you, there is no legal claim available. There is enrichment here—but it is not unjust enrichment. I have violated none of your rights and our freedoms merely co-exist. (Note: it may even be a story of mutual gains.)

me to balance your interests with theirs,” Rather, we go from violation of right to vindication of it, unmediated by any balancing tests.²⁰

Here is a very famous Canadian labour law example of our ideas lost in action.²¹ It is a labour case involving what people used to call “secondary picketing.” In 1963 the Ontario Court of Appeal issued its decision in *Hersees of Woodstock*.²² The facts were simple—there was a labour dispute at a shirt manufacturing plant. The union approached a retail store selling the shirts and asked them to stop selling. The store owner refused. The union picketed the store—two men walked up and down on the public sidewalk with a sign which read “Attention shoppers: Deacon Brothers [the name of the struck manufacturer] sportswear sold at Hersees [the name of the shop]” and handed out leaflets. All very peaceful. All very Canadian.

The Ontario Court of Appeal began its judgement by making a mess of an analysis of some economic torts (especially inducing breach of contract). I pause to note that this particular sort of weak thinking was something Innis was an expert on exposing. But then the court, famously—almost wonderfully—said the following:

But even assuming that the picketing carried on by the [union] was lawful in the sense that it was merely peaceful picketing for the purpose only of communicating information, I think it should be restrained. The [store owner] has a right lawfully to engage in its business of retailing merchandise to the public. In the City of Woodstock where that business is being carried on, the picketing for the reasons already stated, has caused or is likely to cause damage to the [store owner]. Therefore, the right, if there be such a right, of the [union] to engage in secondary picketing of [the store owner's] premises must give way to [the store owner's] right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance....²³

This is, based on what we have just noted, obvious nonsense. Our three lost ideas show why. First, the store owner does not have a “right” to “engage in its business”; it has the freedom to do so. The workers do not

20. Another and deeper point—this is so because if there is a violation of a right then costs and benefits are in fact irrelevant altogether (and thus there is nothing to balance). If while I am away you break into my house and host a nice dinner party, but clean up perfectly afterwards so that I have suffered no loss (the place is even cleaner than I left it)—that is still a violation of my right. And, again, it does not matter in law if it really matters to you in fact that you host a nice dinner party (your whole career will be ruined if you do not host a party for your boss). The law is correctly unconcerned with all of that.

21. Or is it lost ideas in action?

22. *Supra* note 14.

23. *Hersees*, *supra* note 14 at 454.

have a “right” to picket; they have the freedom to do so. Second, these freedoms cannot and do not conflict in law at all. They merely contend in fact. Third, when there is no legal violation of a right (“even assuming the picketing was lawful...”) we do not need and should not get to any balancing test at all.²⁴

The problem with a judge saying that the right to trade is “far more fundamental” than the right of the workers to picket is not that it is wrong (although you may agree with me that freedom of speech is right up there with the best of them in terms of “fundamentality”)—it is, rather, that it is an insult to the basics of our legal system, which we have just reviewed, for a judge to say anything at all. There is no judicial work to be done here. Yes, the store owner’s interests may have been affected (some consumers stop buying in solidarity)—but not its rights. Just as the store owner carrying on selling the shirts may have a negative impact on the interests of the striking workers. But this is all legally meaningless—there is nothing to adjudicate here. This is simply a case of contending freedoms. There is no violation of a right. But we need our basic ideas to see this.²⁵ When we do keep our eye on the legal basics we can see that *Hersees* is just our “two restaurants in Truro” problem. And we need and want the same solution to it here as we do there.

But sometimes our lost ideas, like prodigal sons, find their way home as they did in Canada in the 2002 Supreme Court of Canada decision in *Pepsi Cola*²⁶—after 40 years in the wilderness. In that case the *Hersees* decision was relegated to the legal scrap heap. *Pepsi Cola* is a beautiful decision.

The key facts were basically as in *Hersees*—striking workers from a Pepsi plant picketed retail outlets selling Pepsi products. The employer objected in the courts, relying on *Hersees*. But the approach taken in *Pepsi* is exactly the opposite to that taken in *Hersees* and explicitly so. It is an approach which goes back to our legal basics and gets them right. The lost

24. This is leaving aside the fact that here the balancing is no balancing, rather a complete trumping of the freedom to picket by the freedom to trade.

25. In a society which takes freedom of speech and freedom to trade seriously there is nothing legally interesting at all when, say, a group of students peacefully pickets a local fashion store to protest use of seal skin coats from Canada, or clothing made in sweatshops abroad. And if consumers react, that is not a problem or even a legally relevant fact—that is the exercise of another freedom. It is the world working as it should. In the absence of a tort or some other legal wrong there is no legal issue to be litigated. And in a free and democratic society the last thing we want is a judge “balancing” these freedoms.

26. *Supra* note 15.

ideas find their way home.²⁷ The Supreme Court said that correct approach was to hold that picketing (even “secondary”) is to be permitted unless it involves a legal wrong (a crime or a tort). This is, as we have seen, surely correct. There is no need for further “balancing” at all. For a court, or anyone else, other than the parties, and those such as consumers to whom they appeal in a lawful manner, to try to “balance” these freedoms is an affront to the freedoms—a contradiction of the very concept of a freedom.

2. *Statutes and the creation of derivative rights from freedoms*

Now let us leave the common law world and move to what labour lawyers know all about—collective bargaining legislation. In Ontario, *The Ontario Labour Relations Act*²⁸—in Nova Scotia, *The Trade Union Act*.²⁹

At common law we all have the freedom to associate. As we have seen, that *freedom* is protected against actions of other private actors by the general and background “perimeter” of common law *rights*, which we all enjoy. (So, again, you cannot send around a bunch of thugs to beat me up because I have joined a union, because I have tort rights not to be assaulted—and you have tort duties not to assault me.)

But sometimes, we do protect the exercise of a freedom from other interference by other private actors with more than just the usual background system of rights and duties. Sometimes we do construct in our legislation what I believe are properly called “derivative rights”—i.e. rights derived from this freedom, for the purposes of protecting the exercise of that freedom. That is, sometimes we interfere with the freedoms of others in order to protect workers’ freedom to associate. We alter the normal background rules. We trade off one person’s freedom in order to protect another person’s freedom. We alter the world of contending freedoms by creating rights where none existed before. Labour lawyers are very familiar with this sort of legal move.

We are now at the stage where we can more fully deploy our statutory analogy. The foundational provision of the *OLRA* is s. 5 which reads: “Every person is free to join a trade union of the person’s own choice and

27. Although this case did not directly implicate any constitutional protections, the court saw the issue in which the law had to “balance” what it called the “values and interests” at stake—freedom of speech/picketing and freedom to carry on business. (Keep your eye on the way the word balance is used here—this is a key point.) The correct way to do this, the court held, was not to adopt the *Hersees* rule that secondary picketing was always illegal, nor to balance in a more nuanced way via well accepted legal ideas invented after *Hersees* such as the “ally doctrine” which aim at a more delicate balancing.

28. *Labour Relations Act*, 1995, SO 1995, c 1, Sch A [*OLRA*].

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

to participate in its lawful activities.”³⁰ I tell my students that the rest of the *OLRA* is all just detail in support of s. 5. Section 5, and its Nova Scotia equivalent, s. 13 of the *Trade Union Act*, are what it is “all about.”

If all we had was s. 5 then that freedom would, as noted above, be protected by the normal perimeter of rights and correlative duties. (Again, you cannot send a bunch of hugs around to beat me up because I have joined a union.) But s. 5 is not all there is. There is more. Much more. First, the unfair labour practice provisions from the *Trade Union Act*:

53(3) *No employer and no person acting on behalf of an employer shall*

(a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment or any term or condition of employment, because the person

(i) is or was a member of a trade union,

53(1) *No employer and no person acting on behalf of an employer shall*

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;

Then there is the duty to bargain in good faith:

s. 35 *Where notice to commence collective bargaining has been given...*

*(a) the certified bargaining agent and the employer, ...shall, without delay, ...meet and commence ...to bargain collectively with one another and shall make every reasonable effort to conclude and sign a collective agreement;*³¹

It is critical to note the following: these are not part of the normal background perimeter of rights which happen to protect our freedom to associate (along with much else), such as my right to not be assaulted. These statutory provisions construct very specific right/duty relationships which are not part of the normal set of rules applying to all citizens. They are rights and duties created specifically to protect this freedom (to associate) for this particular group (employees). These are rights and are

30. *Supra* note 28. (I know that in Nova Scotia the relevant section (13) speaks of a “right.” This in my view speaks to the ease of slippage in our language I spoke of earlier. No matter what the Act says—conceptually this is a freedom, which is protected by various rights—some created by the statute itself).

31. *Supra* note 29.

properly called “derivative rights”—they are derived from, because they are necessary to the exercise of, freedom of association.³²

Let’s start with s. 53(3). Without it, an employer is free to dismiss (with reasonable notice) an employee who joins a union. Or not to hire such a person. That is just *Christie v. York*—at common law we are free to contract with anyone (or not) for whatever reason we may have, however odious.³³ The whole point of s. 53 is to alter that legal world—which still holds for all (almost) other reasons for hiring and firing, and contracting more generally. It alters the world of formally equal and contending freedoms which the normal background rules construct. It does so by limiting, most importantly, the employer’s freedom. This is done by granting employees rights which impose duties on employers. Same with the duty to bargain.³⁴

32. We will return to the issue about how we “know” when to create such derivative rights below—but we all know, see above, the basics of our answer. We create the derivative rights when we know that the freedom would not be worth the paper it’s written on without them. That is, we will have a sort of test of real necessity—or impossibility—along the lines that “the real exercise of the freedom, without these derivative rights, is not going to happen, given what we know about the world.”

33. See *Christie v York Corp*, [1940] SCR 139 (a tavern owner defendant was free to refuse to serve the plaintiff because of his race) [*Christie*].

34. The s. 53(1) protection is really particularly interesting, as we have seen, because it not only provides rights to employees to not be subjected to a specific action for a specific reason (i.e. the s. 53(3) duty to not dismiss an employee for joining a union), but it provides protections from the impact of certain activities, regardless of the reason for those activities. That is, it creates a “perfect” or complete protection for the exercise of the freedom—akin to restriction on the state imposed by constitutional freedoms.

But so too are employee freedoms constrained by the great compromises the Act enforces. So—at common law, both union and employer had the freedom to bargain, and could chose not to entertain the representations of others, for whatever reason. That’s why (at times violent) recognition strikes occurred in Canada, and still occur elsewhere. (For a particularly gruesome episode in Canada, see Stan D Hanson’s essay “Estevan 1931” in Irving M Abella, eds, *On Strike: Six Key Labour Struggles in Canada, 1919–1949* (Toronto: James Lorimer, 1975) at 33.) And it was specifically these altercations that our statutes meant to eradicate by taking away the freedom to strike for recognition and giving the employees a right to have their unions recognized and bargained with in good faith, attached to a correlative duty on the employer, all as a means instrumental to the exercise of that freedom. Again the whole point is to alter the normal distribution of rights and freedoms and for the same reasons. This is done by converting background freedoms, which merely contend—as in our two restaurants example—into right/duty relations.

For our purposes it is important to see that what we are doing is creating, by legislative action, (derivative) rights to protect the freedom. Sometimes “we” do this—and often we do not. In most of the world of contracting we do not. But in the *OLRA*—and the *Ontario Human Rights Code* (RSO 1990, c H 19)—we express dissatisfaction with the “normal” world of rights and freedoms as expressed in *Christie*, *supra* note 33, where the freedom to contract was complete. (Again, to know when the “background freedoms” need to be modified, we do need and do have a test.) The fact that we, through the organs of the state, intervene “positively” by creating rights and duties where only freedoms once existed does not—as the majority in *Fraser* seems to think it—magically eliminate the distinction between rights and freedoms. To the contrary, it highlights the necessity for the distinction because it is needed to make clear what sort of claim is being made in these cases, the legal test appropriate to that sort of claim, and the remedy required to satisfy that sort of claim as opposed to others.

3. *The constitution and the creation of derivative rights*

Now, we can make our final move—from the statutory world to the constitutional world. And we come to the payoff for this hard slog through the lost ideas, and the idea that they are required to make sense of what our common law and our statutes are up to. With this structure of thought, made available to us by keeping our eye on our basic ideas, we can see what is going on in our recent *Charter* cases on s. 2(d).

First, we now have s. 2(d). What does it add to our common law freedom to associate, protected by the normal common law background of rights against private actors, supplemented by our statutory “derivative” rights against private actors? It is common ground among all constitutional law scholars that what 2(d) does, at a minimum, is to add to these rights against private actors a new right against the state—that it not infringe the freedom as it so dramatically did in *B.C. Health*, and in our Air Canada example. This is the easy part.³⁵

But now we come to the hard part. The hard part is not when does s. 2(d) protect us all against state interference with our freedoms. It is, rather, when does 2(d) protect us against other private actors interfering with our freedoms?

To put this in a form more natural for Canadian constitutional lawyers: when does the *Charter* create, or force legislatures to create, derivative rights? That is, when is there a constitutional duty on a legislature to pass laws restricting the freedoms of private actors—mainly employers—which interfere with worker exercise of their freedom? When is there a constitutional duty—as opposed to a good legislative idea—to alter the background rules? When is there what I call a “diagonal” application of the *Charter*?

In light of all of the above we can see that the questions in our recent and famous cases are best seen as follows:

- (a) The question in *Dunmore* was whether the state was constitutionally obligated by s. 2(d) of the *Charter* to create for agricultural workers s. 53-type, derivative, unfair labour practice rights, against private actors (employers)? Answer, yes.
- (b) The questions in *B.C. Health* were first, did the state violate worker freedom of association by tearing up collective agreements and forbidding future negotiation? Answer, yes. And second,³⁶

35. But see *infra*; the Supreme Court of Canada is confusing the easy and the hard part.

36. Amazingly, for it was not and could not be raised in the case for reasons we come to below. It is for this reason that I treat the case in what follows as primarily about the first question—and not a derivative rights case.

whether s. 2(d) required the creation of s. 35-type, derivative, duty to bargain rights against private actors (i.e. employers). Answer, yes.

- (c) The question in *Fraser* was whether the state was constitutionally obligated by s. 2(d) to create all of the other important rights and duties of the *OLRA* (the “Wagner Act Model”) beyond ss. 53 and 35 (such as “exclusivity,” arbitration, and so on). Answer, at the Ontario Court of Appeal, yes, but at the Supreme Court of Canada, no.

But there is a very real problem lurking here which we are now in a position to put our finger on. *Dunmore/Fraser* are derivative rights cases—they ask whether the employees’ s. 2(d) freedom obligates the government to alter the background rules and create legislative derivative rights for those employees (with correlative and attendant duties on other private actors—i.e. employers) in order to protect the employees’ freedom.

But *B.C. Health*—like the *Trilogy*³⁷ before it—or now *Air Canada* or *Canada Post*—is not such a case—the claimants there were not alleging that the state had a duty to intervene to alter the normal background rules governing the rights and freedoms of other private actors. They were complaining that the state’s legislation limited their freedom.

There is a very important distinction here between *Dunmore* type cases and *B.C. Health* type cases.

Dunmore/Fraser are cases where the claim is that the government needs to “go to bat for” the freedom by creating derivative rights. (It is a “going to bat for” the freedom case, or what I will call a GTBF case). We are asking the state to “protect” the freedom from attacks by other private actors. *Dunmore* and *Fraser* are hard cases.

B.C. Health is not that type of case at all. It is a case where the claim is that the government has “taken a bat to” the freedom. (It is a “taking a bat to”—or a TABT—case). It is an easy case. We are simply asking the state itself to “respect” the freedom.³⁸

37. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313; *PSAC v Canada*, [1987] 1 SCR 424; *RWDSU v Saskatchewan*, [1987] 1 SCR 460.

38. The language of respect/protect is found in a very familiar set of ideas used in human rights discourse. Human rights can be: 1. Respected by the state (the state itself must not violate the right or interfere with the freedom). 2. Protected by the state (the state must intervene to restrain other private actors (here, primarily, employers) from violating the rights and interfering with the exercise freedoms of others (here, employees)). 3. Fulfilled, Guaranteed or Promoted by the state (the state must provide, for example, schools to those with a right to minority language education.) For a nice example of the use of this typology in a labour law context, see Judy Fudge, “The New Discourse of Labour Rights: From Social to Fundamental Rights?” (2007) 29 *Comp Lab Law & Pol’y J* 29.

B.C. Health is an easy, "Respect," (TABT) case.³⁹ *Dunmore* is a hard, "Protect" (GTBF) case.⁴⁰

Why does this distinction—TABT/Respect vs GTBF/Protect—matter? Because it is fundamental.

In GTBF cases, in which the state is asked to create a derivative right, we will, as we have noted above, *need* a test which marks this sort of circumstance off from the rest of the world where freedoms are simply left to compete.⁴¹ We need an answer to the question—why is the freedom of this person (the employer) to be altered, via the imposition of a duty upon them (i.e. granting a right to the employee)? Why is there a "positive duty

39. See *supra* note 36 for clarification of this point.

40. This forces us to clarify another conceptual point and confusion which stalks these cases. In Canada it is said: 1. that the *Charter* applies to "state action." It does not apply to private actors. And 2. there is, in general, no "positive duty to legislate." What this adds up to is that in Canada, except in rare cases, all we have is a constitution which "Respects"—and does not "Protect" rights and freedoms from the exercise by other private actors of their own freedoms. In other constitutional systems the language used is slightly different and the rules often very different. In Europe, for example, people distinguish between "vertical" application of constitutions (state-citizen, or "respect" scenarios) and "horizontal" application (citizen-citizen, or "protect" scenarios). So, to translate, in Canada we have, in general, only "vertical" application of our *Charter*—this is just another way of saying we have a "state action" requirement. Now, what is going on in *Dunmore/Fraser*, but not *B.C. Health*, is that we are creating exceptions to this basic set of constitutional rules which apply "in general." These are cases where it is argued that the normal rules do not apply. It is argued that it is not enough that the state itself not interfere with the freedom to associate (i.e. it is not enough the state itself "Respects," stays out of the way, or refrains from "taking a bat to" the freedom). It is argued that the state must "Protect" the exercise of the freedom from the actions of other private actors (i.e. employers). That is, it is argued that the state must go to bat for the freedom and create "derivative rights" for employees against (with correlative duties upon) employers. In these cases it is argued that there is a "positive duty" (which does not exist "in general") to legislate. In *Dunmore* this argument worked. In *Fraser* it did not. In *B.C. Health* the argument was not made—but it "worked." Note: this does not mean that we have moved from "vertical" to "horizontal" application of the *Charter*. The result is not that employers are bound by the *Charter* (no direct citizen-citizen application). We are in a sort of half-way house—what we might call diagonal application of the *Charter*. Employees cannot sue their employers for interfering with their freedom to associate, but they (well, at least agricultural workers) can sue the government for not passing legislation to stop employers from interfering with their freedom to associate.

In a GTBF case, what we are asking is whether or not there is a positive constitutional obligation on the government to act by providing rights that can be enforced against other private actors. We are asking whether by not intervening in the contest of freedoms between private parties, the government has thereby violated a constitutional obligation. Although, in cases like *Dunmore*, attempts have been made to suggest that "state action" has limited the freedom, the real culprit is state inaction. On the contrary, a TABT case is a situation in which, but for the state's intervention, one would not be prohibited from exercising their freedom in a specific way. So, in *B.C. Health*, but for the impugned legislation, individuals would have been free to associate for the purposes of bargaining over a wide range of important contractual terms. The issue here is that the state has stepped in, and has restricted the sphere of freedom of union members, because they were bargaining collectively. It is not about creating a derivative right, but rather about infringing on the freedom to bargain collectively.

41. This is our point about *Pepsi-Cola*. In that case, the Court rightly decided to simply let the competing freedoms—the union's freedom to picket, and the claimant's freedom to conduct a business—compete. In other words, it overturned the erroneous creation of a derivative right (for the employer) in *Hersees*.

to legislate” here and not elsewhere? Why is the normal constitutional default rule that the only obligation on the state is to “respect” the freedom not sufficient? Why do we move to diagonal application of the *Charter* in this sort of case? ⁴²

Statutory labour law has long had an answer to these questions in the idea that, because of inequality of bargaining power, employee freedoms would be empty unless protected by a perimeter of rights that is wider than the mere normal background tort and contract rights. But does this answer work for the constitution?

Now this seems to be the sort of test articulated in *Dunmore* and *Fraser* for our constitutional law. Only the test there is extremely stringent under which only *very* badly off workers get the benefit. “Ordinary” workers, RCMP officers, Michelin workers, or even Walmart workers, do not. So, in *Dunmore* Justice Bastarache distinguished the agricultural worker claimants in that case from previous claimants for whom no *Charter* remedy was provided, such as the RCMP officers in *Delisle*,⁴³ on the basis that previous claimants could not show that the “fundamental freedom at issue... was impossible to exercise” (emphasis added) without the state going to bat for the freedom, by creating derivative rights.⁴⁴ In *Fraser*, the Court reiterates that high standard.

But here is the main point: this is a test which we need only when we are demanding that the state act by creating derivative rights. It is a test for the hard, GTBF, protect, cases.

This is *not* a test, it should be obvious, which has any role at all in easy, TABT, Respect cases, like *B.C. Health*. Or *Air Canada*. The idea that there is a stringent test of impossibility to be deployed here is very odd if you think about it. It is inconsistent with our basic understanding of the *Charter*. If the government interferes with my freedom of speech—or religion—or any other freedom—the test is not, has not been, and should not be, “has the state made it impossible to exercise the freedom”? The test is, rather, whether the state has interfered with the freedom in a way that cannot pass s. 1 muster under some version of the Oakes test.⁴⁵

This is the fundamental mistake in the majority in *Fraser*. They say the protection for collective bargaining all goes back to *Dunmore*. They say all the cases are *Dunmore* type cases. They say that *B.C. Health* “follows directly from the principles enunciated in *Dunmore*.”⁴⁶ They say

42. On the idea of diagonal application see *supra* note 40.

43. *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989.

44. *Dunmore*, *supra* note 9 at para 25.

45. *R v Oakes*, [1986] 1 SCR 103.

46. *Fraser*, *supra* note 11 at para 38.

these are all derivative rights cases. They actually say at numerous points and for the first time that the right to collective bargaining is merely a derivative right.⁴⁷ They say that “(i)n every case, the question is whether the impugned law or state action has the effect of making it *impossible* to act collectively to achieve workplace goals.”⁴⁸

This is all very wrong and very confused. We have seen why.⁴⁹

Sections 35 (unfair labour practices), and 53 (duty to bargain) of Section 13 of the *Trade Union Act* and 2(d) of the *Charter* are derivative rights. When someone brings a claim that the government has a constitutional duty to create such rights—and as a result limits those of someone else, i.e. the employer’s freedoms—we will need and do have a rule that demands that they show that this is necessary to the realization of the workers’ freedom—or perhaps, as the Court suggests, that it would be impossible to exercise without the creation of rights.

Sections 5 of the OLRA and 2(d) of the *Charter* are not derivative rights. They are not rights. They are freedoms. And they are not derivative. Of anything. They do not exist as a necessary means or precondition to some end (as is the case with ss. 35 and 53). They are the end. This freedom is what it is all about. When the state hobbles, or interferes with, or constrains the exercise of the freedom in any manner which does not satisfy s. 1 we have a constitutional wrong.⁵⁰

47. *Ibid* at paras 46, 66.

48. *Ibid* at para 46 (emphasis added).

49. This is, I believe, and can see now with more clarity, what Justice Fish warned about in his solo dissent in *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 in connection with s 2(b). See also Jamie Cameron, “Due Process, Collective Bargaining, and s.2 (d) of the Charter; A Comment on B.C. Health Services” (2007) 13 CLELJ 323 at 344.

50. In my view, collective bargaining is an activity that is simply doing with others what I am free to do myself. It is the exercise of the freedom. It is not a means to the exercise of the freedom. So, when we confuse GTBF/protect cases with TABT/respect cases we are making a large mistake. What we end up doing is putting a very stringent and totally inappropriate test in the way of our basic freedoms. This is a very bad—perhaps unthinkable—idea. It will have a large impact in our law.

Here is the implication for the “right”—i.e. freedom—to strike. There is in my view a coherent account of freedom of association and it is very easy on that account to see how freedom of association leads to a freedom to collectively bargain and a freedom to strike. (These are two actions I am freed to take as an individual—therefore I am free to do them in association with others.) Collective bargaining is not derivative of freedom of association—it is just freedom of association being exercised in the workplace. Collective bargaining is associational bargaining; it simply is doing with others what I am free to do. We do not have collective bargaining because it is conducive to, or promotes, or is a necessary precondition to, freedom of association. It is just freedom of association in action in the real world. And legislation directly taking a bat to this freedom, through constraining its exercise by the operation of law, is an assault on that freedom. So too with striking, and the attempts by legislatures to prohibit a collective refusal to work without a contract, is an attack on that freedom. These activities have nothing to do with the very important idea of derivative rights. And nothing to do with the stringent test for their creation.

When the state interferes with the exercise of any freedom (whether of speech or religion or thought or association) the question is—“are we free to do this or not”? and the answer lies in whether the state can justify any interference with or impact upon the freedom under s.1.⁵¹ The question is not “do you, the citizen, really, really need to exercise the freedom”? The question is supposed to be “does the state really, really, need to interfere with your exercise of the freedom”? The hidden result of *Fraser* is to confuse TABT (Respect) and GTBF (Protect) cases. They are different. The result of this confusion, the result of treating TABT cases as GTBF cases, is the setting of the stage for a real evisceration of fundamental freedoms.

We have lost the distinction between easy and hard constitutional cases. All the cases are now hard. This is not right.

So here, for example, is the implication of all of this for the Air Canada and all of the other freedom to strike cases coming our way: If the freedom to strike, for example, is seen as a “derivative right” case—and thus one afforded to individuals only if they “really, really need it,” or where depriving them of that freedom would be to make association “impossible” then we are very unlikely to have meaningful protection of a fundamental liberty.⁵²

But if we stick to our basic ideas we can see what is going on here—and change it. There is hope. Recall—this is what *Pepsi* got right. The

51. In this sense freedoms, because of the “state action/vertical application” rule, always provide citizens with rights against the state to respect the freedom—i.e. it puts a *duty* on the state to respect the freedom. The issue in *Dunmore/Fraser* is whether the state must also legislate to protect—i.e. to legislate derivative rights for employees against employers. And in *B.C. Health* the Court created a derivative right in case in which it was not - and could not conceptually be—asked to do so because it was not a Protect case at all, but rather a Respect case.

52. If, however, striking is seen as the exercise of a freedom to do with others what we are free to do alone, than we have a much more robust and meaningful protection of basic civil liberties, the deprivation of which by the state will have to be demonstrably justified under s 1 in order to pass constitutional scrutiny.

The points made here help identify the nature of the shadow being cast over our law by *Fraser*. They will also, I hope, reinforce the important idea that we do not really need all this constitutional exertion in these cases (which is done so poorly in any event). Rather, we can see that in our statutes we have already sorted out these difficult issues in a clear way. The only issue really in *Fraser* was the question: why do other workers in Ontario get this package of derivative rights, but not agricultural workers? Why are they short-changed in the distribution of protection of the fundamental freedom? That is, why are they treated unequally? In other words, why is this not a *Charter* s 15 issue? As I have argued before, that is the real question in these cases and asking that question is the way to avoid all this unnecessary, very confused, constitutional theorizing by the Supreme Court of Canada (See Langille, “Freedom of Association Mess”, *supra* note 16 at 204-212). It would get us straight to the actual complaint and required remedy. The more decisions like *Fraser* we have, the more we need to get this right. The costs of getting it wrong now include, as we have seen, some very real and very basic constitutional confusions which are of capable of very broad application in our constitutional law.

court in that case was prepared to ask the questions we need to ask when the basic but lost ideas come home—"when do we need derivative rights (for employers in that case) and when do we leave the contest of freedoms alone"? And to answer it correctly: "there is, in this case no good reason to interfere with the contest of freedoms by creating new derivative rights for employers."

This is very basic. And very important for all of our constitutional law. We really need to focus on this question—when does the constitution require the creation of derivative rights—i.e. altering someone else's freedoms—to protect my freedoms? And when not. That is a tough question. In seeing that this was the right question, we got *Hersees* properly overruled. We are also able to clearly see what is at stake in *Dunmore/Fraser*. And agree, or not, whether it was sensibly answered. You might take the view that the test was applied too stringently—that all workers need derivative rights protection, not just the especially vulnerable agricultural workers of *Dunmore/Fraser*. Or you might take the view of Justice Rothstein in *Fraser*⁵³ who seems to believe that we should never do this—that we should never convert contending constitutional freedoms to right/duty relationships. We also know that we have been answering this question in our statutes very easily and for a long time. What is the difference between the statutory version of the question and the constitutional version? These are issues that confront us in derivative rights/GTBF/respect cases like *Dunmore/Fraser*.

But the important point here is that these are not the questions which confront us in the easy, state violation/TABT/respect cases like *B.C. Health*. Or *Air Canada*. Or the *Post Office*. When the state is taking a bat to a fundamental freedom we do not need to worry about when we should be sacrificing one private actor's freedom for another's. We simply have private actors' freedoms being infringed by the state—for any one of a number of reasons—like saving money—or avoiding inconvenience to the travelling public—or some purely ideological consideration. These are not good reasons to interfere with the fundamental freedoms of others.

53. *Fraser*, *supra* note 11 at para 188-203.

As we have noted, the fact that others, exercising their freedoms, have an impact upon us—even a lot of us—is not news. It is not legally interesting.⁵⁴

4. *Why the distinction between constitutional rights and freedoms matters to all Canadians*

What we are all interested in is freedom. Real freedom.⁵⁵ In some extraordinary circumstances agricultural workers argue for the alteration of the normal and formally equal distribution of legal freedoms of others, in the name of protecting their fundamental freedoms. We have a very stringent test in these “going to bat for” the freedom type cases. But here the issue really is “should we trade freedom for freedom”? And the claiming private party must meet a strict test—i.e. offer a very powerful justification for the trade-off of freedoms requested in its favour. The party arguing for a constitutional limit on the freedom of others meets a high hurdle.

But, because freedom is what is important we also never let the state simply take away the freedoms of Canadians—for reasons of convenience, or ideology, or anything else. Here, in “taking a bat to the freedom cases,” the test cannot be one with a heavy onus on the citizen. It must rather rest heavily on the state—i.e. the party seeking to limit the freedom. *Fraser* gets this very wrong. It reverses the onus in our basic and easy constitutional cases. It stands *Oakes* on its head.

B.C. Health was an easy case. So should be the Post Office and Air Canada strike cases. They are TABT cases. My point is that the Supreme Court of Canada will make them hard cases by treating them as GTBF

54. If we start to think it is, we will end up in some very odd legal places. Like the following. Irving shipyards just won the 25 billion dollar contract to build our new Navy ships. This will have, we all hope, a wonderful effect on the local economy—suppliers, truckers, local restaurants, the real estate market, car sales and on and on and on. Irving is having a positive impact on all of us—does that mean they can sue us for the enrichment we will all receive? No—we are enriched but not unjustly. We have not violated their rights. This is a pretty important point to keep in mind.

Or take the opposite example. The board directors of a large paper company decides to shut down a plant in Nova Scotia—potentially devastating the local economy (suppliers, truckers, real estate, car sales, restaurants, and on and on). They do this to maximize shareholder value, that is, because it is in their interest. Does this mean we can sue them for the losses we have incurred because of their exercise of their freedom? We know the answer.

There just is a big distinction between our doing something which has an impact on the interests (positive or negative) of others—and our doing something which violates the rights of others. There is a critical difference between my exercise of my freedoms and my violating your rights. Impacts—positive and negative—and very real are all around us. They are not to be confused with violations of my rights.

As we have noted, sometimes your very good restaurant can drive my restaurant out of business. Sometimes it can benefit me—if I own the hotel next door, for example. That is life.

55. See Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

cases. They are making it much easier for the state to violate our freedoms in the absence of a good reason. In *B.C. Health* and *Fraser*, they were mixing up GTBF and TABT cases. They were doing this by either confusing or jettisoning our very basic ideas. That is very bad news for all Canadians who value their freedoms. All of our freedoms are at risk if this confusion continues.

In preparing for this visit back home to Dalhousie I was leafing through Innis's book—based on his Cambridge thesis—*The Liability of Strikers in the Law of Tort*.⁵⁶ At the very end of that book—in the very last sentence—Innis makes this same point. While enumerating some of the things he has not addressed in the book—like essential services strikes—and he writes:

These are matters which are beyond the scope of this [book] but it is clear that provisions in our law for emergencies and special cases will be adequate only if they are superimposed on a law that provides rationally for normal industrial disputes.⁵⁷

That is what I am pleading for. Rationality. Clear thinking. Keeping basic ideas in play. All in the name of protecting our freedoms. I worry deeply that that the Supreme Court has made all of this very difficult for us to do. I am arguing that this needs to be, and can be, put right. That is my argument for Innis.

56. Innis M Christie, *The Liability of Strikers in the Law of Tort* (Kingston: Queen's IRC Press, 1967).

57. *Ibid* at 195.