Freedom of Association: The Constitutional Limits of Union Rights

Introduction

As part of the fundamental freedoms in the *Canadian Charter of Rights and Freedoms*, section 2(d) guarantees Canadian people the freedom from state interference when they lawfully associate with one another.[1] But what 'associating' actually involves has been a tricky question for the Supreme Court of Canada (SCC) when faced with section 2(d) cases brought by private and public-sector labour unions.[2]

This article will trace the SCC's freedom of association judgments regarding a union's right to associate, to collectively bargain, and to strike since the *Charter* was entrenched in Canada's Constitution.[3] It will demonstrate that the Supreme Court's earliest judgments interpreted freedom of association very narrowly and only protected the formation and maintenance of the association itself. In the 2000s, the SCC started to recognize that collective activities such as collective bargaining deserved protection from state interference. This recognition has expanded the scope of the freedom of association to include the right to strike.

Overview

Unions and those who support organized labour argue that what is protected in section 2(d) of the *Charter* is not only a right to associate but also the right to collective associational activity like the right to bargain with an employer and to withdraw labour services by striking. Because these activities are already recognized in labour statutes, organized labour supporters believe the Court should draw upon them in interpreting the freedom of association in section 2(d) of the *Charter*.[4]

Early Supreme Court rulings gave unions only narrow protections. In its first rulings in 1987, the SCC denied a collective aspect to section 2(d), finding associational activities, like collective bargaining and striking, were not guaranteed protection from government interference because these were not activities that an individual could do.[5]

Some twenty years after this ruling, the SCC reversed its stand on collective rights as it related to collective bargaining in *BC Health Services*.[6] By considering labour history, international law and *Charter* values, it found that section 2(d) must protect unionized workers' rights to collective bargaining. But it interpreted collective bargaining as only including the ability to bring collective representations to the employer. It did not include a guarantee to a particular bargaining model or outcome, for instance.

In *BC Health Services* the Supreme Court declined to comment on whether or how this new interpretation altered its previous ruling that freedom of association does not protect the right to strike. However, in 2015, the SCC ruled that section 2(d) collective bargaining rights applied to the right to strike.

Historical and Political Context

Foundations of Unionism in Canada

Although the history of unions for skilled workers dates back to the 1790s, unionism really took root in Canada during the turbulent 1910s, 1920s and 1930s. It was legal for workers in the private sector to join a union, but unions themselves had few legal protections.[7] Radical ideology and hard times meant that industrial workers banded together to fight for better working conditions and wages.[8] Often such organizing was with an eye to a coming worker's revolution. Workers found support by joining new national and international unions. Union membership grew during the First World War when employment was high and then declined again during the harsh years of the depression.

Because there was no duty in law for employers to recognize these new unions, hostile employers refused to meet with union workers. Since workers were frustrated by their unions' lack of recognition and inability to negotiate wages and conditions for them, they often walked off the job to pressure employers to bargain with the unions. Striking threatened employers' productivity and profits and was often the only way to collectively advance workplace goals. However, it only worked well during times of high employment, like the Second World War, when replacement workers were scarce.

Although provincial governments had passed piecemeal and toothless legislation about union recognition, the federal government finally responded to workers' demands for freedom of association and for union recognition during the 1940s when uninterrupted work was most critical for the war effort.[9] At the time 1 in 3 workers were on strike.[10] Following the model of the *Wagner Act* that had been passed in the United States a decade before, PC 1003, part of the *War Measures Act*,[11] finally legislated private-sector employers to recognize and bargain collective agreements with trade unions. PC 1003 also included an arbitration mechanism and a prohibition on strike activity during the life of a collective agreement. When the war ended the federal government dismantled PC 1003. During wartime, the federal government had assumed control over labour relations for peace, order and good government under section 91 of the Constitution even though in normal times, labour relations were part of the province's jurisdiction under 92(13): property and civil rights.[12] Now that the power had been returned to the provinces, the provinces passed similar legislation to PC 1003 mandating union recognition and establishing labour relations regulations and adjudicative bodies.[13]

Public Sector Unions in the Immediate Post-War Era

In the post-war era (1945-1975), often called 'the post-war compromise' by scholars, high employment levels meant unions were able to build on the legal gains of the 1940s in a way

that was "consistent with their employer's profitability."[14] With high wages and a stable economy, union leadership largely lost its leftist radicalism and accepted capitalism.[15] Union density in these years grew because of the growth in white-collar public sector jobs that began to be unionized.

Part of the post-war compromise involved large investments in public health, education, and other social programs. This 'social safety net' lessened disparities in wealth and equality. It also meant an increase in the size of governments and an increase in the number of government jobs. When this sector grew in size and power, its workers wanted the same rights to association and bargaining that private-sector workers had. Quebec was the first government to extend broad powers to its workers to collectively bargain and strike in 1965. After postal workers went on a wildcat strike, the federal government responded with the *Public Service Staff Relations Act* in 1967.[16] This Act allowed most federal government workers to unionize, collectively bargain and to strike or arbitrate to resolve workplace disputes. Similar legislation in the other provinces soon followed in the 1970s, allowing civil servants, teachers, nurses, cultural workers and others to turn their professional organizations into full-fledged unions.

Globalization, Neoliberalism and the Assault on Unionized Workers

Beginning in the late 1970s and early 1980s, business and political leaders turned their backs on the idea of large government and its related social safety net. In a new global world of capital, business looked for more profit by either 'reorganizing' the shop floor to reduce the number of workers and drive down wages, or move manufacturing offshore. Both gutted the manufacturing industries in Canada. As a result, private sector union density declined as well as the relative number of those unions. At the same time, neoliberal[17] politicians tried to reduce, or in some cases, eliminate social services to get rid of debt and channel any savings into tax cuts for business. This had a significant impact on public sector workers when federal and provincial governments cut the size of government departments and privatized government services. Labour historian Bryan Palmer describes the period as the public sector being "hammered by the state and drained of its combativeness."[18]

So, just as the *Charter* was being negotiated, the face of unionization changed. The largest unions now represented the public sector, whose members also made up the majority of the unionized workforce. They, like private sector workers, were battling against job cuts and government policy that tried to roll back the many benefits unionization brought.

Rights in Association: Early Interpretations

Because they were fighting to hold onto post-war gains, labour organizations were silent in the public committee phase of the *Charter* negotiations in 1981. Only the British Columbia Federation of Labour provided a submission saying that freedom of association should include protections for the right of trade unions to organize and strike. Silence from certified unions and the Canadian Labour Congress meant that organized labour missed an opportunity to influence the wording and scope of section 2(d).[19] After the *Charter's* adoption, it was left to the courts to interpret the scope of protections in freedom of

association. In the first section 2(d) cases, the Supreme Court's rulings gave trade unions very limited protections.

The Labour Trilogy and the Alberta Reference

The Supreme Court was first faced with defining freedom of association in a trilogy of cases that challenged provincial legislation prohibiting striking for public sector workers and mandating compulsory arbitration in cases of bargaining impasses.[20] The SCC's reasoning was discussed most fully in what is known as the *Alberta Reference* case.[21] This particular case resulted from a reference question where the Alberta government sought advice as to whether several pieces of legislation prohibiting striking and imposing arbitration during a negotiation impasse were constitutional. The majority of the Court ruled that section 2(d) did not protect a right to strike because the article was there to protect individual, not collective, interests. While the majority recognized that "freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes,"[22] the right did not exist outside of what rights individuals are guaranteed. Therefore, this case established that:

- There is a protected right for an individual to join, belong to, and maintain a lawful association, whether it be a trade union or otherwise;
- Only activities that an individual could lawfully do would be protected; and
- Since individuals could not themselves engage in trade union activities like striking and collective bargaining, these were not protected under section 2(d).

The majority had little problem ruling that collective bargaining and striking did not fall under section 2(d)'s protection because it said these activities were created by modern law and were not a long-standing fundamental freedom.

Throughout the 1990s the SCC followed its initial narrow interpretation, refining it in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* by clarifying that, even if an association exists solely for a particular activity, the activity still will not be protected by section 2(d) because only the *right* not the reason for existence will be protected.[23]

The Dissent in the *Alberta Reference*

The *Alberta Reference* and the decisions that followed it were a blow to organized labour. Unions could find some comfort in the vigorous dissenting opinion in *Alberta Reference*, however, which gained acceptance in succeeding judgments. In contrast to the individualistic interpretation the majority of the Court took, Chief Justice Dickson in dissent, used international law and Canada's international obligations to argue that section 2(d) also protected collective rights.

Chief Justice Dickson listed the number of international agreements that Canada was a party to that explicitly or implicitly protected associational activities. He argued that "the *Charter* should generally be presumed to provide protection at least as great as afforded by similar provisions in international human rights documents that Canada has ratified."[24] As a practical matter, he also found that striking was part and parcel of collective bargaining in the labour relation system in Canada. Workers could not bring the same amount of pressure to employers individually as they could collectively. Striking had no individual parallel, so "it is precisely the individual's interest in joining and acting with others to maximize his or her potential that is protected by s 2(d) of the *Charter*."[25]

Recognition of Collective Bargaining in section 2(d)

In the 2000's, the ideas from Chief Justice Dickson's dissent began to influence the Court's rulings, widening its narrow interpretation of section 2(d).

Dunmore

In *Dunmore v Ontario (Attorney General)*, the United Food and Commercial Workers on behalf of farm workers challenged their exclusion from Ontario's labour legislation, which made union organization more difficult.[26] The Supreme Court recognized that in certain circumstances government needed to take action to ensure workers could exercise their section 2(d) freedoms to associate. Therefore, it struck down the limiting legislation. In this decision, the Court drew on a similar approach to the dissent in *Alberta Reference* by recognizing it could not mark such a clear division between what actions an individual can lawfully undertake and what the collective can lawfully undertake. For an association to have any meaning, and for individuals to reach their potential through it, "the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level."[27] Therefore the Court had to recognize "certain collective activities" were worthy of protection under section 2(d).

In this way the Court moved away from the restrictive 'individual' interpretation of the freedom of association it had established in the labour trilogy. But it would only go so far. It decided activities like creating and maintaining a union in the face of prohibitive legislation fell under the protection of section 2(d), but, holding firm to its previous decisions, it said not all activities were protected. It explicitly ruled out collective bargaining and the right to strike. In summary the Court decided that:

- Freedom of association has to extend to some activities that are collective because an individual cannot perform them alone;
- It does not protect collective bargaining and striking; and
- Governments must not interfere with groups' abilities to associate.[28]

BC Health Services

Now that the Supreme Court's initial interpretation that association was only defined in light of individual actions had changed, context and labour history became important in its next major decision on section 2(d). In *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia (BC Health Services)* the SCC scrapped the reasoning of the labour trilogy in reference to collective bargaining, finding that it was protected from government interference under section 2(d).[29]

This case concerned legislation passed in British Columbia that stripped healthcare workers' collective agreement of key protections related to job security.[30] The Hospital Employees' Union challenged the law as a violation of freedom of association, and the SCC agreed. On the issue of collective bargaining, the Court went further than it had in *Dunmore* by totally and explicitly overturning its earlier interpretations of section 2(d). Instead, building on Chief Justice Dickson's dissent in the *Alberta Reference*, it interpreted freedom of association according to international law, *Charter* values, and labour history.

Since the collective bargaining activities of unions were protected in the International Labour Organization's convention 87, of which Canada was a signatory, the Court said domestic protections should at least extend that far. The Court also found workers' rights to bargain collectively and with good faith enhanced their dignity and autonomy as individuals, and allowed them workplace democracy and **rule of law**. These values are inherent in the *Charter*.[31] And for the first time, the Court relied on the work of critical labour historians in rendering its judgment.[32] Using their research, the Court found workers' rights to associate for the purposes of collective bargaining were fundamental and longstanding. Collective bargaining existed long before modern statutes that recognized these activities and it existed long before the *Charter*. Rather, the *Charter* should be seen as "the culmination of a historical movement towards the recognition of a procedural right to collective bargaining."[33] Since the reasoning in the labour trilogy disregarded this history, the Court felt justified in overturning the basis for those decisions. It specifically did not say what impact this reversal would have on the right to strike.

For the Hospital Employees' Union, the SCC's decision to strike down part of the law as unconstitutional was a "huge victory."[34] But, what the Court recognized was still a limited right to collective bargaining. It recognized:

- Freedom of association included a right to a good faith procedure or process of collective bargaining, and protections against *substantial government interference* to this right;
- But this protection does not extend to a particular model of labour relations, nor a specific bargaining method or even an outcome to bargaining.[35]

It would be up to a court to determine what substantial government interference entailed based on the context and facts of the case. It therefore would be possible for a union's freedom of association right to be interfered with, so long as it was considered a moderate

or minor interference. This may include a shortened negotiating timeline or an imposed mandate. Or if a government attempted a good faith negotiation and it went nowhere, a government would likely not be in breach of section 2(d) if it resorted to legislating collective agreement terms to conclude bargaining.[36]

A Step back in Collective Bargaining recognition?

Fraser

Despite the Supreme Court of Canada's recognition of collective bargaining as protected under section 2(d) in *BC Health Services*, it left unresolved what a duty to good faith bargaining entailed. In 2011 the SCC released its decision in *Attorney General of Ontario v Fraser (Fraser)*.[37] Many felt this ruling represented a retreat from the SCC's landmark decision in *BC Health Services* since it created "ambiguity in respect of the nature and scope of protection for collective bargaining."[38]

This case resulted from the fall-out of *Dunmore* where Ontario's labour legislation was struck down. Ontario brought in new labour legislation, geared towards providing farm workers their own labour relations regime. The farm workers were still excluded from Ontario's *Labour Relations Code*, so the new legislation did not give them the same protections for their associational and collective bargaining aspirations as other workers received.[39] The United Food and Commercial Workers challenged the constitutionality of this new legislation, arguing that it did not adequately protect farm worker's section 2(d) rights. The trial court ruled in favour of the government, finding that its legislation was constitutional because it complied with the ruling in *Dunmore*. The Court of Appeal, taking guidance from the just-released *BC Health Services*, ruled in favour of the union since the legislation did not allow for meaningful good faith collective bargaining, a constitutionally guaranteed freedom.[40] The SCC overturned the Court of Appeal's decision when the Ontario government appealed it.

At the Supreme Court, the respondent farm workers and the UFCW argued that the *BC Health Services* ruling meant the government must provide statutory duties for employers to recognize bargaining agents and to bargain in good faith. The government, they argued, was constitutionally required to provide a statutory mechanism to resolve bargaining impasse and to interpret collective agreements.[41] The Court then had to answer whether section 2(d) required Ontario to provide a particular form of bargaining rights to farm workers in order to secure their associational rights.

In four separate decisions, the Court ruled 8-1 that the contested legislation was constitutional.[42] But, the reasoning of those concurring in the result varied. Justices Rothstein and Charron wrote a forceful attack on *BC Health Services*, arguing that case was wrongly decided, because section 2(d) protects *individual* freedom to come together and advance a common cause. It does not create positive obligations on others. Because they believed it appropriate to overrule *BC Health Services*, the arguments of the respondents, which were based on that case, would have no basis.[43]

Labour law scholars note that this dissent was so vigorous it forced the majority opinion of Chief Justice McLachlin, and Justices LeBel, Binnie, Fish and Cromwell into a defensive position.[44] While the majority stood by the reasoning in *BC Health Services*, the Court narrowed its interpretation regarding when the process of collective bargaining warranted *Charter* protection, making it more restrictive. The Court determined that, if a law or government action has the effect of making it *impossible* for workers to act collectively in making collective bargaining representations to an employer, only then would the section 2(d) protections be engaged because without the "derivative right" to collective bargain, freedom of association would be meaningless.[45]

In this case, because the legislation did not make it impossible for workers to collectively engage in good faith negotiations with the employer, the SCC found it to be constitutional. Legal scholars, labour lawyers and organized labour were left puzzling about what to make of these divided judgments just a few years after the SCC reached unanimity in *BC Health Services*.[46] This is particularly so because of Justices Rothstein and Charron's apparent desire to return to the interpretation of the labour trilogy. Even the majority opinion appears to have slowed or even stopped the direction the SCC was going in recognizing the importance collective bargaining and striking has to freedom of association and its connection to other *Charter* values. These scholars hope the Court will reaffirm its contextual *BC Health Services* reasoning at the next opportunity

The Right to Strike: *Saskatchewan Federation of Labour*

Unions resort to striking when collective bargaining breaks down. Striking and collective bargaining are intertwined processes aimed at pushing for workplace gains. Like collective bargaining, Canadian labour history shows that the right to strike has had longevity in labour relations. The interpretive framework set by *BC Health Services* also highlights the importance of international law. The recognition of collective bargaining in that case came about partly because the International Labour Organization's convention 87 gave protection to the activity.

The Supreme Court previously rejected the argument that striking should be given constitutional protection. However, in 2015, the SCC recognized the constitutional right to strike in *Saskatchewan Federation of Labour v Saskatchewan*. The case considered legislation like Saskatchewan's *Public Service Essential Services Act* that restricted strike activity for public sector workers whom the government deemed to be essential.[47] But the legislation included no independent dispute resolution mechanism to interpret what positions were essential or to settle a negotiation impasse. The Saskatchewan Federation of Labour challenged the law's effect in denying union members the freedom to collectively withdraw their labour.

In the lower court, Saskatchewan Queen's Bench Justice Denis Ball took a cue from *BC Health Services* and interpreted section 2(d) according to labour history and international obligations. He ruled that the right to strike was part of a union's associational activity 'interdependent' to organizing and collective bargaining that are protected under section

2(d).[48] The "reality of a potential work stoppage," whether through strike or employer lock-out, is what drives both parties to come to the bargaining table in good faith.[49] Therefore, the right to strike is a protected associational activity. His interpretation of international law supported this decision since interpretations of ILO convention 87 have included the right to strike as a protected associational activity.

Without any clear guidance on the issue from the SCC, his decision was in keeping with the SCC's retreat from the labour trilogy and its rulings since then. He had to address the decision in *Fraser* but found it is not "in any way incompatible with recognition of a right to strike as a fundamental freedom under section 2(d)."[50]

The province appealed the decision to the Saskatchewan Court of Appeal where the Court overturned Justice Ball's ruling.[51] The Saskatchewan Court of Appeal decided it had to follow the precedent on striking set in the labour trilogy, even if the Supreme Court's more recent decisions on section 2(d) appeared to upset the logic of that decision.[52] Therefore, the Court of Appeal ruled that there is no *Charter*-protected guarantee of a right to strike. Perhaps anticipating an appeal by the Saskatchewan Federation of Labour to the SCC, the court laid out two opposing interpretations. It contemplated that "strike activity might be seen as being, in effect, an aspect or a dimension of collective bargaining and, more particularly, as being a mechanism for giving employees the economic muscle necessary to make collective bargaining meaningful."[53] On the other hand, striking could also be "seen as conceptually independent of collective bargaining" and therefore should be analyzed on its own terms.[54] The Saskatchewan Federation of Labour appealed the decision to the SCC.

Conclusion: The Constitutional Right to Strike

Abella J, writing for the SCC majority, agreed with the trial judge and overturned the Court of Appeal's judgment. Through an analysis of labour history, evolving SCC jurisprudence, and Canada's international human rights obligations, the Court found striking to be "an indispensable component" of collective bargaining that deserves "constitutional benediction."[55] The Saskatchewan legislation denied the right to strike for a number of public employees, and because it provided no alternatives, was deemed to breach s 2(d) of the *Charter*. For collective bargaining to be "meaningful," the Court reasoned, there must be a right to strike.[56]

The legal test for determining if curbing the right to strike breaches the Charter is the same as other collective bargaining rights: "whether the interference with the right to strike… amounts to a substantial interference with collective bargaining."[57] The Court found that the *Public Service Essential Services Act* substantially interfered with collective bargaining rights by denying the right to strike and that it could not be justified under s 1 of the *Charter*. However, it is important to note that in dissent Rothstein and Wagner JJ disagreed that s 2(d) protected the right to strike.

With the SCC establishing the constitutional right to strike, s 2(d) jurisprudence has clearly evolved since the adoption of the *Charter.* From the Labour Trilogy and the *Alberta*

Reference, where unions were granted only minor s 2(d) rights, the Court has expanded collective bargaining rights. According to Abella J, "the arc bends increasingly towards workplace justice."[58] Thus, the judicial interpretation of s 2(d) has changed considerably in the lifetime of the *Charter*; this jurisprudence will continue to evolve as the nature of work and labour changes.

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[1] *Canadian Charter of Rights and Freedoms*. Part I of the Constitution Act, 1982, being Schedule B of the Canadian Act 1982 (UK), 1982, c 11, s 33.

[2] Because the *Charter*, as set out in section 32, only applies to government action or government legislation, public sector unions whose employers are government bring the most 2(d) challenges. Private sector unions can only bring challenges when government legislation limits their 2(d) rights. Although every Canadian is guaranteed the freedom to associate, there is little case law from other types of associations.

[3] Many of the cases discussed in this article also include section 15, equality arguments. This aspect will not be addressed, as it goes beyond the scope of this article.

[4] Paul JJ Cavalluzzo & Adrienne Telford, "Freedom of Association: How Fundamental is the Freedom? Section 2(d)" in Ryder Gilliland, ed, *The Charter at Thirty* (Toronto: Thomson Reuters, 2012) 33 at 72.

[5] *Reference re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC) (Alberta Reference) ; *PSAC v Canada*, 1987 CanLII 89 (SCC); *RWDSU v Saskatchewan*, 1987 CanLII 90.

[6] Health Service*s and Support: Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 [BC Health Services].

[7] *The Trade Union Act*, SC 1872, c 30.

[8] See eg Craig Heron, *The Canadian Labour Movement: A Short History* (Toronto: James Lorimer, 1996); Bryan Palmer, *Working Class Experience: The Rise and Reconstitution of Canadian Labour, 1800-1980* (Toronto: Butterworths, 1983).

[9] Donald D Carter, Geoffrey England, Brian Etherington & Giles Trudeau, *Labour Law in Canada*, 5th ed (Devinter: Kluwer; Markham: Butterworths, 2002) at 54.

[10] *Ibid*.

[11] *Wartime Labour Relations Regulations*, PC 1003, (1944) C Gaz II.

[12] *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

[13] *Supra* note 9 at 54.

[14] Donald Swartz and Rosemary Warskett, “Canadian Labour and the Crisis of Solidarity” in Stephanie Ross & Larry Savage, eds, *Rethinking the Politics of Labour in Canada* (Halifax & Winnipeg: Fernwood Publishing, 2012) 18 at 24.

[15] Thom Workman, *If You’re in My Way, I’m Walking: The Assault on Working People Since 1970*. (Halifax & Winnipeg: Fernwood Publishing, 2009) at 14.

[16] *Public Service Staff Relations Act*, SC 2003, c 22 s 2.

[17] Neoliberalism can be defined as a wish to return to classic liberal economic ideas of the nineteenth century where the free market reigned unrestrained by state social services. Supra note 15 at 21. This would necessarily involve a rebalance of class interests. Some scholars understand it as class warfare. Tim Fowler, "From Crisis to Austerity: An Introduction” in Tim Fowler, ed, *From Crisis to Austerity: Neoliberalism, Organized Labour, and the Canadian State*. (Ottawa: Red Quill Books, 2013) 7 at 13.

[18] Bryan Palmer, “Canadian Labour: Past, Present, Future.” (2014) 48 Canadian Dimensions.

[19] Stephanie Lee Hudson, *Freedom of Association in Canada: The Dilemma for Trade Unions in a Liberal Society* (MA Thesis, University of British Columbia Political Science, 1988) at 7 [unpublished].

[20] *Supra* note 5.

[21] *Reference re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC) (Alberta Reference).

[22] *Ibid* at para 22.

[23] *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* 1990 CanLII 72 (SCC).

[24] *Supra* note 21 at para 59.

[25] *Ibid* at para 98.

[26] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.

[27] *Ibid* at para 1.

[28] *Ibid* at para 29.

[29] *BC Health Services, supra* note 6.

[30] *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2.

[31] *BC Health Services, supra* note 6 at para 81.

[32] 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 at 151.

[33] *BC Health Services, supra* note 6 at para 68. Emphasis added.

[34] “Big Win for Unions as Ruling says Bargaining Protected” CBC News (June 8, 2007) online.

[35] *BC Health Services, supra* note 6 at para 91.

[36] Tucker, *supra* note 31 at 173.

[37] *Ontario (Attorney General) v Fraser,* 2011 SCC 20 [Fraser].

[38] Cavalluzo & Telford supra note 4 at 72.

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

[40] *Fraser v Ontario (AG)*, 2008 ONCA 760 <http://www.canlii.org/en/on/onca/doc/2008/2008onca760/2008onca760.html?searchUrlHash=AAAAAAAAAAEAFzIwMDYgQ2FuTElJIDEyMSAoT04gU0MpAAAAAQA1L2VuL29uL29uc2MvZG9jLzIwMDYvMjAwNmNhbmxpaTEyMS8yMDA2Y2FubGlpMTIxLmh0bWwB>

[41] *Ibid* at para 7.

[42] Three separate decisions concur in the result: the majority decision was written by Chief Justice McLachlin and Justice LeBel (with Justices Binnie, Fish and Cromwell concurring), one was written by Justice Deschamps, and one was written by Justice Rothstein (with Justice Charron concurring). The dissenting opinion was written by Justice Abella who, on the precedent of BC Health Services, would have found the Ontario legislation unconstitutional in its violation of the farm workers’ section 2(d) rights.

[43] *Supra* note 40 at para 128.

[44] Cavalluzzo & Telford supra note 4 at 72.

[45] *Ibid* at para 46.

[46] See eg, Fay Faraday, Judy Fudge & Eric Tucker, eds. *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012).

[47] *Public Service Essential Services Act*, SS 2008, c P-42.2.

[48] *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 at para 60.

[49] *Ibid* para 92.

[50] *Ibid* para 91.

[51] *Supra* note 44.

[52] *Ibid* at para 51.

[53] *Ibid* at para 52.

[54] *Ibid* at para 53.

[55] *Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4 at para 3.

[56] *Ibid* at para 71.

[57] *Ibid* at para 78.

Ibid at para 1.