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Freedom of Association and the Right to Organize in Canada – Have we gone too far?

By Stéphane Fillion and Daphnée Legault, Fasken Martineau DuMoulin

Introduction

In Canada, freedom of association is enshrined in a constitutional text, the *Canadian Charter of Rights and Freedoms*[1], adopted in 1982. The content of this Charter takes precedence over all other rules of law. The Charter aims to guarantee the rights and freedoms of individuals.

However, the rights and freedoms associated with labour rights are not expressly included in the Charter. Similarly, the official constitution of Canada[2] makes no mention of labour and employment rights. It is indeed well recognized that the labour movement did not advocate, at the time, for the inclusion of workers' rights in the Charter[3]. Thus, labour rights did not find their way into the Charter, with the exception of mobility rights - the right to move and earn a living anywhere in Canada, regardless of province[4], and the promise that Canadians across the country will have roughly equal access to public goods and services[5], both of which have little impact on the actual rights of workers[6].

Nevertheless, this inclusion was ultimately achieved through caselaw based mainly on three (3) more generic freedoms namely, freedom of peaceful assembly, freedom of expression and freedom of association[7]. In fact, in the absence of a constitutional framework for labour rights, freedom of association has been the key for unions and workers since the inception of the Charter. The highest courts in the country have therefore had to consider the scope of this particular freedom over the years. While freedom of association in a labour law context can reasonably be defined as a protection afforded to employees to participate collectively in the negotiation of workplace issues, the Charter does not define in any way which associational activities are entitled to this constitutional protection.

That is where case law played a key role. Over the years, the scope of freedom of expression has expanded, without any legislative intervention, to a point where more recently, the right to strike has been found to be protected by the freedom of association. And it certainly seems

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[1] *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, [Schedule B to *Canada Act 1982*, 1982, c. 11 (U.K.)], [hereinafter the "**Charter**"].

[2] *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), [hereinafter the "**Constitution**"].

[3] Arthurs, H.W., *Labour and the real constitution*, 48 (Issues 1-2) C. de D. 43 (2007), p. 46.

[4] Charter, s. 6

[5] Charter, part. III.

[6] Arthurs, H.W., supra, note 3, p. 46.

[7] Section 2 (d),

like this is going to continue based on more recent caselaw following the famous case of *Saskatchewan Federation of Labour* decision[8].

But have we gone too far? Is there a point where duly elected officials can decide to impose restriction on the right to strike for the greater good? Or are we essentially in a situation where any restriction on the right to strike is deemed illegal?

The purpose of the present paper is to examine where we started and where we are heading when it comes to the freedom of association in Canada. We will then comment on the recent trends when it comes to the application of special laws and the imposition of essential services or other restrictions on the right to strike.

1. Strike or not to strike: The Former Trend

The first key decisions on freedom of association came only a few years after the adoption of the Charter, in 1987. In what has subsequently been dubbed the "trilogy", the Supreme Court of Canada, in three decisions rendered in that year, defined the contours of freedom of association as it was understood at the time. This first period was characterized by the adoption of a restrictive approach to freedom of association.

a) THE *REFERENCE RE PUBLIC SERVICE EMPLOYEE RELATIONS ACT (ALTA.)*[9]

In this case, the Supreme Court was asked to rule on three statutes passed by the Alberta legislature, the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act*, which contained provisions prohibiting the use of strikes and imposing mandatory arbitration to resolve collective bargaining impasses. Two questions were brought to the Supreme Court at the time: (1) whether these statutes were inconsistent with the Charter, and (2) whether the provisions of the statutes relating to arbitration, including limitations on the matters that may be referred to arbitration and the requirement that the arbitral tribunal consider particular factors in making its decision, were inconsistent with the Charter.

The Court concluded that the provisions were not inconsistent with the Charter, since the freedom of association guaranteed by section 2(d) of the Charter does not include a guarantee of the right to bargain collectively and the right to strike. The Court came to this conclusion by analyzing the broader context of the Charter. In its view, it was essential to bear in mind that the concept of freedom of association must cover a wide range of associations or organizations of different kinds, with a wide range of objectives, and must also cover the activities of those organizations.

Moreover, interpreting s. 2(d) in light of the Charter as a whole, this interpretation cannot justify including the right to strike in the constitutional guarantee. The Court also insisted on the fact that the drafters of the Constitution did not in any way include the right to strike in the Charter. Coupled with the fact that the purpose of the Charter is to protect individual, political and

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[8] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [hereinafter referred to as "***SFL***"].

[9] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, [hereinafter referred to as "***the Reference***"].

democratic rights, not economic and property rights, these elements militate in favour of rejecting the right to strike as being even implicitly part of the Charter.

b) THE TWO SUBSEQUENT DECISIONS OF THE TRILOGY*: PSAC V. CANADA*[10] & *RWDSU V. SASKATCHEWAN*[11]

In the second decision in the trilogy, *PSAC*, the appellant represented employees of the federal government and its agencies. It brought an action for a declaratory judgment that the *Public Sector Compensation Restraint Act* violated the Charter, among other things. The Act automatically extended existing compensation plans for a period of two years, and set wage increases in advance. However, during the extension period, the compensation plans covered by the Act and the collective agreements or arbitration decisions concerning such plans remained in force and unchanged. Thus, the Act prohibited collective bargaining of compensation and other terms of the collective agreement.

In the final decision of the trilogy, *RWDSU*, following unsuccessful negotiations between the unions and the major Saskatchewan dairies, the unions served strike notices on the dairies. Before the strikes could even begin, the dairies served the unions with lockout notices for each facility. In response to these events, the Saskatchewan legislature passed *The Dairy Workers (Maintenance of Operations) Act*, which temporarily prohibited dairy factory employees from striking, and consequently prohibited dairies from locking out their employees. The union alleged that this Act violated the freedom of association.

In both these decisions, for the same reasons as in *the Reference* case, the Supreme Court found that the freedom of association did not include the right to bargain collectively and to strike. Although in the first case, the effect of the Act in question was to limit the union's bargaining power, this was not a violation of the freedom of association enshrined in the Charter. Similarly, given that the right to strike was once again excluded from the constitutional protection, the legislation in the second case was also upheld by the Supreme Court.

c) *PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA V. NORTHWEST TERRITORIES (COMMISSIONER)*[12] & *DELISLE V. CANADA (DEPUTY ATTORNEY GENERAL)*[13]

A few years after the trilogy, in 1990, the Supreme Court again had the opportunity to consider the freedom of association. In the *Professional Institute* case, the Institute was the bargaining agent for nurses employed by the federal government in the Northwest Territories until they changed employers and became employees of the Territories. As a result of this change, the nurses ceased to be members of the PIPSC bargaining unit and became eligible to become members of the Respondent Association. In response, PIPSC applied for incorporation under legislation to be passed for that purpose which, pursuant to section 42(1) of the *Public Service Act*, would allow it to represent its former members. The Government of the Territories refused to enact

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[10] *PSAC v. Canada*, [1987] 1 SCR 424, [hereinafter referred to as "***PSAC***"].

[11] *RWDSU v. Saskatchewan*, [1987] 1 SCR 460, [hereinafter referred to as "***RWDSU***"].

[12] *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367, [hereinafter referred to as "***Professional Institute***"].

[13] *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989, [hereinafter referred to as "***Delisle***"].

such legislation, which the Institute decided to challenge by seeking a declaratory judgment that section 42(1) of the *Public Service Act* violated the freedom of association.

The Supreme Court concluded that "While the statutory monopoly created by the section prevents a rival union from bargaining for its members, such legislative frustration of an association's objects is not a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association"[14]. Since the monopoly created by the statute had no bearing on the existence per se of the Institute or on the ability of any person to become a member, the Court reiterated the 1987 trilogy's finding that collective bargaining over working conditions is not constitutionally protected.

Incidentally, if collective bargaining itself is not protected, neither is the choice of a negotiator. Thus, the acquisition and maintenance of bargaining status and the subsequent activity of the association are not protected by the Charter either. Justice L'Heureux-Dubé, adding her voice to that of the majority, went even further and stated that "Interpreting s. 2(d) as embracing any object of an association whose fulfillment is fundamental to the existence of the association has serious consequences which militate strongly against adopting such an approach"[15].

In the end, Sopinka J., writing for the majority, established several principles in relation to freedom of association: (1) the freedom to form, maintain and belong to an association is protected; (2) an activity is not protected merely because it is a fundamental or essential purpose of an association; (3) the collective exercise of individual rights and freedoms is protected.

Almost ten years later, the Supreme Court was again presented with a freedom of association issue in the *Delisle* case. In that case, the appellant, a member of the Royal Canadian Mounted Police (RCMP) and president of an association created to defend members of the RCMP in Quebec had filed a motion to have a section of the *Public Service Staff Relations Act* (PSSRA), as well as another section of the *Canada Labour Code*, declared invalid on the grounds that they violated section 2(d) of the Charter. The PSSRA section excluded RCMP members from the application of the Act, depriving them of protections such as the right to participate in the activities of an employee organization and prohibitions against unfair labour practices. No other legislation offered these protections to RCMP members.

In accordance with its previous rulings, the Supreme Court dismissed the appellant's appeal holding that freedom of association did not include the right to form a particular type of association. Section 2(d) would only protect the formation of an independent workers' association and the collective exercise of members' rights. Consequently, there is no requirement that the appellant qualify for PSSRA or any other similar plan. Section 2(d) protects against employer interference with the formation of a workers' association, but there is absolutely no obligation on the part of the government to provide a particular framework for the exercise of collective rights. In practical terms, the exclusion of RCMP members from the Plan denied them employee status under PSSRA but did not prevent them from forming a workers' association. The fact that the appellant cannot invoke the protection of PSSRA does not affect his freedom of association in any

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[14] *Professional Institute*, supra, note 12, p. 3.

[15] *Ibid.*, p. 4.

way, since the protection conferred by the Charter does not impose a positive obligation of protection or inclusion.

2. First step in the jurisprudential shift: The Right to Collective Bargaining

As appears from our review in the previous section, for nearly 20 years following the adoption of the Charter, freedom of association did not even include the right to bargain collectively. But the early 2000s signalled a reconsideration in Canada of the protection afforded by freedom of association. Indeed, in the first fifteen years of the new century, the Supreme Court radically changed its approach, which it had maintained since 1987.

a) THE RUPTURE WITH THE OLD APPROACH: *DUNMORE* V. *ONTARIO (ATTORNEY GENERAL)*[16]

The *Dunmore* dispute arose out of legislation passed in Ontario, the *Agricultural Labour Relations Act, 1994* (ALRA), which gave agricultural workers the right to organize and bargain collectively over their working conditions. Previously, farm workers had always been excluded from the Ontario labour relations system. However, a year later, Ontario passed the *Labour Relations Act, 1995* (LRA), which repealed the ALRA and, incidentally, brought agricultural workers under the LRA, excluding them from the labour relations regime. The LRA also terminated union certification rights and collective agreements signed under the ALRA. The repeal of the ALRA was challenged on the basis of an alleged infringement of the freedom of association.

Bastarache J., writing for the majority, began his analysis by emphasizing the need for a purposive interpretation of s. 2(d), which must therefore seek to determine the intent of the legislature. He then proposed that the right to form an association for the purpose of achieving labour-related objectives in the context of labour relations falls within the scope of freedom of association, which he defined as the freedom to collectively defend the interests of individual workers[17].

He added that the right to associate must include the exercise of collective activities, namely the defense of the workers' interests before the employer[18]. This statement is in direct contradiction with what Sopinka J. wrote in *Professional Institute*. From that point on, freedom of association is no longer limited to the protection of the right to pursue individual goals, but rather, certain collective activities must be recognized in order for the freedom to form and join an association to be meaningful[19].

The Supreme Court found, for the first time, that the freedom of association was violated in a labour law context, deciding that the legislature's exclusion of agricultural workers from the protection afforded to associating for work-related purposes essentially makes association impossible, and thus substantially impairs the exercise of this freedom. Also, “the absence of legislative support discredited the organizing efforts of agricultural workers and had a chilling

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[16] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 [hereinafter referred to as “**Dunmore**”].

[17] *Ibid*., para. 30.

[18] *Ibid*., para. 30.

[19] *Ibid*., para. 17.

effect on their constitutional right to associate"[20]. In other words, the Court concluded that without a protective regime, agricultural workers are unable to exercise their fundamental freedom of association[21].

A few years later, when the Supreme Court revisited its own teachings in *Dunmore*, it concluded:

> *After Dunmore, there could be no doubt that the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and that this right extends to realization of collective, as distinct from individual, goals. Nor could there be any doubt that legislation (or the absence of a legislative framework) that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association. Finally, there could be no doubt that the guarantee must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments*[22].
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> *[…] Dunmore established that claimants must demonstrate the substantial impossibility of exercising their freedom of association in order to compel the government to enact statutory protections. It did not, however, define the ambit of the right of association protected by s. 2(d) in the context of collective bargaining*[23].

Indeed, as mentioned by the Supreme Court, the *Dunmore* decision only timidly opened the door to the recognition of the right to collective bargaining, without defining its scope. This step was taken a few years later, in 2007.

b) THE FORMAL RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING IN *HEALTH SERVICES*[24]

In response to problems in the British Columbia health care system at the time, the provincial government passed the *Health and Social Services Delivery Improvement Act*. The Act changed rights related to inter-site transfers and assignments, contracting out, contract employee status, job security programs, as well as layoff and bumping rights. It also gave health care employers greater latitude to arrange their relationships with their employees as they saw fit, and even to proceed in a manner contrary to collective agreements, all without complying with the consultation and notification requirements that would normally have applied. It also invalidated several substantive provisions of collective agreements and prohibited collective bargaining on some issues. Finally, the Act invalidated any section of a current or future collective agreement that was inconsistent with it.

Asked to determine the constitutionality of this legislation, the Supreme Court went further than it did in *Dunmore*, holding that the freedom of association guaranteed in the Charter includes

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[20] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [hereinafter referred to as "***Fraser***"].

[21] *Dunmore*, supra, note 16, para. 35, 37.

[22] *Fraser*, supra, note 20, para. 32.

[23] *Ibid*., para. 34.

[24] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 22 [hereinafter referred to as "***Health Services***"].

the procedural right to bargain collectively. In the Court's view, the purpose of the Charter and the language of section 2(d) itself, militate in favour of recognizing the protection of collective bargaining. To justify this new approach (without any legislative change again), the Court indicated that in its opinion, freedom of association should be interpreted in a manner consistent with international instruments to which Canada has acceded, and which recognize the existence of the right to bargain collectively. On this notion, the Court explained that "The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment."[25].

The Court added that the freedom of association protects the process of achieving objectives per se, not particular objectives. Consistent with this statement, the Court added that the guarantee of freedom of association imposes a positive obligation on the employer to agree to meet and talk with employees. It also imposes a negative obligation, by restricting the power to legislate in matters affecting collective bargaining. However, the majority is careful to circumscribe this protection: not all aspects of associational activity are protected and only substantial interference with associational activity is prohibited. But proof of intent to interfere is not essential; it is sufficient that the law or act has the effect of substantially interfering with collective bargaining activity. The Court presented a two-step analysis to determine whether there is substantial interference:

1) the importance of the affected issues to the collective bargaining process and the ability of union members to act to achieve common goals;

2) the impact of the measure on the collective right to consultation and negotiation conducted in good faith.

On this second element, the Supreme Court indicated that it imposes the obligation to meet and spend time in the bargaining process. The parties must then engage in meaningful dialogue and make reasonable efforts to reach an acceptable agreement. This duty to bargain in good faith does not, however, extend to requiring the actual success of the bargaining process, the achievement of a collective agreement or a final agreement on particular measures. In other words, the process does not have to be successful: as long as it was conducted in good faith.

Turning to the facts of this case, the majority concluded that the Act interferes with the collective bargaining process because it squarely sets aside collective bargaining processes that have already taken place, and because it compromises the integrity of future collective bargaining processes in advance.

As stated at the outset of this section, it is important to remember that the Act was adopted by duly elected officials in response to major problems in the British Columbia health care system. This is common to most jurisdiction in Canada where the health care workers are for the most part (if not all) unionized and covered by very extensive collective agreements. As such, even at this early stage of the evolution of caselaw on freedom of association, one had to wonder what means

[25] *Ibid*., p. 5.

does a duly elected government has to affect substantial changes to the work organization when required.

c) POST-*HEALTH SERVICES* DECISIONS: REAFFIRMING THE RIGHT TO COLLECTIVE BARGAINING AND GOOD FAITH BARGAINING

Between the *Health Services* decision in 2007 and 2015 when another leading case was decided, the Supreme Court had three opportunities to revisit and clarify the freedom of association.

i. *Ontario* v. *Fraser*

The case involved a challenge to an Ontario law, the *Agricultural Employees Protection Act, 2002* (AEPA). The AEPA followed the *Dunmore* decision, in which the previous law was declared unconstitutional. The AEPA continued to exclude agricultural workers from the LRA but created a special labour relations regime for them. This new law and regime would give farm workers the right to form and join an association, the right to participate in association activities, the right to assemble, the right to make representations to the employer through the association, and the right to exercise their rights without fear of interference, coercion or discrimination. AEPA also provided that the employer must give the union an opportunity to make representations regarding working conditions, and the employer must hear them. Finally, the AEPA delegated to a tribunal the responsibility for hearing and resolving disputes that might arise in the application of the scheme under the Act. A few years later, after so-called unsuccessful attempts to avail itself of the protections provided for in the AEPA, the union challenged the constitutional validity of the law, alleging that id did not really protect the right to associate and bargain collectively.

The Supreme Court essentially reiterated what it said in *Health Services*, stating that the freedom of association requires the establishment of a meaningful process of dialogue, where the union can make submissions to the employer, who can then hear and discuss them in good faith. According to the Court and as originally articulated in *Health Services*, there are limits to good faith bargaining:

> *it does not impose a particular process; it does not require the parties to conclude an agreement or accept any particular terms; it does not guarantee a legislated dispute resolution mechanism in the case of an impasse; and it protects only the right to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method*[26]*. (we emphasize)*

As appears from the above, the Court was then of the view that the legislature does not have to grant workers collective bargaining rights of a particular type in order to fulfill its obligation to ensure the effective exercise of freedom of association. It was also clear that it was not essential that that the legislation guarantee a resolution mechanism (arbitration for example) to resolve an impasse.

In any event, the Court concludes that farm workers are entitled to a meaningful process, which includes the right of their representative association to make representations to the employer

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[26] *Fraser*, supra, note 20, p. 7.

and have them considered. However, in this case, the AEPA provides a process that satisfies this constitutional requirement. While the Act does not explicitly provide that the employer must give good faith consideration to the employees' claims, such an obligation is implicitly provided for, which is sufficient.

ii. *Mounted Police Association of Ontario* v. *Canada*[27]

This decision follows the Supreme Court's 1999 decision in *Delisle* in which the Court found that although RCMP members could not unionize or bargain collectively, this lack of statutory protection was not unconstitutional. Since then, very little had changed: instead of being excluded from the labour relations regime under the *Public Service Staff Relations Act*, they were now excluded under the new version of the Act.

More particularly, under the new legislation, RCMP members were still subject to a non-union labour relations regime. The main issue in this case was the Staff Relations Representative Program (SRRP), which was the primary and only form of representation through which RCMP members could make representations regarding their working conditions. In 2006, two private associations of RCMP members filed a constitutional challenge seeking a ruling that the combination of the exclusion of RCMP members from the scope of the current *Public Service Labour Relations Act* and the imposition of the SRRP as the only labour relations regime violated the freedom of association.

The Court began its analysis with an assessment of what constitutes freedom of association in 2015 under the Charter. In the Court's view, three categories of activity are included:

1) The right to unite with others and form associations;

2) The right to join with others to exercise other constitutional rights;

3) The right to unite with others to face, on a more equal footing, the power and strength of other groups or entities.

The Court also clarified the concept of substantial interference, first established in *Dunmore* and elaborated in *Health Services*:

> *Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining*[28].

The Court further stated that this bargaining process must provide workers with freedom of choice and sufficient independence to enable them to decide on and defend their collective interests. The freedom of choice is defined as what allows workers to participate effectively in the choice of collective objectives to be pursued by the union. The obligation of the union to be accountable to the members is also an essential component. Also, by independence, the Court

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[27] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [hereinafter referred to as "***Mounted Police***"].

[28] *Mounted Police*, supra, note 27, para. 72.

indicated that there must be a correspondence between the activities of the association and the interests of its members.

By not allowing them to identify and pursue their concerns free from employer influence, the labour relations regime of the RCMP did not achieve the objectives of the protection afforded to freedom of association. While there is not a complete denial of the right to associate, members of the RCMP nevertheless face a substantial interference with that right.

iii. *Meredith v. Canada*[29]

This decision once again involved RCMP members but this time, the dispute was over members' salaries. Essentially, in 2008, Treasury Board had announced salary increases for RCMP members for the years 2008 to 2010, as well as additional allowances. However, as a result of the global economic crisis, Treasury Board revised its decision and lowered the percentage of salary increases in line with the public sector as a whole. In 2009, the *Expenditure Restraint Act* was passed, limiting public sector wage increases for 2008 to 2010 to 1.5 per cent. The Act prohibited any further increases but allowed RCMP members to negotiate additional allowances. As a result, a constitutional challenge was brought, arguing that the 2008 decision to reduce planned wage increases without consultation violated the constitutional right to collective bargaining.

In one of the few recent decisions in which the Supreme Court has upheld the particular statute challenged on freedom of association grounds, the Court first concluded that associational activity by members of the RCMP, even though the process at issue was part of the scheme that had been declared unconstitutional in *Mounted Police*, remained protected by the Charter. Indeed, although the process was flawed, it was still associational activity that was protected by the Charter.

However, the Court concluded that in this case, the *Expenditure Restraint Act* did not substantially interfere with the protected Charter right. The restrictions that the Act imposed were applicable to all public servants, not just members of the RCMP. Moreover, the Act did not prohibit consultation on other current or future pay issues. Nor did the Act prevent the consultation process from proceeding. According to the Court, "*Actual outcomes are not determinative of a s. 2(d) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the ERA had a minor impact on the appellants' associational activity*."[30].

3. The Recognition of the Right to Strike

After taking a major step towards expending the protection offered by freedom of expression to include the right to collective bargaining, the Court went one step further in *Saskatchewan Federation of Labour* decision[31], recognizing a constitutional right to strike, protected by the freedom of association.

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[29] *Meredith v. Canada (Attorney General)*, 2015 SCC 2 [hereinafter referred to as "***Meredith***"].

[30] *Meredith*, supra, note 29, para. 29.

[31] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [hereinafter referred to as "***SFL***"].

In this case, in 2007 and 2008, the Government of Saskatchewan introduced two pieces of legislation: *The Public Service Essential Services Act* (PSESA), and *The Trade Union Amendment Act* (TUAA). The PSESA, which is the one relevant for our purposes, limited the exercise of the right to strike by public sector employees who provide essential services by prohibiting those employees from taking part in a strike without providing for a mechanism for resolving collective bargaining impasses. Up to that point, the caselaw was however clear: this was not required.

In a landmark decision, the Supreme Court affirmed for the first time that the right to strike is essential to the realization of the values inherent to the Charter. According to the Court, the right to strike allows workers to refuse to work under imposed conditions and is an affirmation of the dignity and autonomy of employees in the workplace. Moreover, just as Canada's international obligations supported the recognition of the right to collective bargaining[32], they also require the protection of the right to strike as an important element of a meaningful collective bargaining process. Collective bargaining and the right to strike are therefore closely intertwined:

> *This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2(d) has arrived at the destination sought by Dickson C.J. in the Alberta Reference, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining[33].*

Thus, under the right to strike and the traditional substantial interference test, the new question in this case is whether the statutory limitation on the right to strike substantially interferes with the right to a meaningful collective bargaining process[34]. As for the situation at hand, the Court concluded that there was indeed a substantial interference. The PSESA's prohibition on taking part in a strike satisfies this condition. Also, while the Court was sensitive to the objectives of the legislation, namely avoiding the disruption of essential public services, the question remained whether the means used to achieve this objective minimally infringed on freedom of association. In the Court's view, they did not.

This Supreme Court decision marks a complete break with the trilogy of rulings issued by the same court in 1987. As should have been expected, this decision set in motion a series of challenges to special laws on the grounds that they violated freedom of association. It also brings back into question the governments' right to impose working conditions by special law, following good faith negotiations, and to limit the exercise of the right to strike to protect the best interests of the society as a whole.

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[32] This argument was first presented in *Dunmore*.

[33] *SFL*, supra, note 31, para. 75.

[34] *Ibid*., p. 9.

4. The Influence of the *Saskatchewan Federation Labour* Decision

a) *GORDON* v. *CANADA*[35]

In this decision, two unions sought a declaratory judgment that the provisions of the *Expenditure Restraint Act* (ERA) limited their members' freedom of association and interfered with their right to a meaningful collective bargaining process. In the wake of the 2008 global economic crisis, the Ontario government passed the Act to establish wage increase limits for public servants. In essence, the Act partially rolled back wage increases that had already been negotiated, as well as awards that exceeded the limit, and precluded wage increases and awards in future agreements that exceeded the limits provided for in the Act. However, many collective agreements were completed in the days leading up to the enactment of the Act.

In its decision, the Court of Appeal established at the outset that although the freedom of expression protects the process of bargaining and not the outcome, it does not mean that what is being bargained over, or the outcome of bargaining, are irrelevant to the analysis. In this case, the wage increase caps in the ERA did not amount to substantial interference, since it was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the public administration, and therefore reflected an outcome consistent with actual bargaining processes.

Also, while the Court recognized that the government did partake in hard bargaining, the dialogue or process was never rendered meaningless, and therefore the government did still bargain in good faith. The Court acknowledges that hard bargaining is a permissive form of good faith bargaining. The question to ask in this regard, continues to be whether there was a significant disparity of bargaining power between the Government and the unions. Additionally, the government did not have to consult with unions before passing its legislation. In the name of freedom of association, unions have no more power to do so than other citizens.

In addition, the Court found that the Act's limitations on the arbitration process did not interfere with the workers' right to freedom of association. In one of the earliest decisions to this effect, it concluded that even if it was recognized that alternative dispute resolution mechanisms are associational in nature, it does not necessarily mean that any limits on arbitration amounts to a breach of s. 2(d).

As for rollbacks, referring to the *Meredith* decision, the Court found that while they may constitute a potential barrier to freedom of association, since they nullify the outcomes of free collective bargaining, whether of not they do interfere depends on the context. In this instance, the cap reflects the results of free collective bargaining, and the ERA provided relief for the unions to make substantial gains other than wage increases.

Finally, even though the two ERA articles prohibit future bargaining or arbitral agreements from making up for the effects of the restraints imposed by the Act, as well as overrides provisions

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[35] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 [hereinafter referred to as "***Gordon***"].

in collective agreements before the enactment of the ERA that provide for compensation contrary to the ERA, the Court concluded that this is not decisive:

> *While taking matters off the table might generally be inconsistent with the principles in the 2015 labour trilogy, the context must be kept in mind. Bargaining about wages was limited during the temporary restraint period. It was not permanent. It seems […] that the prohibition on future bargaining relates only to the Government's need to retain the savings obtained during the restraint period. It is, in short, a corollary of the wage increase caps*[36].

b) *BRITISH COLUMBIA TEACHERS' FEDERATION* v. *BRITISH COLUMBIA*[37]

In the most recent decision of the Supreme Court addressing this issue, the highest court revisited its latest assertions regarding the right to bargain in good faith in a very succinct decision. In that case, the Federation challenged the constitutionality of a provincial statute that essentially eliminated the terms of the collective agreement and prohibited collective bargaining on matters relating to members' working conditions. After receiving a court order striking down the legislation for violating freedom of expression, the Province passed a nearly identical statute, the *Education Improvement Act*.

The Province argued that this new legislation followed good faith consultations with the union, and that it contained significant differences from the old legislation. In the trial judge's decision, he found that the discussions between the union and the employer had not been undertaken in good faith, contrary to what was alleged, since the Province had used a strategy of provoking a strike in order to gain political support for imposing the legislation on the federation. The majority of the Court of Appeal allowed the appeal.

The Supreme Court first recognized that the pre-legislative consultations were relevant, and that the context of drafting of the act should have been considered. However, the Court found that the province had failed to negotiate with the Federation in good faith. Indeed, at the center of the freedom of expression is a balance between employees and the employer, that hence allows for meaningful collective bargaining. By negotiating in good faith, the parties must meet and engage in meaningful dialogue, and genuine and constructive negotiations; they must avoid unnecessary and unjustified delays in negotiation; they must make a reasonable effort to reach an agreement; they must mutually respect the commitments entered into; and they must be willing to exchange and explain their positions[38].

The Court ultimately found that the government failed in its duty to bargain in good faith, in particular because it came to the bargaining table with its mind already made up, and put in place a strategy that would inevitably lead to a strike, all of which constituted "a mockery of the concept of collective bargaining"[39].

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[36] *Gordon*, supra, note 35, para. 173.

[37] *British Columbia Teachers' Federation c. British Columbia*, 2016 CSC 49 [hereinafter referred to as "***British Columbia***"].

[38] *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, echoing the writings of the Supreme Court in *Fraser* and *Health Services*, para. 138.

[39] *Ibid*., para. 340.

c) *SYNDICAT DES PROFESSIONNELLES ET PROFESSIONNELS DU GOUVERNEMENT DU QUÉBEC* C. *PROCUREURE GÉNÉRALE DU QUÉBEC*[40]

In this case, the appellant union was certified to represent thousands of professionals, included in a single bargaining unit, and spread across various government departments and agencies. At the first level, the Superior Court had concluded that the union could not call a strike of only a portion of the employees of a single department, since the Quebec *Labour Code* required the uniform exercise of the right to strike by all employees in the same bargaining unit, and made a targeted, partial or sectoral strike illegal, i.e. one that places the employer in contravention of the anti-replacement workers provision by continuing its activities using a portion of the employees covered by the certification in its establishment, while another portion of the same unit is on strike[41].

Before the Court of Appeal, the union essentially argued that the trial adjudicator had not taken into account the "constitutionalized right to strike". The Court did not accept this argument confirming that an association cannot call a strike without respecting the terms and conditions set out in the *Labour Code*. The Court added that:

> *The right to strike is not absolute and remains, despite its crucial role in collective bargaining, subject to the framework provided for in the Labour Code (L.C.). A certified association cannot strike where it wants, when it wants and how it wants. It must, therefore, comply with the terms and conditions set out in the L.C.*[42]*. (Our translation)*

d) *PROCUREUR GÉNÉRAL DU CANADA* C. *UNION OF CANADIAN CORRECTIONAL OFFICERS*[43]

In this case the *Public Service Labour Relations Act* contained a section providing that certain matters could not be negotiated, including anything related to the pension plan and staffing. The union sought to have this section declared unconstitutional as an infringement of freedom of association.

In a unanimous decision, the Court of Appeal found that this section of the Act did constitute a substantial interference with freedom of association. Since pensions and staffing are matters of great importance to employees, and since the prohibition on including these matters in a collective agreement is contrary to freedom of choice and the concept of a balance of power between employer and association, the section did constitute a substantial interference with the right to collective bargaining.

However, the Court still concluded that the provision was constitutional since it was saved by section 1 of the Charter which states that a provision of the Charter may be infringed if it is done within the reasonable limits prescribed by law, as can be demonstrably justified in a free and

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[40] *Syndicat des professionnelles et professionnels du gouvernement du Québec c. Procureure générale du Québec*, 2018 QCCA 2161.

[41] *Ibid*., para. 19.

[42] *Ibid*., para. 71.

[43] *Procureur général du Canada c. Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)*, 2019 QCCA 979.

democratic society. More particularly, the Court found that the objectives demonstrated by the government behind the adoption of this legislation, namely to promote the mobility of employees from one sector of the public service to another, and to ensure the predictability of the pension and the maintenance of control over the government's financial obligations, were legitimate.

Moreover, the prohibition on negotiating the pension plan was one of the reasonable solutions available to the legislator. In the end, the Court held that the overall beneficial effects of the prohibition on negotiating these terms and conditions of employment outweighed the detrimental effects caused by the interference with freedom of association.

e) *PROVINCE OF NEW BRUNSWICK* v. *NEW BRUNSWICK COUNCIL OF NURSING HOME UNIONS (CUPE) ET AL.*[44]

In this case, the association challenged provisions of the *Essential Services in Nursing Homes Act* (ESNHA). The Act established a mechanism by which the province's unions and employers jointly negotiated essential service levels. The Act did not mandate essential service designations in nursing homes. However, a section of the Act gave a nursing home employer the option of applying to the Board for designation of essential services in its workplace.

If the services were indeed considered essential, the employer and the union were to attempt to agree on the designation of the services and the levels of each of those services that were to be maintained. If the parties could not agree, it was up to the Board to decide which services were essential. The Province argued that this section of the Act could not be unconstitutional, as it did not have unilateral authority to designate services or levels of service. However, under the Act, once the Board was notified that the employer considered certain services to be essential, none of the employees providing those services could take part in a strike until the parties reached an agreement, or until the Board unilaterally decides on the services and levels of designation required. It is to be noted that the *Canada Labour Code* includes a similar provision.

The essential services were established by the Board for nursing homes at a level of 90% of the normal services. It is important to note that the Union agreed that this level of essential services is justified but added that the practical consequences was to eliminate the possibility of any meaningful strike activity. As such, the legislation was in violation of the freedom of association.

The New Brunswick Court of Appeal found that there was no reason to distinguish this case from the *SFL* decision. Indeed, due to the large number of nursing home employees at issue who were designated as essential, the members of the certification were not in a position to withdraw their work performance in a concerted manner, which the right to strike is supposed to allow. According to the Court, this was essentially the same issue that was raised in *SFL*, and therefore, for the same reasons as in the Supreme Court decision, results in a restriction on freedom of association. The Court added that a law that eliminates for all practical purposes the possibility of striking could not be said to interfere only partially or minimally with freedom of association. The infringement is almost automatically substantial.

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[44] *Province of New Brunswick v. New Brunswick Council of Nursing Home Unions (CUPE) et al*., 2019 NBCA 85 [hereinafter referred to as "***New Brunswick Council of Nursing Home Unions***"].

Drawing parallels with the *SFL* decision, the Court emphasized that the infringement of the right to collective bargaining as caused by the ESNHA was not mitigated by an alternative dispute resolution process, including arbitration. Since no such process was provided, this made the infringement of freedom of association fatal to the constitutionality of this provision.

f) *Alliance des professionnels et des professionnelles de la Ville de Québec c. Procureure générale du Québec*[45]

In this case, associations and unions challenged the *Act to Foster the Financial Health and Sustainability of Municipal Defined Benefit Pension Plans* (Law 15). In essence, considering the substantial deficits accumulated in most municipal pension plans and the resulting burden imposed on cities who were assuming a vast majority of the costs, the government adopted Law 15 forcing the restructuring of the pension plans. While Law 15 provides for collective bargaining, it imposes specific changes to employee pension plans with rigid parameters for negotiating the content of those pension plans in the future, and altering, in many cases, collective agreements and other similar arrangements. The associations and unions argued that this legislation therefore infringes on their freedom of association.

The Court dismissed the applicants' claims that Law 15 violated their freedom of association by compromising the integrity of the collective bargaining process. According to the Court, dissatisfaction with certain effects of a law cannot, in itself, justify court intervention. The Court recognized that the government had adopted the Act to impose changes to municipal pension plans in order to improve their financial health and ensure their sustainability. And although the Act imposed somewhat rigid parameters, it did not prevent all negotiations concerning the pension plan.

Also, although some of the measures provided for in the Act impose amendments to existing collective agreements, thereby undermining collective bargaining, the Court concluded that the impact is not substantial since negotiations on various other matters that could offset the effects of the restriction imposed by the Act are permitted.

While the Court dismissed this portion of the challenge, the authority granted by Bill 15 to municipalities to unilaterally alter provisions applicable to retirees was deemed an infringement of the right of these employees to the collective bargaining process. This infringement was considered by the Court as sufficiently serious to be considered substantial and deemed unconstitutional.

g) *Procureur général du Québec c. Les avocats et notaires de l'État québécois*[46]

The Quebec Court of Appeal rendered a decision on this matter only a month ago, on April 7, 2021. In this case, the applicant association (LANEQ) was representing lawyers and notaries working for the Quebec government. In 2017, a strike was called. Although the members were

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[45] *Alliance des professionnels et des professionnelles de la Ville de Québec c. Procureure générale du Québec*, 2020 QCCS 2111. However, notices of appeal have been filed. We can expect a decision from the Court of Appeal on this matter in a few months.

[46] *Procureur général du Québec c. Les avocats et notaires de l'État québécois*, 2021 QCCA 559 [hereinafter referred to as "LANEQ"].

complying with existing rules regarding essential services, the government adopted Law 2017 which prohibited LANEQ's members from striking, ordered their return to work, provided a mechanism for further negotiations as well as a post-adoption mediation process, and, in the absence of an agreement to this effect, provided for their working conditions. LANEQ therefore asked that this law be declared unconstitutional, since it would infringe on the freedom of association guaranteed by the Charter.

In the first instance, the judge concluded that the law substantially interfered with the freedom of association by completely removing the right to strike, thereby upsetting the balance of power between the employees and the employer. According to the Court, while the government's objectives in enacting the law were legitimate (ensuring the continuity of essential services), the law goes beyond what is reasonably necessary to achieve those objectives. The judge listed, among other things, the following deficiencies:

1) The law does not provide for a genuine and effective dispute resolution mechanism;

2) The total removal of the right to strike for a period of three years, as provided by the Act, is unjustifiable;

3) The working conditions are decreed, and inferior to the last employers' offers.

In appeal, the Court dismissed all of the province's arguments. The Court first recognized that the constitutional protection of freedom of association has become increasingly inclusive over the years. The Court also dismissed the appellants' argument that the constitutional protection of the freedom of association can only apply to a negotiation conducted in good faith. Following in the footsteps of Abella J. in *SFL*[47], the Court concluded that the trial judge could reasonably determine that the suppression of the right to strike automatically results in a substantial interference.

But the cornerstone of this ruling is that the Court of Appeal concluded that even in the event of an impasse, the government must compensate for the withdrawal of the right to strike with a dispute resolution mechanism. The judges stated that this is one of the key elements of the *SFL* decision:

> *Rather, in the context of collective bargaining, it is the right of union members exercising their freedom of association, and who see their right to strike suppressed by a law, special or otherwise, to simultaneously obtain from the legislature, in exchange for that suppression, some form of dispute resolution mechanism. And that mechanism, the Supreme Court explicitly adds, must be genuine and effective. I highlight these words because, in my view, they alone provide the keystone to the current appeals*[48]*. (Our translation)*

[47] *SFL*, supra, note 31, para. 76.

[48] *LANEQ*, supra, note 46, para. 112.

Takeaways and what to expect going forward

As appears from the above, the protection of the freedom of association has been expanding constantly in Canada since the first decisions rendered in 1987. Despite the absence of any legislative change, the protection went from the right to associate to the right to collective bargaining, to good faith bargaining and more recently, to the right to strike. And some of the most recent decisions give good reason to believe that this is only the beginning.

It is a well-known saying that "Your freedom ends where mine begins". But does this really apply to the freedom of association? What happens when legislation requiring that essential services be maintained is deemed unconstitutional because the level of services is too high given the need to provide for the health and safety of vulnerable citizens? Although the *New Brunswick Council of Nursing Home Unions*[49] was not a Supreme Court decision, it certainly gives an idea of the impact of the *SFL* decision. A similar conclusion can be drawn from the recent decision of the Quebec Court of Appeal in the LANEQ case[50].

While on paper, requiring a government to replace the infringement on the right to strike by an alternative dispute resolution mechanism that is genuine and effective appears reasonable, we cannot turn a blind eye on the impact of such process. Based on the decisions rendered, it is clear that mediation followed by legislation establishing work conditions in the event of an impasse will be found to violate the freedom of association. The only other alternative is some form of interest arbitration. Historically, interest arbitration of any form has led in Canada to constant cost increases over time mostly due to the arbitrators' reluctance to side entirely with one party.

Police officers and firefighters have had this type of mechanism in place for years in the province of Quebec and this has led to considerable benefits and salary increases over time. It is also a process that rarely results in additional flexibility since arbitrators generally prefer to maintain the status quo when it comes to normative aspects of collective agreements. This is certainly not good news.

But there is more. Once a door has been opened, it is difficult to close it. In 2018, Canada Post workers launched a strike only weeks before the holiday season. They were well aware of the impact of the strike given the very high number of Canadians purchasing their gifts for the holiday season online. This was especially prejudicial given that many parcels were actually blocked in storage at the Canada Post establishments with nobody to process them.

Invoking the best interests of Canadians, the Federal Government adopted a special bill ordering an end to the rotating strikes that had been going on for several weeks across the country. Contrary to some of the cases above, the Federal Government did not impose working conditions but instead, mediation and ultimately arbitration as an alternative dispute resolution mechanism. Despite this, within hours following the adoption of the special law, the union announced its intention to challenge the validity of the law alleging a violation of the freedom of association.

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[49] See note 44.

[50] See section 4 g) above.

Since then, the arbitration decision[51] has been rendered granting, among other things, salary increases of 2% for 2018 and 2019, 2.5% for 2020, and 2.9% in 2021, well over what Canada Post was proposing. All this while the arbitrator recognized in her award that the overall wage and benefit package enjoyed by the bargaining unit is already better than most federally regulated employers and is significantly better than Canada Post's competitors in the parcel business. And despite this, the union is still moving forward with its allegation that the special act violated the freedom of association even in the presence of a genuine and effective dispute resolution mechanism.

Similarly, at the end of April 2021, the 1,150 stevedores of the Port of Montreal declared an unlimited strike instantly paralyzing all activities in the second most important port facility in Canada. Faced with this situation, the Federal Government again adopted, just days ago, a special act to put an end to the strike and order workers to come back to work. As it did in the Canada Post case, the Act provides for mediation and ultimately arbitration as an alternative dispute resolution mechanism. Again, the union announced its intention to challenge the constitutionality of the act alleging a violation of the freedom of association.

If history is indicative of how these challenges will turn out, we could very well be on the verge of another extension of the protections offered by the freedom of association. In the end, will it even be possible for a government to order workers back to work to avoid a substantial prejudice to the economy or the population in general?

And the impact of *SFL* is not limited to special bills that order the workers to return to work. It also has a substantial impact on essential services. For instance, aside from the *New Brunswick Council of Nursing Home Unions* mentioned earlier, before the strike was launched in the Port of Montreal, long debates took place before the Canada Industrial Relations Board concerning essential services to be maintained. The Union again relied on the SFL decision invoking its right to strike. In the end, the Board dismissed the Maritime Employers' arguments and did not order that essential services be maintained.[52]

We can only imagine what will happen in the event of a future strike in the railway industry, the airline or telecommunication sector or any other area where a strike can paralyze a portion of the economy and have serious consequences if *SFL* is always relied on to avoid being required to maintain essential services.

While we have not yet seen how the Supreme Court will rule on theses cases in the years to come, we can only hope that a balance will be made between the freedom of association and the rights of the population in general to make sure that essential services are maintained and that public funding will be used responsibly.

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[51] https://www.cupw.ca/sites/default/files/CPC%20CUPW%20final%20eng%20June%202020.pdf

[52] *Maritime Employers Association and Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees*, 2020 CIRB 927.